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OF

Cases Decided

IN

THE HOUSE OF LORDS, THE PRIVY COUNCIL,

THE COURT OF APPEAL,

THE CHANCERY DIVISION, THE QUEEN'S BENCH DIVISION, THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION,

THE QUEEN'S BENCH DIVISION IN BANKRUPTCY,

THE COURT FOR THE CONSIDERATION OF CROWN CASES RESERVED,

AND THE RAILWAY AND CANAL COMMISSION COURT.

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—— Apportionment — Deductions—Interlineations and alterations in agreement. — An agreement by which a seaman stipulates that he shall be entitled to his proportion of a sum awarded for salvage services, calculated not upon the amount awarded but upon so much of that amount as remains after certain deductions have been made, is inoperative by virtue of sect. 182 of the Merchant Shipping Act 1854. (*The Saltburn.*) 19

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Right of presentation—Turns of presentation in rotation—Exchange of benefice—Usurpation of turn.—By a deed-poll made in Aug., 1871, it was provided that the perpetual right of patronage of and of nominating a minister to a certain new church should upon the due consecration thereof be vested in and exercised, for the first and second turns by trustees represented by the defendants, and for the third turn by trustees represented by the plaintiffs, and that so on for ever thereafter the patronage should be exercised by the trustees respectively alternately. In 1871 the defendants nominated W. to the benefice. In 1878 W. resigned the benefice for the purpose of carrying out an exchange of benefices with S., and the defendants at the request of the exchanging parties nominated S. to the benefice, and he was duly licensed thereto. In 1886 S. exchanged benefices with H., and the fendants at the request of the exchanging parti s presented H. to the benefice. In 1891 H. resigned the benefice, and the defendants presented M., who was instituted and inducted thereto. No notice of the several nominations or presentations of S., H., and M. was given to the trustees represented by the plaintiffs. M. died in Jan., 1894, and both the plaintiffs and the defendants claimed to be entitled to present a minister to the benefice on this vacancy. Held, that the exchanges must be reckoned as turns of presentation; that the presentation by the defendants of H. was wrongful, and that the defendants had usurped the third turn, but that this did not give the plaintiffs a right to usurp the defendants' turn, or entitle the plaintiffs to require the defendants to give up their turn; and that the defendants were entitled to present on the vacancy by the death of M. (Keen *v.* Denny.) ... ...*page* 566

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Lease—Compensation for improvements—Notice—Determination of tenancy. — The Agricultural Holdings (Scotland) Act 1883, by sect. 2, confers upon a tenant of an agricultural or pastoral holding a right to compensation for certain improvements "on quitting his holding at the determination of a tenancy;" and by sect. 7, in order to be entitled to such compensation, he must, "four months at least before the determination of the tenancy," give notice in writing to his landlord of his intention to make a claim. The respondent was tenant to the appellant of a farm under a lease for a term of years which expired as to the houses, grass and fallow land, at the spring quarter; as to the arable land at the separation of the crop of the same year from the ground; and as to the barns, barnyard, and two outhouses, at the spring quarter of the following year. After the spring quarter-day on which he gave up possession of the houses, grass and fallow land, and more than four months before the autumn quarter-day, he gave notice in writing of a claim to compensation for improvements under the Act. Held that, in a Scotch lease, the expression "separation of the crop" was equivalent to the autumn quarter-day, and that the notice was given in proper time. (Black *v.* Clay.) 446

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Arbitrator—Agreement to refer to a named person—Probability of bias—Staying proceedings in an action.—The rule that a judge, magistrate, or other person holding a judicial office, must not be judge in his own cause, and must not act if there is any reason to suspect him of bias, does not apply in the case of a person who has been chosen by the parties as arbitrator. When the parties to a contract have agreed that all disputes which may arise under the contract shall be referred to the servant of one party, the court will not refuse to stay an action in respect of such disputes upon

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the ground that such servant may be suspected of bias in favour of his employer, or may have to decide questions as to his own competency, skill, or care. (Eckersley and others *v.* The Mersey Docks and Harbour Board.) ... ...*page* 308

BANKRUPTCY.

Act of bankruptcy—Notice of suspension of payment.—By the Bankruptcy Act 1883, s. 4, a debtor commits an act of bankruptcy (*h.*) if he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts. A debtor's solicitor wrote to the creditors, "I have been consulted by Mr. J. B. W. . . . and I find that his affairs are in so complicated a state that it is only right his creditors should be called together to decide whether the serious loss to them in bankruptcy can be avoided. I therefore respectfully request your attendance at a meeting of creditors to be held at . . . when and where a statement of affairs will be submitted." Held, that this letter was a notice within the meaning of sect. 4, and therefore an act of bankruptcy on which a receiving order should be made. (*Re* Waite; *Ex parte* Bentley's Yorkshire Breweries.) 778

—— Privity of petitioning creditor to deed of assignment by creditor.—The debtor executed a deed of composition providing for the payment of 15s. in the pound by instalments, and for the execution of a deed of assignment for the benefit of creditors in case of default in payment of instalments, and to this deed the petitioning creditors assented. The debtor made default, and executed a deed of assignment not in accordance with the terms of the deed of composition. The petitioning creditors dissented from the deed of assignment, and filed a petition, relying upon the execution of the deed of assignment as an act of bankruptcy. Held, that, although the deed of assignment was not in accordance with the terms of the deed of composition, and did not bind the petitioning creditors, nevertheless they could not rely upon it as an act of bankruptcy, since its execution had been demanded by the trustee under the composition deed as agent for them, and for the other creditors who assented to that deed. (*Re* Adamson; *Ex parte* Viney.) 579

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—— Goods held by sheriff for twenty-one days—Act of bankruptcy—Payment out after twenty-one days—Rights of execution creditor.—By the Bankruptcy Act 1890, s. 1, "a debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any court, or in any civil proceedings in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days." A creditor who has issued execution against the goods of a debtor must, in order "to be entitled to retain the benefit of the execution against the trustee in bankruptcy of the debtor," have completed the execution by seizure and sale, or "by the receipt or recovery of the full amount of the levy," before the goods have been held by the sheriff for twenty-one days. For by the above section such possession by the sheriff for twenty-one days is an act of bankruptcy, of which the execution creditor will be taken to have notice, and will defeat the rights of the execution creditor under an execution not completed until after the date of such act of bankruptcy. (Figg *v.* Moore Brothers.)... 232

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estate of B. and C. Held, that A. was entitled to draw dividends out of the separate estates of B. and C. in competition with their separate creditors. Sect. 40 of the Bankruptcy Act 1883, which in substance is in the same terms as the order of Lord Loughborough of the 6th March 1794 relating to the distribution of the joint and separate estates of bankrupts, is to be construed in the same way as that order, and is subject to the same exceptions. (*Re* Budgett; Cooper *v.* Adams.) ... ...*page* 72

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Petition—Proof necessary at hearing.—The affidavit of verification which is required by sect. 7 of the Bankruptcy Act 1883 as a condition precedent to the right to file a petition, cannot be relied upon at the hearing of the petition, if contested, as proof of any of the matters which are required to be proved at such hearing. A petitioning creditor must be prepared to prove at the hearing of a contested petition all matters in dispute, whether the same are included or not in the debtor's notice to dispute. (*Re* Sanders; *Ex parte* Sanders.) 236

Petitioning creditor's debt—Merger of debt in judgment.—By sect. 7 (2) of the Bankruptcy Act 1883 —"At the hearing the court shall require proof of the debt of the petitioning creditor. . . ." By sect. 7 (3), "If the court is not satisfied with the proof of the petitioning creditor's debt. . . . the court may dismiss the petition. The petitioning creditor had founded his petition chiefly upon a judgment upon which a receiving order had been made from which the debtors appealed. Held, that there was no provision in the Bankruptcy Act 1883 which altered the old common law of bankruptcy, that a debt though merged in a higher security, such as a judgment, was still a good petitioning creditor's debt. (*Re* King and Beesley; *Ex parte* King and Beesley.) 580

Priority — Equitable charges of life interest — Foreclosure — Voluntary settlement — "Void against the trustee in bankruptcy."—A bankrupt who was tenant for life of certain property, had executed two post-nuptial settlements of his life interest in favour of his wife and children, settling by the first 500*l.* and by the second 800*l.* a year upon them during life. He subsequently gave to the plaintiff equitable charges on the property for sums advanced and interest. By an order made in bankruptcy, in pursuance of sect. 47 of the Bankruptcy Act 1883, on the application of the trustee in bankruptcy, with the consent of the parties interested under the settlements, and by way of compromise, it was declared that the settlement of 500*l.* a year was valid as against the trustee in bankruptcy; but that the settlement of 800*l.* a year was void as against him. In a foreclosure action brought by the plaintiff to enforce his charges, the question arose as to whether the effect of the operation of this order was to vest the 800*l.* a year in the trustee in bankruptcy for the benefit of the unsecured creditors in priority to persons claiming to be incumbrancers outside the bankruptcy, or not. Held, that there was nothing in sect. 47 of the Bankruptcy Act 1883 which gave an order made under it the effect of thus vesting the property in the trustee in bankruptcy, and that the trustee failed in his claim for priority as against the plaintiff mortgagee. (Sanguinetti *v.* Stuckey's Banking Company Limited.) 872

Proof—Interest on debts—Interest over five per cent. By the Bankruptcy Act 1890, s. 23 "where a debt has been proved upon a debtor's estate under the principal Act and such debt includes interest, or any pecuniary consideration in lieu of interest, such interest or consideration shall for the purposes of dividend be calculated at a rate not exceeding five per cent. per annum, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled, after all the debts proved in the estate have been paid in full." Where a creditor had advanced 600*l.* to the bankrupt upon two promissory notes for 400*l.* and 600*l.* at three and six months respectively, whereof the first had been paid before the date of the receiving order, Held, that the above section did not disentitle the creditor to appropriate the first payment to interest, and to prove for the sum due upon the second note as for principal unpaid. (*Re* Holland; *Ex parte* Parker *v.* Young.) ... ...*page* 435

Protected transaction — "Contract, dealing, or transaction with bankrupt" — Charging order against fund in court belonging to bankrupt.—A charging order under sect. 14 of 1 & 2 Vict. c. 110, is not "an execution against the goods of a debtor" within sect. 45 of the Bankruptcy Act 1883, nor is it a protected transaction within sect. 49 of that statute. (*Re* O'Shea; Courage *v.* O'Shea.) 827

Purchase of claims of creditor—Undisclosed agreement between bankrupt and creditor for payment by bankrupt to creditor of additional sum—Validity—Annulment of bankruptcy with consent of creditors. — To obtain the annulment of a bankruptcy a large sum, but insufficient to discharge in full the claims of the bankrupt's creditors, was placed in the hands of trustees to enable them to buy up all claims against the bankrupt. The trustees negotiated with each of the bankrupt's creditors separately, and obtained an assignment of his claim on paying him the smallest sum he was willing to take for it. While these arrangements were proceeding between the trustees and the creditors, the bankrupt made an agreement with one of the creditors to the effect that, if the creditor would assign his claim to the trustees for a certain sum, the bankrupt would pay the creditor an additional sum; and the creditor, on the faith of that agreement, assigned his claim to the trustees for the sum agreed on. All the claims of the bankrupt's creditors were bought up by the trustees, and an order annulling the bankruptcy was obtained without disclosing the agreement, either to the court or to the other creditors. The discharged bankrupt died without having paid the additional sum agreed on. A decree for the administration of his estate was obtained, and the creditor carried in a claim for that sum against the estate. Held, that it was not necessary to mention the agreement to the court, as it was merely a collateral one between the debtor and this one creditor; that the other creditors had not been injured by it, as all the creditors were not acting on a common basis, but each creditor made his own bargain with the trustees; and therefore there had been no fraud on the bankruptcy law, and the estate of the discharged bankrupt was liable for the amount. (*Re* McHenry; McDermott *v.* Boyd; *Ex parte* Levita.) 502

Receiving order—Act of bankruptcy—Bankruptcy notice—Bankruptcy petition dismissed—Second bankruptcy notice in respect of same judgment debt—*Res adjudicata*—Estoppel.—The petitioning creditors presented a bankruptcy petition, founded upon non-compliance with the terms of a bankruptcy notice, against the debtor in the County Court. At the hearing of this petition the circumstances under which the judgment had been obtained were fully inquired into, and the registrar refused to make a receiving order. Subsequently the debtor came within the jurisdiction of the High Court in Bankruptcy, and the petitioning creditor served upon him a second bankruptcy notice in respect of the same judgment debt, and, upon non-compliance with the terms of that notice, presented a bankruptcy petition against him in the High Court. At the hearing of the petition the whole matter was inquired into, and the registrar made a receiving order against the debtor. Held, that

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the petitioning creditors were not estopped from serving the second bankruptcy notice or presenting the second petition, and that the registrar of the High Court could make a receiving order, inasmuch as the registrar of the County Court only refused to make a receiving order in the exercise of his discretion under sect. 7, sub-sect. 3, of the Bankruptcy Act 1883, and did not and could not decide anything as to the validity of the judgment debt. (*Re* Vitoria; *Ex parte* Vitoria (No. 2.) ... ...*page* 48

Receiving order—Partnership firm—Infant partner—Amendment—Form of order.—An infant may become a partner in a trading firm, but he does not become a debtor for goods supplied to the firm, and cannot be made subject to the bankruptcy laws in respect of any debt contracted by the firm. But he is not entitled to any share of the partnership assets till the debts of the firm are paid. In a case in which judgment had been obtained and a receiving order made against a firm, in the partnership name, in which one of the partners was an infant: Held, that a receiving order in that form could not stand, but that the judgment and bankruptcy proceedings might be amended by adding after the word "defendants" the words "other than the infant partner." (Lovell and Christmas *v.* Beauchamp Brothers.) 587

Shares in company—Not fully paid—Disclaimer—Proof for damages by reason of.—The trustee in bankruptcy of a debtor who was the holder of shares in a company which were not fully paid, disclaimed the shares. The liquidator of the company put in a proof against the debtor's estate for the damage sustained by the operation of the disclaimer, and assessed that damage at the amount unpaid on the shares. The trustee rejected the proof. Held, that the proof must be admitted for the amount claimed subject to a deduction for the value, if any, of any shares received back by the company, and any other advantage the company had gained by reason of the disclaimer. (*Re* Hallett; *Ex parte* National Insurance Company.) 408

Small bankruptcy—Motions by trustee dismissed with costs—Trustee's costs payable out of the estate—Three-fifths of the costs only.—Motions made by the trustee in a small bankruptcy against creditors, to have payments made to them by the debtor declared void as fraudulent preferences were dismissed with costs, but the trustee was allowed to recoup himself out of the estate: (Bankruptcy Rules 1886, r. 112.) Held, that the trustee was only entitled to the lower scale of costs out of the estate. namely, three-fifths of the charges ordinarily allowed, disbursements being added, and not to his costs in full. (*Re* Marsh; *Ex parte* The Board of Trade.) 776

Trustee—Appointment—Objection by Board of Trade—Difficult for trustee to act with impartiality—Decision of High Court as to validity of objection—Appeal by Board of Trade—Right of appeal.—When the High Court has decided against the validity of an objection by the Board of Trade to the appointment of a trustee, under sect. 21 of the Bankruptcy Act 1883, an appeal will lie to the Court of Appeal; and such appeal may be brought by the Board of Trade as "a person aggrieved" within the meaning of sect. 104 of the Act. (*Re* Lamb; *Ex parte* the Board of Trade.) 312

BILL OF EXCHANGE.

Acceptance for accommodation of drawer—Acceptance upon higher stamp than necessary—Fraudulent alteration by drawer after acceptance—Liability of acceptor to holder in due course.—The defendant accepted a bill of exchange for 500*l.* for the accommodation of the drawer upon paper bearing a stamp sufficient to cover 4000*l.* The bill was complete when the defendant signed it, and the drawer, having obtained the bill so signed, fraudulently altered the same by inserting the figure 3 before the figures 500, there being a space sufficiently wide for such interpolation between the sign £ and the figures following, and he also inserted the words "three thousand," the word "three" being at the end of the second line, and the word "thousand" being at the beginning of the third line, there being sufficient room in the bill as drawn for such interpolation. He thus altered the bill into one for 3500*l.*, and in this state he negotiated it. When the defendant signed the bill there was nothing to call his attention to the amount of the stamp, and the bill appeared to be drawn in the ordinary form, though in such a shape as to make alteration possible without detection. In an action against the defendant, as acceptor, by a holder in good faith and for value: Held, that the defendant was not liable for the amount of the altered bill, on the ground that he was not guilty of such negligence in accepting the bill, either as to the amount of the stamp or the form of the bill, as would render him liable for the subsequent forgery; but, that, as the alteration was "not apparent," he was, under sect. 64 (1) of the Bills of Exchange Act 1882, liable to the extent of the amount for which the bill was originally drawn and accepted. Held also, that, as the bill had not been "issued" for stamp purposes at the time of its alteration, it did not become a new instrument requiring a fresh stamp. (Scholfield *v.* Londesborough (Earl of.) ... ...*page* 86

Dishonour—Days of grace—Bills of Exchange Act 1882.—The holder of a dishonoured bill of exchange cannot commence an action to recover the amount until after the expiration of the third day of grace. (Kennedy *v.* Thomas.) 144

BILL OF SALE.

Assignment of chattel—Assignment of hiring agreement of the chattel in same deed—Assignment of chattel void—Validity of assignment of hiring agreement.—The debtor had let a piano under a hire-purchase agreement; subsequently, by way of security for the payment of money, he assigned by deed "all that piano and also an agreement for hire dated . . . and made between . . . relating to the said piano, and the full benefit and advantage thereof." This deed was not registered under the Bills of Sale Acts, and the trustee in bankruptcy moved for a declaration that it was null and void. Held, that the deed was not void, inasmuch as it contained a valid assignment of a *chose in action*, which was distinct and separate from the assignment of the piano. (*Re* Isaacson; *Ex parte* Mason.) 583, 812

BUILDING SOCIETY.

Deed of dissolution—Alteration of rights and liabilities of members—Withdrawing unadvanced members—Advanced members—Advances repayable by instalments—Immediate payment of balances owing.—The priority of repayment of members of a building society who have given notice of withdrawal may be abrogated by an instrument of dissolution executed pursuant to the Building Societies Act 1874, s. 32, without an alteration of the rules of the society. So held by Kekewich, J. An instrument of dissolution does not alter the right of the borrowing members of a building society to continue paying their instalments in accordance with the terms of their respective mortgage deeds; and they cannot be compelled to pay up immediately the balances due from them in respect of their advances. So held by the Court of Appeal (reversing the decision of Kekewich, J.). Sect. 10 of the Building Societies Act 1894 is retrospective in its operation, and applies to societies in course of dissolution at the time of the passing of the statute. (Kemp *v.* Wright.) 650

Dispute between society and unadvanced shareholder—Arbitration—Appointment of arbitrators after commencement of action by member—Staying proceedings—Jurisdiction.—Where the rules of a building society, incorporated under the Building Societies Act 1874, provide for the settle-

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ment of disputes between the society and any of its members by reference to arbitration pursuant to sect. 16, sub-sect. 9, of that statute, the fact that some of the full body of arbitrators are appointed after the commencement of an action by an unadvanced shareholder against the society in respect of a dispute does not give the court jurisdiction to entertain the proceedings. (Norton v. The Counties Conservative Permanent Benefit Building Society.) ... ...page 790

First mortgage—Postponement of security—Borrowing powers—*Ultra vires*.—According to the rules of a building society, which had exhausted its borrowing powers, no property was to be deemed a sufficient security for advances which should be subject to previous mortgage otherwise than to the society; but the directors were empowered to release a portion of a mortgaged estate, if satisfied that the remainder was sufficient. A sum considerably in excess of 6000*l*. had been previously advanced by the society to H., one of its members, upon mortgage of various houses. The directors were in need of money, and in pursuance of an arrangement, which was carried out by a mortgage deed of the 1st Dec. 1891, H. mortgaged the the same houses to a life insurance company for 6000*l*., the building society joining in the deed to release and postpone its security, so that the life insurance company had a first charge. The 6000*l*. was paid to H., who immediately handed it to the building society in reduction of his debt, the balance of the debt being thus secured by a second mortgage of the property. All the costs of this transaction were paid by the building society. Upon the society going into liquidation, this transaction was impeached: Held, that the mortgage of the 1st Dec. 1891 was *ultra vires*, and not binding upon the society, inasmuch as it was not within either the express or implied powers of the directors to enter into such a transaction, nor could it be upheld as a realisation of their security as mortgagees. (Portsea Island Building Society v. Barclay.) 82

Solicitor—Officer of the society—Liability for misfeasance—The Companies (Winding-up) Act 1890.—W., a solicitor, was appointed and acted as sole solicitor to the Liberator Society, which was incorporated under the Building Societies Act 1874, at an annual salary out of which he was to pay officers, clerks, &c., and undertook to pay over to the society all fees and costs paid to him by clients of the society. An order was subsequently made for the compulsory winding-up of the society, and pursuant to rule 78 of the Companies (Winding-up) Act 1890, application was made by the official receiver to bring to the notice of the court certain acts of misfeasance committed by W., and for an order that he should contribute to the assets of the society sums received by him as officer thereof. Held, by Cave and Collins, JJ., that, although *primâ facie* a solicitor is not any more an officer of a society than is a banker, yet inasmuch as W. had agreed to do all the work that the society had for him to do in consideration of a fixed salary, and to forego as far as the members of the society were concerned all the ordinary rules with regard to payment, and as he had acted practically as the society's financial manager, he was an officer of the society within sect. 10 of the Companies (Winding-up) Act 1890, and that as such his estate was liable to contribute to the assets of the society all sums that he had received as "officer" of the society. (*Re* The Liberator Permanent Benefit Building Society.) 406

CHARITY.

Compulsory sale of lands to railway company—Voluntary subscriptions and donations—Endowment—Consent of Charity Commissioners.—The income of any endowment of a charity *primâ facie* means income derived from any invested funds; but, in the case of a charity partly maintained by voluntary subscriptions, and partly by the income of any endowment, bequests and donations for the general purposes of a charity, which may be lawfully applied as income consistently with the terms of the gift, are exempt from the jurisdiction of the Charity Commissioners; and such gifts, and the income thereof, are not brought within the jurisdiction by being invested by the governing body of the charity. Land belonging to a charity had been taken by a railway company under the powers conferred by their special Act whereby the purchase money was fixed at 40,000*l*. The Charity Commissioners having intervened, the sum of 5000*l*., part of the purchase money, had been paid into court. The land had originally been bought by the charity out of moneys produced by the sale of consols, which were derived from investments of voluntary contributions, and were available for the general purposes of the charity, and could be dealt with as income. The charity had power under their Act of incorporation to purchase land, but there was no provision empowering them to sell or let the land so purchased. A power of sale was, however, conferred by the special Act of the railway company above referred to. A petition was presented by the charity for payment of the 5000*l*. to them as being absolutely entitled thereto. Held, that the proceeds of the sale of the land were still applicable as income to the general purposes of the charity, and therefore exempt from the jurisdiction of the commissioners; and that direction for payment to the charity could be rightly made. (*Re* The Clergy Orphan Corporation.) ... ...page 450

Trustees—Accounts—Motion to commit trustees for not rendering accounts—Charity Commissioners—Jurisdiction—Charitable Trusts Act 1853.—Unless a charity comes within the exemptions specified in sect. 62 of the Charitable Trusts Act 1853, the trustees are bound to render accounts to the Charity Commissioners. On motion to commit the trustees for refusing to render accounts, the trustees were ordered to pay the costs of the motion. (*Re* Gilchrist's Trusts.) 875

CHEQUE.

Post-dated cheque—Payable on demand—Valid cheque—Stamp—Penny stamp sufficient—Holders for value—Bankers.—A post-dated cheque for any amount payable to order and bearing a penny stamp, issued as a negotiable instrument before the day of its date, is a valid cheque upon which an action can be brought after the date which it bears When a customer hands a cheque to his bankers in order that it may at once be placed to his credit, and it is so placed to his credit, the bankers become holders for value of the cheque. (Royal Bank of Scotland v. Tottenham.) 168

CHOSE IN ACTION.

Promise to lend money—Assignment—Judicature Act 1873 (36 & 37 Vict. c. 66), s. 25, sub-sect. 6.—The owner of a piece of land covenanted with a builder for the erection of houses thereon, the builder to be entitled to long leases of the houses when built. While the work was being carried out, and in order to assist the builder in finishing it, the owner verbally agreed to lend the builder 250*l*. on each pair of houses in small sums from time to time. The builder afterwards made an assignment in writing to the plaintiffs of 50*l*. out of the money due or to become due from the owner to himself. In an action by the assignees against the owner upon this assignment: Held, that, as there was no consideration for the agreement to lend, there was nothing that could be assigned, and the action must fail. Held also, that, if the agreement to lend had been a binding one, such an agreement, being enforceable only by an action at common law for damages, would not have been assignable under sect. 25, sub-sect. 6, of the Judicature Act 1873. (May and another v. Lane.) 869

COLONIAL LAW.

Canada—Law of Lower—Procedure—Non-judicial day—Expiration of time—Code of Civil Proce-

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dure, art. 3—49 & 50 Vict. c. 95 (Quebec), s. 20—42 & 43 Vict. c. 53 (Quebec), s. 12.—By the Canadian Code of Civil Procedure, art. 3, it is provided that, "if the day on which anything is to be done in pursuance of the law is a non-judicial day, such thing may be done with like effect on the following day." By the Declaratory Act, 49 & 50 Vict. c. 95 (Quebec) sect. 20, "If the day fixed for any proceedings, or for the doing of anything, expires on a non-judicial day, such delay is prolonged till the next following judicial day." Held, that these provisions relate to matters of procedure only, and to things which the law directs to be done by either of the parties in the course of a suit, and not to the title or want of title in the plaintiff to institute and maintain it; and therefore where a statute (42 & 43 Vict. c. 53 (Quebec) s. 12) provided that proceedings of the respondent corporation might be questioned on the ground of illegality by a petition presented to the Superior Court within three months, and the last day of the three months was a non-judicial day, the time for presenting such petition was not extended to the following day. (Déchêne v. City of Montreal.) ... ...*page* 354

Manitoba—Street railway—Exclusive right to run over streets—Construction of agreement.—The appellant company were empowered by their private Act (with the consent of the city authorities) "to use and occupy any and such parts of any of the streets and highways" in a city "as may be required for the purposes of their railway track, the laying of the rails and the running of their cars and carriages." The mayor and council of the city afterwards by deed granted to the appellants the right to "construct, maintain, and operate . . . a double or single track railway with the necessary appurtenances, upon or along any of the streets and highways of the city and to run their cars . . . upon the same." A subsequent clause provided that, if any other party proposed to "construct street railways on any of the streets not occupied by" the appellants, "the nature of the proposal thus made should be communicated to them," and they should have the option of carrying it out themselves. Held, that these provisions conferred no exclusive rights upon the appellants to the use of the streets of the city, but that the city authorities could validly grant to the respondent company a right to lay down street railways in streets already worked by the railways of the appellants, and also in streets not worked by them, which they were nevertheless willing to work. (Winnipeg Street Railway Company v. Winnipeg Electric Street Railway Company and the City of Winnipeg.) 127

New South Wales—Crown lands—Dedication by Crown—Permanent common—Common of pasturage—Inclosure.—By sect. 5 of the Crown Lands Alienation Act of New South Wales 1861, it is enacted that Crown lands in the colony may be reserved or dedicated for various specified purposes, including "pasturage common, or for public health, recreation, convenience, or enjoyment." A tract of Crown land was duly dedicated under the Act as "permanent common," and the Municipal Council of Sydney were appointed trustees of the land so dedicated, under the Public Parks Act 1854. The Municipal Council let a small portion of the land on lease to the other appellants, who inclosed it, and used it for agricultural shows, races, and cricket and football matches, and made a charge for admittance. Held, that the dedication of the land did not create a common of pasturage, and that the use by the appellants was not inconsistent with the dedication, which must be taken to have been for the public enjoyment, and that such use should not be restrained at the suit of the Attorney-General suing on behalf either of the Crown or of the public. Judgment of the court below reversed. (Municipal Council of Sydney and others v. Attorney-General of New South Wales, and Milroy.) 30

New South Wales—Law of—Appointment of new trustees by court—Vesting order—Practice—Parties.—The statute 16 Vict. No. 19, by sect. 30, empowers the Supreme Court of New South Wales, upon the application of any person beneficially interested, to appoint new trustees in certain cases; and by sect. 32 provides that "it shall be lawful for the court upon making any order for appointing a new trustee, either by the same or by any subsequent order, to direct that any land subject to the trust shall vest in the person or persons" so appointed. By the practice of the court, embodied in rules of procedure, the appointment of a new trustee was referred to the master with directions "that upon such appointment the trust property and effects be vested in the" new trustee. Held, that an order so made upon a reference to the master was sufficient to vest the legal estate in the new trustee, and that a subsequent order by the court was unnecessary. The Act does not require that all persons interested should be made parties to the suit, but leaves a discretion to the petitioner and to the court. (Plomley v. Richardson and others.) *page* 372

COMPANY.

Articles of association—Debenture—Irregularities in issue—Validity—Transferee for value without notice.—By one of the articles of association of a company it was provided that any debenture bearing the seal of the company and issued for valuable consideration should be binding on the company, notwithstanding any irregularity touching the authority of the directors or officers or servants of the company to issue the same. The company issued a debenture sealed with the seal of the company, and signed by a director and countersigned by the secretary of the company, as required by the articles. It appeared, however, that, contrary to the provisions of the articles, the seal had been affixed to the debenture on the sole authority of one of the directors, in whose favour it purported to be made; that no other director was present or voted in favour of the affixing of the seal; that no meeting had been convened for the purpose; and that the moneys purported to be secured by it were not moneys which the directors had power to secure. Held, that, as against a transferee who took without notice, the irregularities in the issue of the debenture were covered by the article, and that the debenture was therefore valid. (Davies v. R. Bolton and Co. Limited.) 336

Bondholders—Failure of object of company—Compromise—"Proceedings concerning a trust"—Power of court to enforce.—Three actions were brought by the holders of first mortgage bonds issued to provide funds for the completion of a railway in course of construction, the proceeds of the bonds being in the hands of trustees. The first and third actions were brought by a substantial minority of the bondholders, which minority asked for a return of such proceeds of the bonds as remained in the hands of the trustees, on the ground that the completion of the railway had become practically impossible, and, consequently, the purpose for which the bonds had been issued had failed. The second action was brought by a small majority of the bondholders, who desired to have the remaining proceeds of the bonds expended in continuing the construction of the railway. Pending certain inquiries directed by North, J., before whom the actions came on for trial, a petition was presented by the plaintiffs in the first action asking the sanction of the court to a proposed scheme for the compromise of the litigation. North, J. refused to sanction the scheme. On appeal: Held, that the court having power under rule 9a of Order XVI. to approve a compromise in the absence of some of the persons interested, and in this case the proposed compromise being beneficial, the scheme would be sanctioned, subject to a sum being set apart to meet the claims of the dissentient bondholders. (The Foreign, American, and General Investment Trust Company Limited v. Sloper. Collingham v. Sloper.) 456

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SUBJECTS OF CASES.

Company limited by guarantee—Not having a capital divided into shares—Regulations as to share or interest of members in the company's undertaking—*Ultra vires.*—The G. M. Syndicate Limited was incorporated on the 23rd Feb. 1894, as a company limited by guarantee and not having any capital divided into shares. The amount guaranteed by each member was 1l. For the purpose of registration the number of members was declared (by the articles) to be twenty, but the directors were empowered to register an increase. A special resolution of the company was duly passed on the 13th June 1894, substituting for the articles of association of the company a body of new regulations, which provided that the undertaking of the company should be regarded as divided into 1400 shares or interests; that the members of the company at the time at which the regulations came into operation should be deemed to be entitled to these shares in equal proportions; that the number of shares in the undertaking might be increased, and the additional shares so created dealt with in such manner as the directors should think expedient, and any preferential or special rights might be attached to such additional shares; that the shares or interests of any member might be transferred, and should pass to his executors on death; and that a member might be admitted, or permitted to increase his holding on the footing of payment to the company of a specified sum per share or interest, by instalments or otherwise. This was an action by one of the members of the company against the company and the directors to restrain their acting on the new regulations on the ground that they were *ultra vires* as being an attempt to get the benefit of having a capital divided into shares without being subject to the restraints imposed upon such capital by the Companies Acts. The plaintiff now moved for an injunction, and the motion was by consent treated as the trial of the action. Held, that the regulations were *intra vires;* they were merely attempts, whether successful or not the court expressed no opinion, to define and make it possible to deal with the fractional interests of the members of the company in its undertaking, and did not either limit their liability by the amount of their shares, or attempt to create a capital divided into shares within the meaning of sect. 14, and other sections of the Companies Act 1862. (Malleson *v.* The General Mineral Patents Syndicate Limited.) ... ...*page* 476

Issue of shares at a discount—Winding-up—Discharge of creditors—Calls—Rights of contributories *inter se.*—A limited company, having under its articles of association power to issue shares at a discount, created additional capital in shares, some of which were issued at a discount to A. who was also an original shareholder. The company having been ordered to be wound-up, all the creditors were duly paid before the whole of the share capital had been called up. The question then arose whether, in adjusting the rights of the shareholders *inter se* under sect. 38 of the Companies Act 1862, A., as the holder of discount shares, was still liable under sect. 25 of the Companies Act 1867 to pay up the whole amount of those shares. Held, that the issue of shares at a discount was void altogether, and not merely as against creditors; and that therefore the discount shares were liable to be called up in full, under sect. 25 of the Companies Act 1867, for the purpose of adjusting the rights of the various shareholders in the company *inter se.* (*Re* The Railway Time Tables Publishing Company Limited; *Ex parte* Welton.) 682

Liability of directors—Agreement made *bonâ fide* but *ultra vires*—Measure of damages—Market price of shares.—Where the directors of a company made an agreement for the sale of shares, which was in fact partially *ultra vires*, but was made *bonâ fide*, in the honest and reasonable belief that it was for the interest of the company, they cannot be charged with *dolus malus* or fraud merely because the effect of the transaction was to cause a rise in the shares of the company, which enabled them to sell shares of their own at prices which gave them large profits; and the proper measure of damages in an action brought by shareholders against the directors in respect of the transaction is the value of the shares to the company if the agreement had not been made. A subsequent market price, due to the influence upon a market, fluctuating from day to day, of the impugned transaction itself, is not the proper measure of what might have been realised from the shares if no such transaction had taken place. (Hirsche and others *v.* Sims and others.) ... ...*page* 357

Loan by bank—Debentures with blanks instead of the names of the obligees, as collateral security—Invalid at law—Equitable contract to give valid debentures entitling bank to rank with holders of valid debentures.—A company with large borrowing powers having issued a large number of debenture bonds got into difficulties. and obtained an advance from its bankers, giving, as collateral security for the advance, debenture bonds under the company's seal, in which debentures the name of the obligee was omitted, blanks being left for such name. In connection with the transaction between the company and the bank there was a minute of a resolution of the company duly signed by the chairman at a subsequent meeting, and a covering deed by which the property of the company was vested in trustees to secure the payment of the principal moneys and interest due on the debentures; and the bank was registered as holder of the debentures. The company was dissolved; and subsequently, upon an action by a debenture-holder, an order was made that the trusts of the covering deed should be performed and carried into execution, and inquiries as to the holders of the debentures were directed. On the further consideration of the action the question was raised whether, with respect to the debentures held by the bank, in which the name of the obligee was omitted, a blank space being left for such name, the bank was a debenture-holder, and entitled with the other debenture-holders to the benefit of the covering deed. Held, that, although the debentures were void at law, there was a valid contract with the bank to issue valid debentures to them (the terms of which contract could be gathered from the resolution of the company, the debentures which were good as written memoranda, and the covering deed), under which contract the bank had an equitable claim to share with the other debenture-holders the benefit of the covering deed. (*Re* Queensland Land and Coal Company Limited; Davis *v.* Martin.) 115

Promoting and obtaining Act—Solicitor's costs—Agreement for payment of costs on condition of "the capital" being raised—Issue of part of the company's capital—Rights of solicitors.—A company was being promoted for the building of a railway, and for the purchase, in connection therewith, of a certain canal. The promoters and a firm of solicitors came to an agreement, afterwards adopted by the company, by which the solicitors consented to give their services gratis "in the event of the application to Parliament failing, or the capital not being raised," but in the event of these two conditions being fulfilled, they were to be paid the customary professional charges for work done. An Act of Parliament was obtained incorporating the company, and providing for the transfer to it of the canal, and authorising the construction of the railway. The capital was not to exceed eight million pounds, and the company was authorised to resolve that the canal undertaking and capital necessary for it should be a separate undertaking, with a separate capital. This course was adopted by the company, and the canal capital fixed at one and a quarter millions. This amount was raised, but the rest of the capital of the company was not raised. In an action by the solicitors to recover the customary professional charges for work done by them: Held, that the raising of the canal capital was not a raising of "the capital," and

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that the conditions of the contract made between the promoters and the solicitors not having been fulfilled, the solicitors were not entitled to succeed in the action. (Nichols *v.* the North Metropolitan Railway and Canal Company.) ... ...*page* 249, 836

Shareholder — Debt — Legatee — Call on shares — Creditors—Fraudulent conveyance.— Mrs. T., the widow and residuary legatee of R. T., the testator, in Nov. 1889 took out letters of administration with the will annexed, and possessed herself of the personal property of the testator, but did not have 500 shares in the plaintiff company transferred into her name. On the 10th April 1893 the plaintiffs gave Mrs. T. notice of a call of 1*l.* per share. On the 17th April three deeds were executed, whereby Mrs. T. assigned the whole of the personal estate except the shares to L., upon consideration of covenants entered into by L. to indemnify Mrs. T. against all liabilities, and to provide her with board, lodging, and wearing apparel, and amenities suitable to her position, and on Mrs. T.'s death to provide her with a decent funeral. Held, that, as legal personal representative, Mrs. T. was bound to administer her husband's estate according to law, and that, as residuary legatee, she took only what was left after due administration, that is to say, after payment of the debts, including the calls that might be made on the shares; the deeds of assignment must be declared void as against the plaintiffs, and there must be the ordinary accounts in a creditor's action; the plaintiffs were entitled to be paid the call and interest, and the costs of the action, and the surplus of the estate would go according to the provisions of the deeds of assignment. (*Re* Troughton; Rent and General Collecting, &c., Company *v.* Troughton.) 427

WINDING-UP.

Contributory—Application for shares—Verbal withdrawal—Authority of clerk at registered office to receive withdrawal—Stoppage of cheque for application money—Notice to company.—An application for shares in a company may be verbally withdrawn before allotment. A. signed an application form for shares in a company, and handed the same to a clerk at the registered office of the company with a cheque for the amount of the allotment money. On the same day A. called at the office and told the clerk that he withdrew his application, and asked him to return the cheque. The clerk declined to do so, on the ground that the secretary was out. A. thereupon stopped his cheque. The company subsequently allotted the shares to A. Held, that, in the absence of evidence to the contrary, it must be inferred that the clerk was so far in charge as, in the absence of others, to have authority to receive A.'s statement, which must, therefore, be taken to have been communicated to the company before allotment. Directors, who allot shares on the basis of payments to their bankers, ought to make inquiries as to such payments before allotting the shares. (*Re* Brewery Assets Corporation Limited; Truman's case.) 328

—— Director—Qualification shares—Fixed period for acquiring shares—Resignation within period. — Where, by the articles of association of a company, a period is fixed within which a director is to acquire his qualification shares, but he is empowered to act before so doing, the fact that he acts as director is not evidence of an agreement to take the shares, and, if he resigns within the period fixed for acquiring them he is under no obligation to acquire them, and therefore on the winding-up of the company is not liable to be placed on the list of contributories in respect of those shares. (*Re* R. Bolton and Co. Limited; Salisbury-Jones and Dale's case.) 284

Costs—Taxation—Official receiver's report — Misfeasance summons—Adjournment into court—Oral evidence—Instructions for brief—Three counsel—Consultations—Refreshers.—The official receiver's special report under rule 78 of the Companies (Winding-up) Rules 1890 is neither a pleading nor equivalent to a pleading, nor an affidavit, nor within Order LXV., r. 27; but a statement of facts for which the only charges which can be made are for drawing at 8*d.* a folio, and copying at 4*d.* a folio. The hearing of an adjourned misfeasance summons under sect. 10 of the Companies (Winding-up Act) 1890 is not "the hearing or trial of action upon notice of trial, or notice for judgment given" (R. S. C. 1883; App. N., No. 81), and therefore charges for instructions for brief cannot be allowed, but only for drawing and copying all the necessary proofs and statements of the witnesses and observations at the rate of 1*s.* for drawing and 4*d.* for each copy for counsel. On the hearing of such a summons upon affidavit and oral evidence the fees and costs of three counsel may be allowed where it is essential to justice, having regard to the issues raised and the probable and actual length of the hearing, that the services of three counsel should be retained. Fees to counsel for consultation (after the first one) during the hearing disallowed. The registrar has power to allow refreshers on such an adjourned summons where oral evidence is adduced, such a case being a matter within Order LXV., r. 27, sub-rule 48, and sect. 100 of the Judicature Act 1873. (*Re* Anglo-Austrian Printing and Publishing Union Limited.) ... ...*page* 331

Deposit of securities in Land Registry—Debenture-holder's action—Receiver—Order on registrar to deliver up securities to receiver.—The Court has an implied power, under sect. 46 of the Mortgage Debenture Act 1865, to order the Registrar of the Land Registry to hand over *en bloc* to a receiver in a debenture-holder's action, the securities deposited with him under the Mortgage Debenture Acts 1865 and 1870 upon which the debentures are charged. (Somerset *v.* Land Securities Company Limited.) 512

Directors—Remuneration by way of percentage on net profits—*Bonâ fide* over-estimate of assets—Resolution based thereon—Validity—Payment out of capital—Stale demand—Interest.—The articles of association of a company provided that the dividends should be paid out of net profits, and that 10 per cent. of the residue of such net profits should be paid to the directors as remuneration. In 1883 resolutions were passed by the shareholders declaring a dividend on the share capital, and providing after payment of such dividend for the application of the balance (*inter alia*) in payment to the directors of their 10 per cent. by way of remuneration. These resolutions were based upon a balance-sheet in which the assets had been greatly over-estimated, but which had been made out *bonâ fide*. Before the balance was distributed the company went into voluntary liquidation. All the creditors had been paid in full. The directors claimed the 10 per cent. on the net profits declared in 1883. The liquidator opposed the claim on the ground that, in order to meet it, it would be necessary to raise the larger portion of it out of capital. Held, that, having regard to the lapse of time, and to the fact of there being no suggestion of want of *bona fides*, the directors were entitled to the amount they claimed, but not to interest thereon. (*Re* Peruvian Guano Company Limited; *Ex parte* Kemp.) 611

Director's qualification — Agreement to acquire qualification—Reasonable time for performance—No business done by company—Agreement to become member.—An agreement by a director to acquire qualification shares does not amount to an agreement to take shares within sect. 23 of the Companies Act 1862, and does not become so merely by his acting as a director. The articles of association of a company provided that the qualification of a director should be the holding in his sole name of shares to a certain nominal value, and that his office should be vacated if he ceased to hold the requisite share qualification. A., B., and C. were appointed first directors, and accepted the office, and acted to some extent as directors; but none of them ever applied for

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shares, or were any shares ever allotted to them. The company never did any business, and did not go to allotment. Within a year of its incorporation the company was ordered to be wound-up, and the liquidator placed the names of A., B., and C. on the list of contributories in respect of their qualification shares. On a summons taken out by A., B., and C. to have their names removed from the list: Held, that the agreement to be inferred on the part of A., B., and C. respectively, was an agreement to acquire the requisite number of qualification shares either from the company, or from outside persons, within a reasonable time; that such an agreement did not amount to an agreement to take shares within the meaning of sect. 23 of the Companies Act 1862, and did not become so by their acting as directors; and, further, that, having regard to the circumstance that the company never went to allotment, a reasonable time for acquiring such qualification shares had not elapsed at the date of the winding-up. Held, therefore, that their names ought to be removed from the list of contributories in respect of such shares. (*Re* Issue Company Limited; Hutchinson's case; Betzold's case; Benjamin's case.) ... ...*page* 667

Memorandum of association—Signature by member of firm—Subsequent application by and allotment to firm of same number of shares—Satisfaction.—The liability under sect. 23 of the Companies Act 1862 of a subscriber of the memorandum of association of a limited company for the shares subscribed for is satisfied by an allotment of a similar number of shares to his firm, made in pursuance of an agreement with the company that only the number of shares mentioned in the memorandum shall be taken by the firm or any member thereof. (*Re* Glory Paper Mills Company Limited; Dunster's case.) 528

Official receiver — Board of Trade — Scheme of arrangement—Reservation to official receiver of rights against directors of old company—Opposition to proceedings by new company—Sanction of court.—Whether or not proceedings under sect. 10 of the Companies (Winding-up) Act 1890 for misfeasance ought to be instituted by the official receiver against the directors or officers of a company, is a matter for the determination of the court, and not of the Board of Trade. Where a scheme sanctioned by the court under the Joint Stock Companies Arrangement Act 1870 contains a reservation to the official receiver of his right to proceed against the directors of the old company under sect. 10 of the Companies (Winding-up) Act 1890 for misfeasance, the court will refuse to sanction such proceedings even where a *primâ facie* case of misfeasance has been shown, if it is satisfied that the directors of the new company have come to a *bonâ fide* conclusion that such proceedings will be detrimental to the interests of their company. (*Re* New Zealand Loan and Mercantile Agency Company Limited.) 693

Petition not presented in good faith—Jurisdiction of court to prevent abuse of its own process—Restraining advertisement of petition.—The Court has an inherent jurisdiction to stay proceedings when they amount to an abuse of its own process. Where, therefore, a petition had been presented for the winding-up of a company which the court was satisfied had not been presented in good faith, the Court on the application of the company granted an injunction restraining the petitioner from advertising the petition, and from taking any further proceedings thereon. (*Re* A Company.)... 15

Public examination — Official receiver's report—Fraud not alleged—Facts stated suggesting fraud.—A motion was made by certain persons who were directors of a company at the date of the order for winding it up, asking for the discharge of an order made by Williams, J. under sub-sect. 3 of sect. 8 of the Companies (Winding-up) Act 1890 for the public examination of the applicants and certain other persons who had formerly been directors or officers of the company. It was decided by Williams, J. that, where a *primâ facie* case of fraud against any person in the promotion or formation of a company, or against any director, appeared from the official receiver's report, all the promoters and directors, whether implicated or not, might be summoned for examination under that section; and he made an order accordingly. On appeal: The Court, by consent, made an order discharging the order of Williams, J. as regarded the persons consenting, and directing that a public examination of those persons should take place before the court, or such person as might be appointed by the court, with liberty for the official receiver and any creditor or contributory of the company to take part in the examination, putting such questions only as should be allowed by the court. (*Re* The New Zealand Loan and Mercantile Agency Company Limited.) ... ...*page* 130

Public examination—Report of official receiver—Statement in report that fraud has been committed.—In order to obtain an order for public examination under sect. 8 of the Companies (Winding-up) Act 1890, the official receiver should, in his further report under sub-sect. (2), state matters of information and belief, and that in his opinion such matters constitute a *primâ facie* case of fraud by some person—not defining which person—in the promotion or formation of the company or in relation to the company since the formation thereof; though, if it is manifest on the face of the report that fraud has been committed, it is not necessary for him to say so in express terms. It is not sufficient for the report merely to suggest that fraud has been committed. (*Re* General Phosphate Corporation Limited.) 619

Rates—Business premises—Occupation by liquidator — Caretaker — Beneficial occupation. — The liquidator of a company is bound to pay in full the rates becoming due in respect of the company's premises after the commencement of the liquidation, where such premises are retained by him with a view either of obtaining a better price or of avoiding a loss. In default of such payment liberty to distrain ought to be granted. (*Re* Blazer Fire Lighter Limited.) 664

Scheme of arrangement—Transfer of assets and liabilities to new company—Proof of debt—Contingent liability—Joint Stock Companies Arrangement Act 1870.—C., the lessee of certain mines, assigned his lease to a company, the company covenanting to indemnify him against all claims in respect of rent or breach of any of the covenants contained in the lease. The company went into liquidation, and subsequently, with the knowledge of and without any opposition by C., the Court sanctioned a scheme under the Joint Stock Companies Arrangement Act 1870, under which a new company was formed to take over the assets and liabilities of the old company. After the assets of the old company had been distributed under the provisions of this scheme, C. claimed to prove in the winding-up of the old company in respect of his contingent liability under the lease, and to have the amount secured. Held, that C. was a creditor within the meaning of sect. 2 of the Act of 1870, and therefore was bound by the scheme; but, if he was not bound by it, his present application was too late. (*Re* Midland Coal, Coke, and Iron Company Limited; Craig's case.) 329, 705

Shares—Member—Infant—Allotment of shares to—Executed contract — Repudiation — Rectification of register—Right to recover money paid—Failure of consideration.—An infant who has applied for shares in a company and paid money on their allotment to him may not only repudiate the shares, but may also recover the money so paid, provided that he has derived no benefit from holding such shares. (Hamilton *v.* Vaughan-Sherrin Electrical Engineering Company Limited.) 325

Shares in English company—Shareholder—Sequestration in Scotland—English personal representative — Title to shares — Contributory. — A., a

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domiciled Scotchman, was at the date of his death the registered owner of certain shares in an English company, which shortly afterwards went into voluntary liquidation. These shares were held by him as a trustee for other persons. After his death sequestration was issued in Scotland against his estate, and in the sequestration proceedings a trustee was appointed. No personal representative to his estate had been constituted in England. The assets of the company had been realised, and after payment of debts and liabilities there remained a balance in the hands of the liquidator, which he was desirous of distributing amongst the shareholders. Held, that the legal title to the shares in question was vested in the trustee in the Scotch sequestration; that, that being so, it was unnecessary to make any order under Order XVI., r. 46, dispensing with the English representative; and that the money distributable in respect of the shares might be paid to the trustee in the Scotch sequestration upon the joint receipt of himself and the beneficiary. (*Re* Tuticorin Cotton Press Company Limited.) ... ...*page* 723

COMPENSATION.

Mines under canal—Compensation for minerals left for support of canal—Undertaking by canal company not to sue for damage caused by not leaving the minerals—Right of action—34 Geo. 3, c. 78, ss. 39 and 40.—Under the provisions of a special Act of Parliament for the building of a canal, the owners of minerals near and under the canal brought an action for a declaration that a certain amount of the minerals should be left unworked so as to avoid injury to the canal, and that the canal company should pay to the mine-owners the value of the minerals to be left unworked. It was proved that, if these minerals were worked and taken away, no such injury would be caused to the canal as would involve any damage to the interests of the public in its navigation. After the action had been commenced the canal company offered an undertaking not to sue the mine-owners for any injury that might be caused to the canal by the working and taking away of the minerals which the mine-owners proposed to leave unworked, and in respect of which they asked compensation. Held, that since the mine-owners, by reason of the undertaking of the canal company, would incur no danger of an action for injuring the canal by working the minerals proposed to be left unworked, they were not entitled to the benefit of the Act, and their action should be dismissed. (The Chamber Colliery Company Limited *v.* The Company of Proprietors of the Rochdale Canal.) 535

CONFLICT OF LAWS.

Will—Testator domiciled in England—Land abroad—Trust for sale—Law governing disposition of proceeds.—P., who died in 1888, by his will devised and bequeathed all his real and personal estate to trustees upon trust to sell and to invest the proceeds in English securities and pay the income thereof, one-fifth to his wife during widowhood, and the remainder equally among his children and his brother and sister, and from and after the death or second marriage of his wife upon trust for all his children and his said brother and sister in equal shares; but the testator directed half of each child's share to be held on trust for such child for life, with remainder to his or her children at twenty-one, with gifts over in case of the death of any child without issue, and the whole of his brother's share to be held on similar trusts for him and his children. And the testator empowered his trustees to postpone the sale and conversion of his real and personal estate, and to manage the same until sale. The trustees were appointed executors. The testator was at the time of his death entitled to lands of considerable value in Sardinia. The trustees had proved the will in Italy, and had sold and mortgaged some of the testator's Sardinian land without the purchasers or mortgagees making any objection to their power to do so. An action had been brought for the administration of the testator's estate, and an inquiry ordered (among others) whether the testator's interest in lands situate elsewhere than in England passed by his will, and were validly devised on the trusts thereof, and if not who were entitled thereto. This inquiry was referred to the judge. A number of conflicting opinions of Italian advocates were produced as to the effect of the dispositions in the will according to Italian law. Held, on the evidence, that the trustees had, according to Italian law, a valid power to sell the land and receive the purchase money; that this being established, the distribution of the proceeds of sale was governed by English and not by Italian law, and such proceeds must be held upon the trusts of the will; but that the distribution of the rents and profits of the land until sale was governed by Italian law. Held also, on the evidence, that by Italian law the gifts to the widow and children were good, but the gifts over were bad, and therefore the children and the brother took their shares in the income of the land until sale absolutely. The children, however (except the heir-at-law), elected to take this income also according to the trusts of the will. (*Re* Piercy; Whitwham *v.* Piercy.)... ... ...*page* 745

CONTEMPT OF COURT.

Court sitting in private—Publishing proceedings.—On the 1st June North, J. made an order restraining H. from having any communication with M., a female infant who had been made a ward of court, and ordered H. to appear before him on the 6th June. On that day H. appeared, and it was then proved that he and M. had been married some weeks before. The judge being satisfied that the marriage was valid, stayed the operation of his former order. H. immediately on leaving the court concocted with a friend a paragraph purporting to be an account of what had taken place in private before the judge, but which was chiefly a puff of H.'s novels, and contained no statement of any fact which came out before the judge, except that H. and M. were married. This paragraph appeared in the *Star* of the same date. A paragraph to the same effect appeared the next day in the *Morning*, and was copied in the *Pall Mall Gazette*, and the *People*. In the last three papers, however, it did not appear that the matter had been heard in private, and the editors stated that they did not know it was so heard. Motions were made to commit the editors of all four papers, and H. and his friend the author of the paragraph in the *Star*. Held, that it is a contempt of court to publish an account of any proceedings which a judge has ordered to be heard in private, but that in this case the contempt was not premeditated or intentional and not of a serious character, and, apologies having been made, the justice of the case would be met by ordering H. and the editor of the *Star* to pay the costs of the motions against them. The other four motions were dismissed with costs as frivolous and unnecessary. (*Re* Martindale.) 468

CONTRACT.

Agreement—Hire-and-purchase—Instalments—Default in payment of—Sum paid—Balance by instalments—Liability of guarantee—Sale.—Plaintiffs as "owners" of omnibuses and horses agreed to let them to G., the "hirer," who paid a large sum of money in advance, the balance to be paid by monthly instalments. The agreement was, that in the case of breach or default, the owners might seize the chattels, and in that event all money already paid under the agreement was to belong to them. Default was made in payment of an instalment and the owners seized the chattels. In consideration of the chattels being returned to the hirer, the defendant paid the amount due, and became guarantor of the remain-

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ing instalments due. Upon two more instalments becoming in arrear, the plaintiff again seized and resumed the possession of the chattels. The owners then sued the defendant (the guarantor) for the amount of the two unpaid instalments, and recovered judgment. On appeal by the defendant (the guarantor) from a judgment recovered against him in the County Court: Held, that the hire-and-purchase agreement was primarily a sale-and-purchase agreement, and was determined by the plaintiffs (the owners) resuming possession of the chattels. By so doing they lost their right to sue G. (the hirer), and therefore could not recover the unpaid instalments from the defendant (the guarantor). They could not resume possession and still recover unpaid instalments from the surety. (Hewison and another *v.* Ricketts.) *page* 191

Breach—Engagement as musical director—Measure of damages—Implied term in contract.—By an agreement of the 18th Aug. 1892 the defendant company engaged the plaintiff as musical director of their theatre until the 1st Oct. 1895, upon certain terms as to salary, with a provision that the plaintiff's name should be announced in certain daily newspapers, and on bills and programmes. It appeared that the most important duty of a musical director is to conduct the orchestra. The plaintiff had conducted three pieces at the defendants' theatre with perfect success, when a piece was brought out which was conducted by the composer. Since that time the plaintiff had not been called on to conduct or perform the duties of his office, but his salary had been paid under the agreement, and it was common ground that he was still musical director of the theatre. Held, that the stipulation that the plaintiff's name should appear as musical director meant, that such a state of things should exist that the defendants should be in a position truly to make such an announcement; or, in other words, that they should employ him in that capacity, and the plaintiff, though it had not been shown that his non-employment had interfered with his obtaining another post, was entitled to more than nominal damages. (Bunning *v.* The Lyric Theatre Limited.) 396

Sale of goods—Conflict of laws—*Lex loci contractûs* or *lex loci solutionis* — Arbitration clause. — Where a contract is entered into between parties residing in places where different systems of law prevail, the question which law is to prevail is to be decided by the intention of the parties as gathered from the whole contract. A vendor resident in Scotland, and a purchaser resident in England, agreed for the sale and purchase of goods to be delivered in Scotland. The agreement contained a clause that any dispute should be "settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way." The vendor brought an action against the purchaser in the Scotch court for non-acceptance of the goods according to contract. The purchaser pleaded the arbitration clause. The Scotch court held that the arbitration clause, not being good according to Scotch law, afforded no defence to the action. Held, that the intention of the parties, gathered from the whole contract, was that it should be governed by English law, and that the arbitration clause, being good in English law, and not fundamentally opposed in principle to the law of Scotland, was a good defence to the action. (Hamlyn and Co. *v.* Talisker Distillery Company.) 1

CONVERSION OF REAL ESTATE.

Option to purchase freeholds — Intestacy. — The owner of a freehold house granted a lease thereof for his life at a yearly rent, and the lease provided that, after the decease of the owner, the lessee, his heirs and assigns, should have the option of purchasing the premises for 750*l.*, such option to be declared in writing within six months from the decease of the owner. The owner died intestate, and within six months after his decease the lessee gave notice in writing to the heir-at-law, and also to the administrator of the owner, declaring his intention to exercise the option. Held, that, on the exercise of the option, the property devolved as personal estate, and that the administrator, and not the heir-at-law of the owner, was entitled to receive the purchase money. (*Re* Isaacs; Isaacs *v.* Reginall.) ... ...*page* 386

COPYHOLD.

Admittance—Implied admittance—Receipt of quit rents with knowledge of facts—Seizure *quousque*—Proclamations or notice.—The acceptance of quit rents by the steward or lord of a manor in respect of copyholds from a person entitled to be admitted is an implied admittance of such person if the steward or lord have knowledge of the facts, and if such person afterwards refuses to come in and be admitted after notice the lord cannot seize *quousque*. The right of the lord of a manor to enter and seize *quousque* first accrues when the tenant refuses to come in and be admitted after proclamations or notice, and the Statutes of Limitation begin to run from the time of such refusal. (The Ecclesiastical Commissioners for England *v.* Parr and others.) 65

COPYRIGHT.

Infringement—Registration—"Book" "Separately published" — Injunction — Damages — Copyright Act 1842.—Where a volume contains separate parts, each perfectly distinguishable from the other parts, and the volume is published, each such separate and clearly distinguished part in the volume is separately published within the meaning of sect. 2 of the Copyright Act 1842. J. agreed with the proprietors of the *Weekly Dispatch* to write for them a series of stories under the title "Birds of the Night," intending to republish them himself afterwards in book form. He received payment for each story, but did not part with the copyright in them. The first of these stories appeared in the *Weekly Dispatch* on the 8th Sept. 1893, and the eleventh of the series, entitled "The Cabman's Story," on the 19th Nov. 1893. A paper called *Tit Bits* subsequently published "The Cabman's Story" as a prize story, purported to have been sent in by a correspondent. J. thereupon registered his book, "Birds of the Night," at Stationers' Hall, stating the first publication to have been on the 8th Sept. 1893. There was no publication of these stories otherwise than in the *Weekly Dispatch*. By sect. 2 of the Copyright Act 1842, "the word 'book' shall be construed to mean and include every volume, part, or division of a volume . . . separately published." In an action by J. against the proprietors of *Tit Bits* to restrain the infringement of his copyright: Held, that there had been a separate publication of the stories in the *Weekly Dispatch* within the meaning of sect. 2 of the Copyright Act 1842. Held also, that the registration was accurate within sect. 19 of the same Act, and J. was entitled to an injunction and 25*l.* damages. (Johnson *v.* Newnes Limited.) 230

Newspaper—Infringement.—Where C., the proprietor of a weekly sporting newspaper, which was registered at Stationers' Hall, stated every Monday the names of horses likely to win particular races on each day during the week, and the defendants in a daily paper stated the names of horses selected by C. as likely to win particular races on each day: Held, that the words published by the defendants, and complained of by the plaintiff, were not in law the subject of copyright, and there must be judgment for the defendants with costs. (Chilton *v.* The Progress Printing and Publishing Company Limited.) 664

Registration—Pattern of sleeve of dress—Interpretation of word "book"—"Map, chart, or plan"—Subject-matter—Literary merit.—An action for infringement was brought by the plaintiff as assignee of the copyright in an apparatus entitled "The Cosmopolitan Sleeve Chart 1886," for cut-

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ting out on scientific principles the sleeves of ladies' dresses. It consisted of a cardboard pattern of the outside of the sleeve of a lady's dress, and contained on its surface a system of lines and figures which enabled a dressmaker to cut from it a complete sleeve for any arm without the necessity of any measurements beyond the simple measurements of the actual arm. The principal defence was, that the apparatus was not a "book" or a "map, chart, or plan," within the meaning of sect. 2 of the Copyright Act 1842, and could not be the subject of copyright. Held, that the apparatus was not a literary production; but that it was merely for purposes of measurement, and was not a "map, chart, or plan" within the statute. (Hollinrake v. Truswell.) ... ... *page* 419

COSTS.

Action in High Court which might have been brought in County Court — Credit given on writ — Admitted set-off — Whether such credit is an admitted set-off.—Sect. 57 of the County Courts Act 1888 gives jurisdiction to the County Court to try an action where "the debt or demand claimed consists of a balance not exceeding fifty pounds, after an admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff. Held, that a credit given by the plaintiff on his writ for money paid to him by the defendant is an admitted set-off within the meaning of the section, although such credit has not been assented to by the defendant, and that therefore if in an action of contract in the High Court, the plaintiff recovers a sum which, after the deduction of such credit, does not exceed 50*l*., the action is one which might have been brought in a County Court, and the plaintiff is entitled only to costs on the County Court scale, unless he gets a special certificate for costs. To be an admitted set-off it is not necessary that the set-off should be admitted by both parties before action; it is sufficient if it be admitted by the person against whose interest it is to admit the same. (Lovejoy v. Cole.) 374

Copy correspondence—Taxing master's discretion — Costs, charges, and expenses of trustees — Statute-barred costs paid and payable. — The amount to be allowed for copy correspondence is in the discretion of the taxing master, but his answer must show that he has ascertained what portion of the correspondence, having regard to all the circumstances of the case, was necessary and proper for the due consideration of the case. The practice of disallowing statute-barred items under a common order to tax a solicitor's bill, or under a special order not expressly dealing with the question of statute-barred items, is not applicable to a case where there is an order containing an express direction to ascertain the costs, charges, and expenses properly incurred by trustees. Under such an order trustees are entitled to be allowed statute-barred costs, which they have properly incurred, whether paid or payable. With respect to the latter class of items, trustees cannot be compelled to plead the Statute of Limitations, as they are paying debts which they have themselves incurred. (Budgett v. Budgett.)... 632

Preparation of agreement for lease—Agreement for letting for three years—Taxation.—On an agreement for letting for a term not exceeding three years, the lessor's solicitor is entitled to the scale fee under sched. 1, part 2, to the General Order of Aug. 1882, under the Solicitors' Remuneration Act 1881, as for an agreement for a lease. The lessor's solicitor, having prepared an agreement for letting certain premises for a term of three years, delivered a bill with items in respect thereof to the tenant, who obtained an order to tax the same. The taxing master applied the first scale in sched. 1, part 2, to the General Order to the transaction and certified for the scale fee. On a summons to review the taxation: Held, that the scale applied, but that, as the tenant was not liable for the duplicate or counterpart, a reasonable reduction from the scale fee ought to have been made in respect thereof. (*Re* Negus.) ... ...*page* 716

Taxation—Agreement—Scale fee—Freeing property sold from charges before conveyance—Retainer—Admission of retainer — General Order under Solicitors' Remuneration Act 1881.—A solicitor retained a sum of money for costs in pursuance of an agreement with his client under the Solicitors' Remuneration Act 1881, and the client received the balance of the purchase money of the property sold by him, and obtained an order for delivery by the solicitor of a bill of his costs. The solicitor delivered ten bills of his costs, amounting altogether to a sum considerably larger than that retained by him. The client then obtained an order for taxation of the ten bills, without reserving any right to dispute the retainer of the solicitor as to any of the bills. The solicitor appealed from the order for taxation and the Court of Appeal affirmed that order, so that the taxing master might certify whether the agreement was fair and reasonable. The taxing master, by taxation, reduced the amount of the bills to a sum less than the sum retained by the solicitor under the agreement, but certified that the agreement was fair and reasonable. In taxing the bills the taxing master allowed the costs of a reconveyance by a mortgagee to the vendor previously to the execution of the conveyance to the purchaser, of a power of attorney given by a person abroad who concurred in the conveyance, and of a deed of confirmation by the vendor, as well as the scale fee for the conveyance; and also allowed the charges in one of the bills with respect to which the client disputed the retainer of the solicitor. On a summons for a review of the taxation: Held, that the taxing master was not unreasonable in allowing the costs of deeds freeing the property sold from the charges upon it, in addition to the scale fee for the conveyance; and that the client, by obtaining an order to tax the ten bills without reserving any right to dispute the retainer of the solicitor as to any of the bills, had admitted retainer as to each of the bills. (*Re* Frape; *Ex parte* Perrett.) 80

Taxation—Discretion of taxing master.—The court has no jurisdiction to review the allowance of a witness's costs under Order LXV., r. 27, sub-rule 29, if on proper consideration they have been allowed by the taxing officer. (Oliver v. Robins.) 636

—— Three counsel.—The costs of more than two counsel will not be allowed upon taxation between party and party unless it can be shown that the questions involved were of a very complicated nature, and that it was essentially necessary for the purpose of doing justice that three counsel should be employed. (Glamorgan County Council, applicants, v. Great Western Railway Company, resps.... 736

COUNTY COURTS.

Costs—Action for sum exceeding 100*l*. commenced in High Court—Judgment under Order XIV. as to part of claim—Action as to balance under 20*l*. remitted to County Court—Sum recovered in the action—County Court scale of costs—Higher scale, column C.—In an action founded on contract to recover the sum of 104*l*., and which was commenced in the High Court, the plaintiff obtained judgment under Order XIV. for 90*l*. The action as to the balance, which did not exceed 20*l*., was remitted under sect. 65 of the County Courts Act 1888, to be tried in the County Court. This the defendants paid into courts, and the plaintiff obtained judgment for the same. The registrar taxed the costs incurred in the proceedings in the County Court under column C. of the County Court scale of costs, being of opinion that the sum recovered in the action exceeded 50*l*. Held, on appeal, that the registrar was right in so taxing. By the order of the master the whole action had been remitted and the registrar was right in taking into consideration the sum recovered under Order XIV. in the High Court, and that the

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sum therefore recovered in the action exceeded 50*l*. (Keeble *v.* Bennett and another.) ... ...*page* 247

Jurisdiction—Summary Procedure under Agricultural Holdings (England) Act 1883—Tenant's claim for compensation — Landlord's counter-claim—Balance in favour of landlord—Enforcement of award—Writ of prohibition.—In the case of a claim by a tenant for compensation under sect. 6 of the Agricultural Holdings (England) Act 1883, and a counter-claim by the landlord, if the umpire in his award finds that the counter-claim overtops the claim, the court will prohibit the County Court from exercising its summary jurisdiction under the Act to enforce the award. The landlord's counter-claim can only be in reduction of, and must not exceed, the tenant's claim. (Holmes *v.* Formby.) 842

Practice—Remitting action to County Court—Claim for unliquidated damages indorsed on writ—County Courts Act 1888—Judicature Act 1873, s. 67.—Held, by the Court, that they were bound by the decision in *Knight* v. *Abbott, Page, and Co.* (10 Q. B. Div. 11; 52 L. J. 131, Q. B.). Nothing but a claim for liquidated damages can be remitted to the County Court. (Bassett *v.* Tong.) 12

(*See* COSTS.)

COVENANT.

Construction—Covenant to pay 1000*l*. or transfer "1000*l*. worth" of fully paid-up shares in company to be formed by covenantor—Company formed with preference and ordinary shares—Breach—Right of covenantee to recover sum of money.—The defendant, by deed dated the 2nd Dec. 1892, covenanted within twelve months from that date to "pay the sum of 1000*l*., or hand over to or otherwise transfer into the names of" the plaintiffs "1000*l*. worth of fully paid-up shares in a company to be formed" by the defendant within the same period for working certain mines, the capital of such company not to exceed 12,000*l*. The defendant formed the company, and it was registered on the 20th Nov. 1893 with a capital of 12,000*l*., divided into 6000 (A) or preference, and 600 (B) or ordinary shares of 10*l*. each. On the 23rd Nov. 1893 the defendant executed to the plaintiffs a transfer of 100 (B) shares purporting to be fully paid, but which had not been paid for in cash. No contract had been registered in respect of these shares before issue as required by sect. 25 of the Companies Act 1867. The shares of the company had never had any marketable value. Under these circumstances the plaintiffs declined to accept the shares, but claimed payment of 1000*l*. in cash. It was decided by Stirling, J. (*ante*, p. 484) that the shares which the defendant had contracted to transfer were to be shares in a company in which all the shareholders should stand on a footing of equality; that by forming the company with preference and ordinary shares the defendant had put it out of his power to comply with that branch of the covenant which related to the transfer of shares; and that he was, therefore, on the authority of *Studholme* v. *Mandell* (1 Lord Raym. 279), bound to perform the other alternative by paying the 1000*l*. The defendant appealed. Held, that the meaning of the covenant was not shares of the nominal value of 1000*l*., but shares which were worth 1000*l*. in the market; and that therefore on this ground, without going into the reasons given by Stirling, J. for his decision, his judgment must be affirmed, and the appeal dismissed with costs. (McIlquham *v.* Taylor.)... 484, 679

COVENANT IN RESTRAINT OF TRADE.

General restraint—How far reasonable—Public policy.—The common law rule which distinguished particular from general restraints of trade in covenants, and treated the former as exceptions from the general rule that such covenants were invalid, is no longer applicable to the altered conditions of commerce. The question is whether the restriction is reasonable in reference to the interests of the parties concerned, and to the interests of the public, in the circumstances of each case. A covenant, unlimited in space, not to carry on for the space of twenty-five years "the trade or business of a manufacturer of guns, gun-mountings or carriages, gunpowder, explosives, or ammunition," held valid in the case of a manufacturer of artillery, whose customers consisted almost exclusively of national Governments, as not being unreasonable as between himself and his vendees, or contrary to public policy. (Nordenfelt *v.* Maxim-Nordenfelt Company Limited.) ... ...*page* 489

CRIMINAL LAW.

Habeas corpus—Extradition — Political offence—Anarchism—Evidence of identity—Evidence of accomplice — Corroboration — One commitment on two charges. — By the Extradition Act 1870 (33 & 34 Vict. c. 52) the crimes of murder and manslaughter are with others made the subject of extradition, but by sect. 3, sub-sect. 1, it is provided that a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character. One M., an Anarchist and a fugitive criminal in England from France, had been committed to prison under the Extradition Act 1870, by one of the magistrates at Bow-street, with a view to his extradition to France in consequence of a requisition by the French Government for his surrender to take his trial in that country on two charges of murder, and attempt to murder in Paris, one being that by means of an explosion he had attempted to wreck a government building, and the other of causing an explosion in a public *café*. An application was made on behalf of the prisoner for a writ of *habeas corpus* for his release on the ground that the offence charged with respect to the explosion at the government building was a political offence within the meaning of sect. 3 of the Extradition Act 1870; that there was no evidence as to identity; that the evidence against the prisoner was the evidence of an accomplice, and was uncorroborated; and that there had been only one commitment on the two charges. Held, that the prisoner being an Anachist, did not belong to a party having a form of government of its own or which sought to impose a form of government upon another party, and that the offences with which he was charged, being directed in the main against citizens generally rather than against the government as a government, were not offences of a political character within the meaning of sect. 3 of the Extradition Act 1870, and that consequently the writ ought not to go. Also, that there was sufficient evidence of identity to enable the magistrate to commit; that a prisoner is not entitled to be acquitted because the only evidence against him is that of an accomplice or accessory after the fact, and that the fact of whether there is corroborative evidence or not is not conclusive of the duty of a magistrate, but that he has to exercise a discretion in these cases; and further, that under the Act it is not necessary that there should be a separate commitment for each offence. (*Re* Meunier.) 403

Obtaining goods by false pretences—Receiving—Indictment—Two prisoners, Farrell and Taylor, were charged in an indictment which contained four counts, of which the first and second counts charged Farrell with obtaining goods by false pretences, the alleged false pretences being set out in the usual form. The third and fourth counts charged that Taylor unlawfully received the goods, unlawfully, knowingly, and designedly obtained by false pretences. The false pretences by which it was alleged that Farrell obtained the goods were not set out in the third and fourth counts. Upon a writ of error it was contended on behalf of Taylor that the indictment was insufficient, as it did not state in the third and fourth counts what the false pretences were by means of which it was alleged that the goods had been obtained. Held, that the indictment was

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good and sufficiently set forth the charge against Taylor. (Taylor *v.* The Queen.) ... ...*page* 571

Practice—False pretences—Indictment—Necessary averment—Person to whom pretence made—24 & 25 Vict. c. 96, s. 88.—An indictment for obtaining or attempting to obtain money, &c., by means of a false pretence which does not state to whom the pretence was made, nor from whom the money, &c., was obtained or attempted to be obtained, is bad. (Reg. *v.* Sowerby.) 300

CUSTOMS AND INLAND REVENUE ACT 1889.

Duties on personal estate—Gift—Reservation of benefit to donor—Customs and Inland Revenue Act 1881 (44 & 45 Vict. c. 12), s. 38—Customs and Inland Revenue Act 1889 (52 & 53 Vict. c. 7), s. 11.—The Customs and Inland Revenue Act 1881, by sect. 38, imposes a duty upon the personal property therein described, and the Customs and Inland Revenue Act 1889, by sect. 11, sub-sect. 1, includes within the description of property in the earlier Act "property taken under any gift, whenever made, of which property *bonâ fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise." The sum of 23,000*l.* was due to A. upon a mortgage of land, and he had obtained a decree for foreclosure which had not become absolute. A deed was executed, by which the mortgagors conveyed the equity of redemption to A.'s son in consideration of 500*l.*, and A. conveyed the legal estate to his son and released the mortgage debt, and his son covenanted to pay A. an annuity of 750*l.* The annuity was paid for some years until the death of A. Held, that this was a gift of personal property within sect. 11, sub-sect. 1, of the Customs and Inland Revenue Act 1889, and that, upon the death of A., his son was liable to pay the duty imposed by the Act of 1881. (The Attorney-General *v.* Worrall.) 807

DEDICATION OF SURFACE OF LAND.

Soil beneath—"Street"—Public place—Public Health Act 1875—Tunbridge Wells Improvement Act 1890.—A landowner who dedicates land to the public to pass and repass over it, dedicates the surface and no more for the public to use as a way, and all that is below the surface belongs to him as before. By an agreement, afterwards confirmed by Act of Parliament, and entered into in 1739 between the lord of the manor and his freehold tenants, it was declared that a certain promenade which formed part of the waste of the manor should remain always open and free for the public use and benefit of persons frequenting Tunbridge Wells, in the manner the same then was or lately had been used. At various times, subsequently, the town authorities of Tunbridge Wells, with the consent of the lord of the manor, made alterations and improvements in the promenade. The public had a right to pass and re-ss on foot over the promenade from the earliest times. By the Tunbridge Wells Improvement Act 1890 the defendant corporation was authorised to erect and maintain "in any street or public place," conveniences for the use of the public. It was also provided, that the word "street" should have the same meaning as in the Public Health Act 1875. Held, that the soil below the promenade was not a "street" repairable by the inhabitants at large within the meaning of the Public Health Act 1875, and was not vested in the corporation; neither was it a "street or public place" within the meaning of the Tunbridge Wells Improvement Act 1890; and therefore the soil below the promenade was vested in the lord of the manor, and the corporation was not entitled to make an excavation and erect a convenience below the promenade without his consent. (Baird *v.* Mayor, &c., of Tunbridge Wells.) 211

DEED OF ARRANGEMENT.

Registration—Affidavit—Secured creditors—Omission of names from schedule to debtor's affidavit—By sect. 6, sub-sect. 1, of the Deeds of Arrangement Act 1887, on the registration of a deed of arrangement there shall be filed an affidavit of the debtor stating (*inter alia*) the names and addresses of his creditors. Held, that it was not necessary to set out in the schedule to the debtor's affidavit the names and addresses of those creditors whose debts were secured, and that an omission to do so did not render the registration bad. (Chaplin *v.* Daly; Onion, Claimant.) ... ...*page* 569

DIVORCE.

Collusion—Collusive arrangements brought before the court at the hearing—Decree *nisi*—Papers sent to Queen's Proctor—Intervention—Decree rescinded—Costs.—Collusion between the parties to a divorce suit, even where all the facts in relation to the collusive arrangement are brought before the court at the hearing of the petition, is sufficient ground for rescinding the decree *nisi* then pronounced; for, where the parties are acting in concert in presenting and prosecuting the suit, the court is not able to act with certainty that it has all the circumstances before it when pronouncing a decree. If the initiation of a suit be procured, and its conduct provided for by agreement, this constitutes collusion, although a finger cannot be placed on any specific fact as having been falsely dealt with or withheld. The court, on public grounds, should be able to rely on the protection afforded by the parties being presumably at arm's length the one from the other, and, even where the petitioner has, apart from the question of collusion, an indisputable ground for petitioning the court to dissolve his marriage, and where his object in entering into arrangements with his adulterous wife is shown to have been substantially to benefit their child; yet the court will, upon the intervention of the Queen's Proctor, rescind the decree upon the ground of the collusion voluntarily disclosed by the petitioner at the hearing of the petition. The meaning to be attached to collusion in 20 & 21 Vict. c. 85, s. 30, and in 23 & 24 Vict. c. 144, s. 7, is the same, namely, "acting in concert," and it is not necessary for the Queen's Proctor, intervening under the later Act, to show, after he has once proved collusion, that the decree *nisi* which has been obtained was, apart from the question of collusion, in fact obtained "contrary to the justice of the case." The intention of the Legislature, in sect. 30 of the Divorce Act 1857, was to continue the practice of the House of Lords in regard to Divorce Bills. In view, however, of the fact that substantially all the matters relied on upon the intervention were brought to the knowledge of the judge at the hearing of the petition, The Court, in rescinding the decree, made no order as to costs. (Churchward *v.* Churchward and Holliday; the Queen's Proctor showing cause.) ... 782

Costs—Suit for judicial separation—"Usual order" for wife's costs refused.—In a suit by a wife for judicial separation on the ground of cruelty, where no summons for discovery of documents had been applied for by the wife's solicitor, it transpired, and was conclusively proved at the hearing, that numbers of affectionate letters had passed between the parties during a period of more than a year after the husband had gone to China to resume his official duties, and, after the acts specified in the petition as cruelty and deposed to by the petitioner, were alleged to have been committed. At the close of the petitioner's case the petition was dismissed, and the Court refused to make the "usual order" for the wife's costs. (Hough *v.* Hough.)... 703

Divorce practice—Restitution of conjugal rights—Answer—Pleading.—In answer to a petition by the wife for restitution of conjugal rights, the husband pleaded that the petition was not presented in good faith with the object of obtaining

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the relief sought for, inasmuch as the petitioner had alleged in a former suit for judicial separation, in which she had failed, and inasmuch as she still alleged, that her husband had been guilty of an abominable crime. The respondent further pleaded that this amounted to cruelty on the petitioner's part, and he prayed for a judicial separation on this ground. Upon a summons to strike out the answer on the ground that it contained no allegation of a matrimonial offence and disclosed no bar to the prayer of the petition: Held, that the case ought to be left to be dealt with on the merits, it being the practice of the court not to strike out a pleading where a reasonable doubt existed as to the legal effect of the allegation therein contained, and, where such legal effect could properly be discussed after all the facts had been elicited in evidence at the trial. (Russell *v.* Russell.) ... ...*page* 826

Nullity suit—*De facto* marriage—Alimony *pendente lite*—Jurisdiction—Application after date decree *nisi* might have been made absolute—Allowance from date of service of citation.—On the 7th Feb. 1893 a decree of nullity of marriage was made on the husband's petition on the ground of his wife's relationship to his first wife. The wife had not entered an appearance or delivered any defence to the petition. The husband did not apply to have the decree made absolute, and, having obtained leave, the wife on the 13th April 1894 entered an appearance in the suit, and presented a petition for alimony *pendente lite*: Held, that there having been a *de facto* marriage, the Court had jurisdiction to grant alimony *pendente lite* from the date of the service of the citation, and to refuse to make the decree *nisi* absolute until the order for alimony *pendente lite* had been issued. (Foden *v.* Foden.) 279

Restitution of conjugal rights—Delay.—Delay is no bar to a suit for restitution of conjugal rights. (Beauclerk *v.* Beauclerk.) 376

Variation of marriage settlements — Contingent interests—Absence of possible beneficiary and of one trustee — Order — Trustees' costs. — Where there were five beneficiaries who might become entitled in a remote contingency to share in the settled fund, four of them consented to an order upon the trustees to repay the corpus of the fund to the petitioner, but the fifth was somewhere in the interior of Africa, and could not be communicated with: The Court made the order, extinguishing the interest of all five; and, as it further appeared that one of the trustees of the settlements had left this country, and his whereabouts could not be ascertained, the costs of the two trustees who had appeared upon these proceedings were allowed out of the settled fund, in his absence, as if he had joined with them. (Storer *v.* Storer.) 704

DRAINAGE.

Expenses—Land in settlement—Owners of premises—Trustees.—A testator, who died in 1846, devised certain messuages in trust to permit his wife and his son S., and the survivor of them, to receive the rents, and after the decease of S., or the decease or remarriage of the widow (if S. should then be dead), in trust for the first and other sons of S. in tail, with divers equitable remainders over. He made a bequest of the residue of his estate, and declared in conclusion that "The parties beneficially entitled to the rents and profits of any of my houses or property should see that the same be kept, or that they should keep the same, in good and absolute repair, and properly insured against fire." The trustees having between 1861 and 1869, and during the life of S., expended some 247*l.* out of capital moneys of the testator's estate for drainage and other expenses under sects. 49 and 90 of the Public Health Act 1848 in respect of the devised messuages: Held, that this was a proper payment, the trustees being owners within the definition clause of that Act; that the work in respect of which the expense was incurred did not fall within the repairs in the will mentioned, and the sums expended must therefore be treated as a charge on the property. (*Re* Barney; Harrison *v.* Barney.) ... ...*page* 180

ELECTION LAW.

Parliament—Registration of voters—Borough vote—Lodger franchise—Old lodger—Notice of claim—Omission of name of borough—Validity of claim—Power to amend—Parliamentary and Municipal Registration Act 1878.—A notice of claim delivered by a voter already on the old lodgers list was not made out in accordance with Form H., No. 2, in the Order in Council of 1889, inasmuch as the name of the borough in respect of which the claim was made was omitted. In every other respect the claim was in accordance with the prescribed form. The overseers inserted the claimant's name on the list, but the revising barrister expunged it on the ground that the claim was bad, and he refused to amend it. Held, that the omission was a pure mistake, and was not misleading, and that the revising barrister should have exercised his discretionary power to amend. Mere technicalities should not be allowed to defeat the claims of voters where the substance of the claim is good. (Treadgold, app., *v.* The Town Clerk of Grantham and White, resps.) ... 729

Two names on voters list in respect of same qualifying property.—The names of two persons were on the occupiers list as parliamentary electors in respect of the same qualifying property. Objection was raised against one of them, but the revising barrister found he was duly qualified, and retained his name on the list. No objection was raised against the other, and no evidence was given as to his qualification. Held, that the mere fact that another person, whether qualified or unqualified is on the register in respect of certain premises, is not enough to keep a person off who is properly qualified in respect of the same premises. (Warren *v.* Maule.) 731

Registration — Duplicate qualifications — Right of selection by voter—Form of notice of same to revising barrister—Duty of revising barrister—Right of appeal. No appeal lies from the decision of a revising barrister upon an objection made to a qualified parliamentary voter selecting the place of his qualification under sect. 28, sub-sect. 14, of the Parliamentary and Municipal Registration Act, 1878. (Reg. *v.* The Revising Barrister of Liverpool and Chadwick; *Ex parte* Warde.) ... 636

ENDOWED SCHOOLS ACTS.

Public Schools Act 1868—Endowment—Scholarships in which a public school is interested jointly with others—Jurisdiction of Charity Commissioners. (Attorney-General *v.* The Dean, &c., of Christ Church, Oxford.) 472

EQUITABLE EXECUTION.

Appointment of receiver at instance of judgment creditor—Personal estate of debtor — Jurisdiction of court to order sale of same. — When at the instance of a judgment creditor a receiver has been appointed by way of equitable execution of the goods and chattels of the debtor, the Court has no jurisdiction to order a sale of such goods and chattels to satisfy the debt. (De Peyrecave *v.* Nicholson.) 255

—— Profits or earnings of business—Receipts of theatre—Rents and profits of land.—A receiver appointed at the instance of a judgment creditor is not entitled to carry on the business of the judgment debtor, or to take the profits derived from it, though he is entitled to prevent the debtor from carrying on such business. A judgment creditor of a company who carried on the business of theatrical proprietors, and held a lease of a theatre, which lease they had mortgaged, not being able to obtain satisfaction of his judgment, was held entitled to have a receiver appointed by way of equitable execution of the rents and profits of the company's land, without prejudice to the rights

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of prior incumbrancers, and delivery of possession of the property to the receiver; but the receiver was not to be allowed to take the receipts at the doors of the theatre, such receipts not differing from the earnings of any other business. (Cadogan v. The Lyric Theatre Limited.)... ... ...*page* 8

Reversionary interest in proceeds of sale of real estate—Application for receiver—Jurisdiction to appoint.—The court has jurisdiction to appoint a receiver by way of equitable execution over an equitable reversionary interest in personalty under a will. (Tyrrell v. Painton.) 637

ESTOPPEL.

Judgment by consent—*Res judicata.*—Under an agreement the S. Company became liable to a bank for a debt of another company. The debt was repayable by instalments, and the first instalment was duly paid by the S. Company. The S. Company failedto pay the second instalment, and the bank thereupon brought an action against the company for the amount of such instalment. The S. Company denied the agreement to pay the debt, and counter-claimed for a return of the first instalment already paid by the company. At the trial of the action before Kennedy, J., a compromise was arrived at under which a judgment, by consent, was taken by the bank for the amount of the second instalment. The S. Company subsequently went into liquidation, and in the liquidation the bank claimed to prove for the amount of the debt remaining unsatisfied on the basis of the agreement. The official receiver and liquidator rejected the proof. An application was thereupon made by the bank that the decision of the official receiver and liquidator might be reversed, and that the proof of the bank might be admitted. Held, that the judgment of Kennedy, J., although by consent, estopped the official receiver and liquidator from disputing that there was in existence an agreement binding on the S. Company to pay the debt; and that the proof of the bank must therefore be admitted. (*Re* The South American and Mexican Company Limited; *Ex parte* The Bank of England.) ... 334, 594

EXECUTOR.

Probate of will—Action by creditor.—The rule laid down in the case of *Douglas* v. *Forrest* (4 Bing. 686), that the creditor of a deceased debtor cannot sue the executor named in the will unless he has either administered or proved the will, refers to a grant of probate in due form by the proper court; and an action will not lie at the suit of a creditor against a person named as executor who has only applied for probate, and has proceeded no further in the matter, though the court has made an order that probate should be granted to him on his taking the usual oath of office. (Mohamadu Mohideen Hadjiar v. Pitchey.) 99

GUARANTEE OR INDEMNITY.

Verbal promise—Promise to indemnify against liability generally—Promise to answer for the debt of another—Statute of Frauds (29 Car. 2, c. 3), s. 4.—In March 1888 the defendant's son became a partner in a firm of C., W., and Co. In June 1888 the defendant gave the plaintiff a written guarantee for 5000*l.* in consideration of the plaintiff's allowing C., W., and Co. to draw upon him. C., W., and Co. gradually increased their overdraft until March 1891, when, according to the plaintiff, he met the defendant, who then verbally agreed to increase his guarantee to 6000*l.* on condition that the plaintiff should give credit to C., W., and Co. up to 10,000*l.* In Dec. 1891 the plaintiff declined to go on taking up the bills of C., W., and Co., as their overdraft exceeded 4000*l.* The defendant thereupon, at an interview with the plaintiff in Dec. 1891, verbally undertook to provide funds to meet a batch of bills of C., W., and Co. for 5950*l.* which were then falling due; and in Jan. 1892, at another interview with the plaintiff, the defendant undertook in the same way to provide funds to meet another batch of bills for 5280*l.* which were then falling due. Mathew, J. decided that the extension by 1000*l.* of the guarantee of March 1891 ought, as required by the Statute of Frauds, to have been in writing, and that, as it was not, the plaintiff could not recover that 1000*l.* But he decided that the undertakings of Dec. 1891 and Jan. 1892 were not guarantees, and were not, therefore, within the requirement of the Statute of Frauds, and that the plaintiff was entitled to recover upon them. Consequently judgment was given for the plaintiff for all the sums in question except the 1000*l.* The defendant applied for judgment or a new trial of the action. Held, that the true result of the interviews was, that the defendant promised that, if the plaintiff would accept the bills of C., W., and Co., he would take care that they should be met; that the plaintiff accepted the bills on the faith of that promise; and that, therefore, this was a promise to indemnify and not a guarantee, and came within the principle of *Thomas* v. *Cook* (8 B. & C. 728). (Guild and Co. v. Conrad.) ... ...*page* 140

HABEAS CORPUS.

Attachment for contempt by disobeying writ—Service of original writ necessary.—A writ of *habeas corpus* can be properly served only by delivering the original writ itself to the person served, or to the principal person where there are more than one. If the original writ is not so served it is impossible for the person served, by appearing to the writ, and waiving its proper service, to obey the writ, and consequently he cannot disobey it, and so commit contempt of court. If the original writ has not been delivered to the principal of several person served, the service of a copy is not a good service upon any of the others. (Reg. v. Rowe.) 578

HARBOURS, PORTS, AND NAVIGABLE RIVERS.

Depositing rubbish on shore within sect. 11 of 54 Geo. 3, c. 159.—By sect. 11 of 54 Geo. 3, c. 159, it is enacted that, if the owner or master of a ship or vessel, &c., or any person working any quarry, mine, or pit near to the sea or any harbour or navigable river, "or any person or persons whatsoever," shall cast, throw, &c., rubbish or filth, &c., into such harbour or navigable river so as to tend to the injury or obstruction thereof, "or in any place or situation on shore where the same shall be liable to be washed into" such harbour or river, he shall forfeit the sum of 10*l.* The appellant company, in the course of their business as alkali manufacturers, caused a quantity of waste matter, in the form of a very finely divided powder, which was held in suspension by water, to be conveyed by means of a drain into a brook, whence it was carried into a navigable river: Held, that they were rightly convicted under the above Act; that they came within the meaning of the words "or any other person or persons whatsoever"; that the matter deposited was "rubbish or filth" within sect. 11 of the above-mentioned Act; that what they had done was a "casting, throwing, or emptying" on shore within the said section, and that it was not necessary in the last case for the prosecution to show that the act complained of "tended to the injury or obstruction of the navigation." (United Alkali Company, apps., v. Simpson, resp.) 258

HIGHWAY.

Bridge and canal—Approaches—Repair of railway over bridge—Liability of canal company.—By an Act of 11 Geo. 3, for making a canal in the county of Derby, from Chesterfield to the river Trent, a canal company was authorised to make such canal, and it was provided that the company, their successors and assigns, should make and maintain, and keep in repair, certain bridges over such canal. At Clayworth, in the county of Nottingham, the canal crossed a public highway, which it

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was necessary to raise for a distance of 180 feet on either side of the canal for the purpose of making approaches to a bridge which the company had to construct over the canal at that point. The canal subsequently became vested in the defendant company and the highway was made a main road within the Highway and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77), s. 13, and became vested in the plaintiffs. The question arose, who was legally liable to maintain and repair the raised approaches to the bridge. Held, that, as the bridge could not have been constructed without making the approaches, the latter were practically part of the bridge, and that the defendants' obligation as regards the approaches did not cease on the completion of the bridge, but that they were bound to keep them in repair. (The Nottingham County Council *v.* The Manchester, Sheffield, and Lincolnshire Railway Company.) ... ... *page* 430

Subsidence through working of mines—Railway crossing highway on level—Maintenance of level by construction of embankment—Obstruction of highway—Right of highway authority to recover damages from mine owner—Highways and Locomotives (Amendment) Act 1878. The plaintiffs were the sanitary authority for the B. district, and as such were surveyors of highways within the district, and responsible for the maintenance and repair of highways. By reason of the working of the defendants' mines the surface of a highway within the plaintiffs' district, together with the adjoining land, had been caused to subside; but no injury had been done by the subsidence to the surface of the highway. The highway had previously to the subsidence been crossed on the level by a railway. As the highway subsided the railway company placed ballast underneath the railway, so as to maintain it at the original level, with the result that an embankment ten feet high was formed across the highway rendering it impassable. The highway was a public carriageway at and before the time when the railway was constructed. The special Act under which the railway was constructed did not authorise the company to make a level crossing at the place in question; but the Act contained a general power to the company to make and maintain the railway on the levels shown on the deposited plans. Held, that the obstruction was caused by the railway company, and not by the defendants. (Attorney-General (on the relation of the Local Board of the Brownhills District) and the Local Board of the Brownhills District *v.* The Conduit Colliery Company.) 771

Urban authority—County Council—Repair and maintenance of main roads—Costs of—Dispute as to contribution—Mode of settling disputes.—By sect. 11, sub-sect. 2 of the Local Government Act 1888 (51 & 52 Vict. c. 41), it is provided that an urban authority may, within a certain period, claim to retain the powers and duties of maintaining and repairing any main road within their district, as if such road were an ordinary road vested in them and that the county council shall make to such authority an annual payment towards the costs of the maintenance and repair of such road, and by sub-sect. 3 it is provided that the amount of such annual payment shall be such sum as may be agreed upon, or in the absence of agreement may be determined by arbitration of the Local Government Board. A dispute arose between the town council and county council as to what sum the latter should contribute, the town council claiming to be entitled to recover from the county council the entire amount expended. No agreement was come to between the parties. On a special case being stated for the opinion of the court: Held, that the court had no jurisdiction and was not the proper tribunal to settle the amount to be paid, but that by sub-sect. 3 of sect. 11 the Local Government Board was the machinery created to determine such a question. (*Re* Bedfordshire County Council and Bedford Urban Sanitary Authority.) 433

HUSBAND AND WIFE.

Divorce—Maintenance and education of children of the marriage—Exercise of jurisdiction of the court during whole period of infancy.—The jurisdiction conferred by the Divorce Acts to make orders thereunder respecting the custody, maintenance, or education of infants can be exercised during the whole period of infancy, *i.e.*, until the children, whether males or females, attain twenty-one years of age. (Thomasset *v.* Thomasset.)... ... ...*page* 148

Jewellery given during marriage—Paraphernalia—Husband's claim dismissed.—The husband and wife, who were married in 1888, lived together till 1893, when the husband filed a petition for a divorce against his wife. During the time they lived together, he at various times presented his wife with jewellery of the value of over 8000*l*. Some of the articles were given about Christmas time and the anniversaries of the wife's birthday, and more than one article of considerable value was given "as a peace-offering" after quarrels between husband and wife. Upon a summons by the husband under sect. 17 of the Married Woman's Property Act 1882: Held, that the jewellery in question did not constitute paraphernalia, but was the absolute property of the wife. (Tasker *v.* Tasker.) 779

Separation deed—Deed between husband and wife without a trustee — No *dum casta* clause — Covenant by wife not to "annoy" husband—Adultery of wife—Right of wife to sue for arrears of annuity.—A separation deed between husband and wife may, since the Married Women's Property Act 1882, be entered into by the husband and wife alone without the intervention of a trustee, and the wife can sue in her own name upon such deed. When such deed contains no *dum casta* clause, the admitted adultery of the wife is no defence to an action by the wife against the husband for arrears of the annuity which the husband covenanted in such deed to pay to his wife. Adultery by the wife is not an "annoyance" to the husband within the meaning of a covenant in the deed that the wife was not to molest, annoy, or interfere with her husband. (Sweet *v.* Sweet.) 672

INCOME TAX.

Appeal against assessment—Unsatisfactory schedule—Right of appellant to be put an oath—The appellant appealed against his assessment for income tax. He sent in a schedule of accounts, and, on appearing before the special commissioners, tendered himself for examination on oath for the purpose of verifying his schedule. The commissioners refused to put him upon oath, and upon the evidence before them, confirmed the assessment, The appellant obtained a rule *nisi* for a *mandamus* to the commissioners to hear and determine the matter, or to state a special case. Held, that the decision of the commissioners was a decision merely on a question of fact; but, assuming that there was a point of law in the appellant's contention that the commissioners were bound to put him on oath, and that his oath as to the correctness of his schedule would be conclusive, nevertheless it was not one in respect of which the court ought to grant a *mandamus*. (Reg. *v.* Chew and others.) 541

"Cost-book" mines—Capital—Capital expenditure—Whether there can be capital in such mines—Cost of sinking new shaft—Right to deduct cost. — Commissioners of Inland Revenue having decided that in the case of cost-book mines, and under the Stannaries Acts, there was no such thing as capital, and that there could be no profit in working such a mine until every expenditure had been met, and that therefore the cost of sinking a new shaft was not capital expenditure, but working expenditure, and could be deducted in assessing the annual profits for income tax purposes: Held, that the Commissioners were wrong in their finding that in such mines there could be no capital; that in this respect there was no difference between a cost-book mine and any

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other mine, and that the question whether the cost of sinking the shaft was capital expenditure or working expenditure, or partly the one and partly the other, was a question of fact to be decided on the circumstances of the case. (Morant (Surveyor of Taxes), app., *v.* The Wheal Grenville Mining Company, resps.) ... ...*page* 758

Fines for renewals of leases—Temporary deposit in bank producing interest—"Productive capital"—Exemption of such temporary deposits from assessment.—The Income Tax Act 1842 (s. 60, sched. A., r. 2 (5) renders chargeable fines received in consideration of any demise of lands, subject to the proviso that, in case the party chargeable shall prove to the satisfaction of the commissioners that such fines have been applied as productive capital on which a profit has arisen, otherwise chargeable under the Act for the year of assessment, the commissioners may discharge the amount so applied from the profits liable to assessment. Held, that a temporary deposit in a bank of fines received for renewals of leases, producing interest for the year of assessment, is not an application of such fines as "productive capital on which a profit has arisen" within the meaning of the proviso, and that such temporary deposits are therefore not exempt from assessment. (Lord Mostyn, app. *v.* London, Surveyor of Taxes, resp.) 760

Trade exercised in England by foreigner resident abroad—Chargeable in name of agent—Liability of agent.—The Income Tax Act 1853, sect. 2, sched. D., imposes the tax upon "profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident in the United Kingdom, from any profession, trade, vocation, or employment exercised in the United Kingdom;" and the Income Tax Act 1842 provides by sect. 41 that, "any person not resident in Great Britain, whether a subject of Her Majesty or not, shall be chargeable in the name of any factor, agent, or receiver having the receipt of any profits or gains in the like manner and to the like amount as would be charged if such person were resident in Great Britain, and in the actual receipt thereof." The appellants acted as agents in England for R., a foreign wine merchant resident and carrying on business abroad, and it was held that R. exercised his trade in England. Payments were collected by the appellants for R., and they gave receipts for and on his behalf; customers often made payments direct to R.; the appellants sent R., all cheques and bills made payable to him; in cash they received just sufficient to pay their commission and expenses. An assessment to the income tax, of 3000*l.*, was made thus: "L. Roederer . . . in the name of Grainger and Son (the appellants), agents." Held, that a foreigner exercising his trade within the United Kingdom can be assessed, under sect. 41 of the Income Tax Act 1842, in the name of his agent whether such agent does or does not receive the profits or gains, and that the assessment was properly made. (Grainger and Son *v.* Gough.) 802

INJUNCTION.

Action conducted in name of another—Indemnity—Interference by nominal defendant.—A defendant to an action for the infringement of a patent, not being willing to defend the action, agreed to allow the maker of the machine which was the subject of the action, to do so in his name on being indemnified against the costs. The indemnity as to the costs of the action was given, and the defendant signed a retainer to the solicitor of the maker of the machine to act as solicitor in the action, and in any appeals. An appeal to the House of Lords having been presented by the maker, the defendant, on the ground that he had refused to give him a further indemnity, purported to withdraw his retainer to his solicitor, and instructed another solicitor to take steps to withdraw the appeal. The costs of the proceedings up to the time of the appeal to the House of Lords had been paid and security lodged for the costs of that appeal. Held, that the defendant, being fully indemnified against the costs, had no right to revoke the retainer, or otherwise interfere with the proceedings, and an injunction must be granted restraining him from doing so. (Montforts *v.* Marsden.) ... ...*page* 620

Building scheme—Lease—Restrictive covenants—"Building" — "Annoyance" — Hoarding or Screen—Obstruction of view. The plaintiff, who was tenant for life of freehold land, with power to grant building leases, by a lease dated the 11th Nov. 1878, and made in pursuance of a building scheme, demised to A. B., for ninety-nine years, a piece of ground, with a dwelling-house erected on it by the said A. B., who by the same lease covenanted that he, "his executors, administrators, and assigns, would not without the licence and consent in writing of the lessor . . . for that purpose first obtained, erect or build, or cause or permit to be erected or built, upon the said piece of ground, or upon any part thereof, any other building whatsoever save and except a stable and coachhouse [which might be erected, as therein mentioned], and also that he . . . his executors, administrators, or assigns, would not do or suffer to be done on the said premises or any part thereof any act, matter, or thing which might be or become an annoyance, nuisance, or disturbance to the neighbourhood or to any tenant of the lessor." The piece of land comprised in the lease was ultimately assigned to the defendant. By a lease, dated the 14th Sept. 1881, the plaintiff demised a piece of land, adjoining that previously demised to A. B. as aforesaid, to R. G., who thereby covenanted for self and assigns to erect a dwelling-house on the demised land within twenty-one years, according to plans to be approved by the lessor's architect, and also entered into covenants similar to those contained as above mentioned in A. B.'s lease. The premises comprised in the lease of Sept. 1881 were ultimately assigned to F. N., who in 1893 built a house according to plans approved by the lessor's architect, and overlooking the defendant's garden. The defendant thereupon erected a hoarding, or trellis-work screen, nearly sixty feet long and nearly twenty feet high, close to the partition wall on his own side thereof, and about eighteen feet from the nearest part of the house built by F. N. The plaintiff brought an action for an injunction, and contended that the screen was both a "building" and an "annoyance" within the meaning of the covenants. Held, (1) that the hoarding or screen was a "building" within the meaning of the covenant, though the case was somewhat near the border line; and (2) that the putting up of such a structure was certainly a breach of the covenant against annoyance "to any tenant of the lessor," being an "annoyance" within the meaning of that covenant to F. N., who was such a tenant; and that an injunction must accordingly be granted. (Wood *v.* Cooper.) 222

Nuisance from noise—Noise by two or more persons acting independently.—If the acts of two or more persons acting independently of each other amount in the aggregate to a nuisance, each is separately liable to be restrained by injunction in respect of his own share in the nuisance, although the acts of each alone would not constitute a nuisance. (Lambton *v.* Mellish; Lambton *v.* Cox.) 385

INSURANCE.

MARINE.

Cargo—Damage to some of goods insured—Examination of all the goods—Expenses of examining such of the goods as were undamaged—Actual damage—Liability of underwriters.—The plaintiff shipped a number of cases of galvanised iron for carriage from Bristol to London, there to be transshipped by barges to another vessel for export to Australia. The goods were insured for the voyage from Bristol up to and including the transshipment, and by the policy average was agreed

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to be recoverable on each package separately or on the whole. In a storm upon the insured voyage most of the cases were wetted by salt water, and in London the plaintiff had them all landed and examined. All the cases were unpacked; and those in which the iron was found to be undamaged were repacked and exported, while those in which the iron was damaged were sold by auction. Held, that the plaintiff was entitled to be reimbursed by the underwriters only for the loss upon the cases in which the iron had been damaged, and was, therefore, not entitled to the expenses incurred by him in the examination of those cases of iron to which no damage had in fact occurred. (Lysaght *v.* Coleman and others... *page* 830

General average—Stranded vessel—Extraordinary use of engines—Contribution for extra coal consumed.—By a policy of insurance effected by the plaintiffs with the defendants, the former insured the hull and machinery of their steamship against ordinary marine risks. In the course of her voyage the vessel stranded, and was eventually got off by means of her engines and by lightening the ship. On the question as to whether the defendants were liable to contribute *pro ratâ* in general average in respect of the coal so consumed. Held (affirming the President, Sir F. Jeune), that, as there had been an abnormal use of the engines which constituted a general average act, there must also have been an abnormal consumption of coal, and the shipowners were therefore entitled to general average contribution in respect thereof. (*The Bona.*) 551, 870

"General average and salvage charges payable according to foreign statement"—Bills of lading—Exceptions—Effect of—Dutch law—Contribution by cargo owners—Liability of underwriters on ship—Particular average.—Plaintiff, a shipowner, effected with the defendants two policies of insurance on a ship and freight containing the words, "general average payable according to foreign statement," and the usual sue and labour clause. A loss occurred owing to the vessel stranding through the negligence of the master, and a general average statement was drawn up (at Rotterdam) in accordance with Dutch practice. Various charges which were incurred in getting the ship and cargo off were apportioned as general average, which, if the average statement had been made in England, might have been treated as particular average on ship and freight, or as charges under the sue and labour clause. The shipowner was unable to obtain contribution to general average from the cargo owners, because by Dutch law when a loss occurs through the negligence of the master, contribution to general average losses cannot be recovered from the cargo owners by the shipowner, even though (as in this case) the bills of lading contain the exception of "strandings, . . . even when occasioned by negligence, default, or error in judgment by the pilot, master, or other servants of the shipowner." The shipowner then brought this action on the policies on ship and freight to recover as particular average on ship and freight, or as charges under the sue and labour clause, what they were precluded by Dutch law from recovering as general average. Held, that the plaintiff having agreed to be bound by a foreign average statement, could not now go behind the statement drawn up at Rotterdam, and could not recover as particular average charges which had been treated as general average in the foreign statement, and that the foreign statement also governed as between the assured and the underwriters. (*The Mary Thomas.*) ... 104

Hire of tug—Contract of indemnity—Collision—Running-down clause—Duty to enforce policy.—In an agreement by which a tug-owner agreed to let his tug, it was provided that the owner would fully insure and keep insured the tug against certain specified risks, including risk of collision causing damage to the tug or other craft; and, further, that if at any time during the continuance of the agreement any of the risks covered should happen, the tug-owner would indemnify the hirers in respect of all such damage to the extent of all moneys received by him under the insurance. The owner effected policies to cover the specified risk for 2000*l.*, leaving 800*l.*, the balance of the agreed value of the tug, uninsured. A barge employed by the hirers of the tug coming into collision, whilst in tow of the tug, with a steamship at anchor, an action was brought by the owners of the steamship against the hirers of the tug. The latter admitted liability, and the damages were assessed by the registrar. The tug-owner sent in a claim to the underwriters, who refused to pay. In an action by the hirers against the owner of the tug for repayment to them under the contract of the amount of damages paid and costs incurred by them in consequence of the proceedings by the owners of the colliding steamship, or, in the alternative, for such amount as damages for breach of the contract: Held, that the defendant, the tug-owner, was only liable to indemnify the hirers to the extent of any moneys received by him under the policies, that he was under no obligation to sue the underwriters, and that as he had received no moneys he was under no liability to the hirers. (Williams, Torrey, and Field Limited *v.* Knight.) ... ...*page* 92

Policy on freight — Construction of policy — Commencement of risk. — By the terms of a policy of marine insurance the defendants agreed to make good to the plaintiffs all such losses thereinafter expressed as might happen to be the subject-matter of the policy and might attach to the policy in respect of the sum of 2000*l.* thereby assured, which assurance was thereby declared to be upon freight of meat valued at 3000*l.*, warranted free from all claims, unless caused by stranding, sinking, burning, or collision, but to be liable for any loss occasioned by breaking down of machinery until the final sailing of the vessel, &c. The assurance to commence upon the freight from the loading of the said goods or merchandise on board the said vessel at Monte Video, and to continue until the said goods or merchandise were discharged and safely landed at as aforesaid. The freight insured arose under a contract between the plaintiffs and a firm of merchants who imported meat from South America to Europe, and it was thereby agreed that after the arrival of the vessel at the port of loading the refrigerating engine should be worked until the temperature in the chamber in which the meat was to be loaded was reduced to a specified temperature, and then, and not until then, the steamer's agents were to give notice that the steamer was ready to receive the meat. The merchants agreed to pay freight on the arrival of the vessel at the port of discharge. After the arrival of the vessel at the port of loading, the refrigerating engine broke down and the cargo of meat was not taken on board the vessel, which was subsequently loaded with other goods. Held, that the plaintiffs were not entitled to recover the amount covered by the policy, as the risk had never attached. (The Hydarnes Steamship Company Limited *v.* The Indemnity Mutual Marine Assurance Company Limited.) ... 193

Proximate cause of loss—"Damage received in collision"—Loss of vessel while being towed to place of repair after collision.—A tug was insured against "the risk of collision and damage received in collision with any object." The policy did not include the perils of the sea. The tug ran against a floating snag which did it considerable injury, including damage to the engine-room, machinery, and amongst other things broke the cover of the condenser, leaving an opening about twenty square inches in area. The tug commenced leaking, and there being danger that the water would come into the ship through the ejection pipes and the hole in the condenser cover, the pipes were plugged from the outside. While she was being towed to a place of repair, a plug came out and the water rushed into the engine-room through the ejection pipes and the hole in the condenser cover, and she began to fill rapidly. An attempt

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to again plug the ejection pipes failed, and the vessel sank. Held, that the collision, and not the towing, was the proximate cause of the loss, and that the insurers were liable under the policy for a total loss. (Reischer v. Borwick.) ... ...*page* 238

INTERNATIONAL COPYRIGHT.

Picture painted abroad—Publication abroad—Place where picture "produced"—Action for infringement of copyright in England — Necessity of registration.—Under the International Copyright Act 1886, and the Order in Council of Nov. 28, 1887, made thereunder, registration in England is not a condition precedent to the maintenance of an action for infringement of the copyright of a picture produced in a foreign country, party to the Convention of Berne of 1887. With reference to such a picture the word "produced," as used in the International Copyright Act 1886, is equivalent to "published." (Hanfstaengl v. The American Tobacco Company.) 864

JUDGE (ACTION AGAINST).

Malice.—No action will lie against a judge in respect of any acts done by him in his judicial capacity, even if such acts are done maliciously. (Anderson v. Gorrie and others.) 332

JUSTICES.

Summary Jurisdiction Act 1879 — Town Police Clauses Act 1847—Railways Clauses Consolidation Act 1845—Bye-laws—Nonpayment of cab fare—Penalty—Order for payment—Form of order.—The penalty imposed by the Town Police Clauses Act 1847 and bye-laws made thereunder for the nonpayment of a cab fare is "a sum of money claimed to be due and is recoverable on complaint to a court of summary jurisdiction, and is to be deemed a civil debt" within the meaning of sect. 6 of the Summary Jurisdiction Act 1879. Therefore justices have no jurisdiction to make an order directing that a person who has not paid a cab fare should be imprisoned in default of the payment of the fare. (Reg. v. Kerswill and another.) 574

LANDLORD AND TENANT.

Lease of premises for purposes of particular business—Derogation from grant—Obstruction by landlord to access of air to tenant's premises—Extent of right of access of air—Parol licence—Revocation—Notice.—Under a grant expressed in general terms, and not made for any special purpose, the grantee will not acquire a right by way of easement to the access of air, except where such right is enjoyed through a definite channel over adjoining property. This is not inconsistent with the principle recognised in *Caledonian Railway* v. *Sprot* (27 L. T. Rep. O. S. 265; 2 Macq. 449); *North-Eastern Railway Company* v. *Elliot* (3 L. T. Rep. 82; 1 J. & H. 145); and *Robinson* v. *Kilvert* (61 L. T. Rep. 60; 41 Ch. Div. 88), that the grantor of land to be used for a particular purpose is under an obligation to abstain from doing anything on the adjoining property belonging to him which wou prevent the land granted from being used for the purposes for which the grant was made. A tenant obtained from his landlord a revocable parol licence to erect certain ventilators in the stables forming part of the demised premises, and erected them at his own expense. The landlord without notice obstructed the access of air to the ventilators. Held, that the tenant was not entitled to an injunction to restrain the obstruction complained of, but might take, at his own risk, an inquiry as to the amount of damage (if any) which he had suffered, by reason of the obstruction having been caused without previous notice of the revocation of the licence. (Aldin v. Latimer, Clark, Muirhead, and Co.) ... 119

Lessee—Under-lessee—Forfeiture by lessee—Right of under-lessee to relief—Terms imposed on under-lessee.—Sect. 14 of the Conveyancing and Law of Property Act 1881 gives the court power, upon terms, to grant relief to a lessee against forfeiture, but this power does not extend to (amongst other things) a forfeiture on the bankruptcy of the lessee; and sect. 4 of the Conveyancing and Law of Property Act 1892 gives the court a similar power to relieve under-lessees against forfeiture: Held, that the court had jurisdiction, under sect. 4 of the Act of 1892, to grant relief to an under-lessee for an act of forfeiture committed by the lessee, although the forfeiture be such that the lessee himself would have been precluded from all relief under sect. 14 of the Act of 1881. Accordingly, where a lessee leased to an under-lessee and afterwards became bankrupt, thereby incurring a forfeiture under the original lease, it was held that, although the lessee by his bankruptcy would have been shut out from all relief, the court had power to give relief to the under-lessee, and it did so on the terms that he should personally enter into the same covenants with the lessor, and pay the same rent as the lessee, but that he should not be required to pay the increased rent which it was alleged the premises were worth. (The Wardens and Governors of Sir Roger Cholmeley's School v. Sewell and others.) ... ...*page* 88

Mortgage—Death of mortgagor — Possession and payment of interest by his heir-at-law. — A mortgagor, who was tenant at will to his mortgagee under an attornment clause in the mortgage, died intestate, and his heir-at-law entered into possession, and paid interest on the mortgage debt, receiving receipts as for interest and not rent. The interest being in arrear the mortgagee distrained; the trustee in bankruptcy of the heir brought an action for illegal distress. Held, that the original tenancy was put an end to by the death of the mortgagor; that a new tenancy had not been created between the heir-at-law and the mortgagees; that, therefore, the distress was illegal. (Scobie v. Collins.) 775

Notice to quit.—The plaintiff was the lessee and the defendant the lessor under an indenture of lease for a term of twenty-one years, determinable by the lessee at the end of the seventh or fourteenth year, on his giving six months' previous notice. More than six months before the expiration of the seventh year the lessee wrote a letter to the lessor, informing him that, after making inquiries, he found that he was paying too high a rent, and added, "I understand that the rent is 50*l.* too high, and I shall not be able to stop unless some reduction is made. Held, that this was a good and effectual notice to quit, and that the plaintiff was entitled to a declaration that the term of years created by the lease had been determined by such notice. (Bury v. Thompson.) 846

LANDS.

Title—Parish—Corporation—Possession and acts of ownership—Presumption of grant—Rent—Quit rent or rentcharge.—Where a feoffee of parish lands alleged that from the time of legal memory a churchyard had been vested in the feoffees upon trust for the vestry, subject to a rentcharge of 3*l.* 6*s.* 8*d.*, and that the corporation had been tenants of the vestry at a rent of 150*l.* per annum since 1838, which tenancy had expired, and claimed a declaration accordingly: Held, that there were two exceptions to the general proposition that long-continued and uninterrupted possession and acts of ownership must be referred to a good title, namely, first, the title itself must be good at law; secondly, there cannot be made a presumption contrary to proved fact; that it was possible to presume a grant to feoffees in trust, which might properly and legally enure for the benefit of the parish: but that as a fact a conveyance dated the 18th May, 1627, passed the fee of the churchyard to the corporation, and that the plaintiff held the land as tenant of the corporation at a yearly rent of 3*l.* 6*s.* 8*d.*, and the court could not infer that this small sum was a quit rent or rentcharge, and the case of *Reynolds* v. *Reynolds* (12 Ir. Eq. Rep. 172) did not apply. (Eliot v.

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The Mayor, Aldermen, and Burgesses of the City and County of Bristol.) ... ...*page* 660

LANDS CLAUSES ACTS—COMPENSATION.

Tenancy for less than a year—Injury to adjoining property held on thirty years' lease—Jurisdiction of magistrate.—The respondent was tenant of a piece of land held upon a lease from the Crown for the term of thirty years from 1889, subject to a right reserved to the Crown to give him a three months' notice to quit as to any part of the land comprised in the lease. The appellants, a railway company, gave him notice to treat in respect of a strip of this land required by them for their railway. Afterwards the Crown gave him a three months' notice to quit this strip of land. The metropolitan police magistrate, before whom a summons was afterwards taken out by the appellants, refused to assess, under sect. 121 of the Lands Clauses Act, the compensation to be paid to the respondent. Upon a motion by the appellants for a *mandamus* to the magistrate, the Divisional Court held (*Reg.* v. *Kennedy*, 68 L. T. Rep. 454: (1893) 1 Q. B. 533) that the respondent had no claim except for the loss of the strip of land and damage for its severance during the remainder of his three months' interest in it, and granted a *mandamus* to the magistrate to assess, under sect. 121, the amount of compensation due. Upon a special case subsequently stated by the magistrate: Held, that the magistrate had no jurisdiction under sect. 121 to assess compensation for the injuriously affecting of the remainder of the respondent's land upon the basis of a thirty yars' tenancy, and that the only compensation he had jurisdiction to assess was, for the loss of the strip of land and damage for its severance for three months. (The Bexley Heath Railway Company, apps., *v.* North, resp.) 533

LEASE.

Covenant to spend substantial amount in repairs—Building lease—Sanction of the court to lease—Ordinary repairs.—A lease in which the lessee covenants to spend a substantial amount in executing repairs to the property is a building lease within sect. 8, sub-sect. 1, of the Settled Land Act, 1882. But where a tenant for life had a large income, the Court refused to sanction such a lease for thirty years, on the ground that the repairs were such as a landlord usually did for his tenant, and that it would be improperly relieving the tenant for life of the cost of doing them. (*Re* Daniell's Settled Estates.) 563

LICENSING ACTS.

Licence — Lapse — Application by new tenant—Discretion of justices to refuse transfer.—The tenant of a beerhouse which had been continuously licensed from a date prior to the 1st May 1869, was convicted of permitting drunkenness on the premises, and in consequence the justices, at the general annual licensing meeting in Aug. 1891, refused to renew the licence. The licence expired on the 10th Oct. 1891. On the 5th Oct. the tenant gave up possession to the appellant, who applied at the special sessions on the 17th Nov. 1891, under sect. 14 of the Licensing Act 1828, for a transfer of the licence. The justices refused the transfer upon grounds other than those mentioned in sect. 8 of the Wine and Beerhouse Act 1869: Held (affirming the judgment of the court below), that at the time that the application was made the licence was not "in force" within the meaning of sect. 19 of the Act of 1869, as amended by the Act of 1870, and that, therefore, the justices' power of refusal was not limited to the four grounds mentioned in sect. 8 of that Act. (Freer *v.* Murray and others.)... 444

Licence—Renewal—General annual licensing meeting—No previous notice of intention to oppose—Objection made in court—No grounds stated—Jurisdiction to adjourn.—A verbal objection to the renewal of a licence, made in open court, though no grounds of objection are then stated, gives to the justices power to adjourn the granting of the licence, and to hear and consider the objection upon a future day, under sect. 42, sub-sect. 2 of the Licensing Act 1872. (Dakin, app., *v.* Parker and others, resps.) ... ...*page* 379

LIGHT.

Right to light—Obstruction—Injunction—Ancient lights—Time from which period of prescription begins to run—Actual enjoyment—Unfinished house—Prescription Act (2 & 3 Will. 4, c. 71), s. 3.—In an action for an injunction to restrain the defendant from obstructing the access of light to the windows of the plaintiff's house, it appeared that the house was finished externally, the openings for the windows being made, and the roof completely slated, more than twenty years before the issue of the writ in the action, but the house was not fit for habitation, the window frames and sashes were not in, or the floors laid, till less than that period before the issue of the writ. Held, that not only was it unnecessary that the house should be either occupied or completely fit for habitation before the statutory period of twenty years' uninterrupted enjoyment of the access of light could begin to run, but it was immaterial even that the window frames and sashes had not been put in, or the floors finished, or gas or water laid on, provided that light had come through the window openings for the benefit of the building; and the plaintiffs were accordingly entitled to their injunction. (Collis *v.* Laugher.) 226

LIS PENDENS.

Registration — Personal property — Book-debts — Mortgage—Priority—Laches.—The doctrine of *lis pendens* does not affect personal property other than chattel interests in land.—In 1885 the defendants assigned their present and future book-debts to the plaintiffs by way of mortgage. In June 1892 the plaintiffs commenced an action for foreclosure, which they registered as a *lis pendens*, and in July obtained an order appointing a receiver of the book-debts and an injunction restraining the defendants from dealing with them. No notice was given to the debtors of the plaintiffs' mortgage or of any of the proceedings. In 1893 the defendants assigned several of the debts comprised in the plaintiffs' security to a bank without notice of that security or the proceedings. The bank at once gave notice of the assignment to the debtors, and, on the 28th Nov. 1893, obtained judgment against the defendants for the amount due to them. On the 30th Nov. the receiver appointed on the plaintiffs' action took possession and claimed the debts. Held, that the doctrine of *lis pendens* did not apply; but that, if it did, the laches of the plaintiffs disentitled them to priority. (Wigram *v.* Buckley.) 237

LOCAL GOVERNMENT.

Borough with population under 10,000—Separate commission of the peace—No separate court of quarter sessions—Clerk to borough justices—Payment of salary.—Where a borough with a population under 10,000 has a separate commission of the peace but no separate court of quarter sessions, the salary of the clerk to the borough justices is payable by the county council for the county within which the borough is situate, and the fees received by such clerk are payable to the county fund. (*Re* The Herefordshire County Council and the Leominster Town Council.)... ... 57

County council—Licence—Music and dancing—Licensing committee—Appeal to council—Bias of councillor—Validity of proceedings—Bias—Administrative or judicial functions of council—Writ of *certiorari* or *mandamus*.—A committee of the London County Council for hearing and determining applications for music and dancing licences, recommended to the council the renewal of

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such licence upon certain conditions. The council affirmed the recommendation of the committee. The applicant applied for a rule for a *mandamus* to compel the county council to rehear, or for a *certiorari* to quash the resolution of the county council on the ground that P. (one of the councillors) had previous to the application being made, attended a meeting to which he had been invited, and at which meeting some of those who opposed the renewal of the licence were present, and the evidence that was to be adduced before the committe was discussed. P. in an affidavit stated that he took no part in the discussion other than by telling the meeting the course of the procedure to be taken to oppose the licence being renewed. It did not appear that P. in any way other than by his vote affected the resolution of the council. Held, that the rule for a *mandamus* must be discharged, as sufficient bias had not been shown to disqualify the councillor from acting upon the council. (Reg. *v.* The London County Council; *Re* The Empire Theatre.) ... ...*page* 638

New street—Footpath on one side only—Expenses of—Apportionment—Frontagers on other side—Liability of such frontagers to proportion of expenses—Private Street Works Act 1892.—By sects. 6 and 10 of the Private Street Works Act 1892 the expenses of an urban authority in executing private street works, are to be apportioned on "the premises fronting, adjoining, or abutting on such street or part of a street," "according to the frontage of the respective premises." An urban authority resolved under the powers of the Act to sewer, pave, and make good a new street, which had houses on the north side only, the south side being vacant land, and the works were to consist of a roadway and a footpath on the north side of the roadway where the houses were. Held, that the expenses of the footpath ought not to be thrown exclusively on the premises abutting on the north side, but ought, with the expenses of the roadway, to be apportioned upon the premises abutting on both sides of the street. (The Great Clacton Local Board, apps., *v.* Young and Sons, resps.) 877

LOCKE KING'S ACTS.

Equitable charge—Lien for unpaid purchase money—Money agreed to be paid by lessor for purchase of ground rents from lessee—Building agreement.—On the 16th April 1883 K. agreed to lease two plots of land to H. on building leases for terms of ninety-nine years at ground rents amounting to 180*l.* per annum. The agreement contained provisions binding the lessee to erect a certain number of houses, and the lessor to grant a lease of each house as soon as finished, and a special provision that, so soon as the lessee had taken a sufficient number of leases to secure by the ground rents thereby reserved the total rent of 180*l.*, the lessor should either convey to the lessee the fee simple of the remaining land for a payment of 50*l.*, or at the option of the lessor the lessee should sell to the lessor the ground rents to be created out of the land not then already leased when the same should have been created, at the price of twenty-two years' purchase; such ground rents not being in any case more than one-sixth of the rack-rent value of the houses on which the same were secured. Leases of a sufficient number of houses to secure the 180*l.* were granted in the lifetime of K., and the executors of H., who were carrying out the agreement after his death, gave K. notice that they were ready to take a conveyance of the remaining land. K. declared her option to purchase the ground rents. The number and amount of the ground rents to be created was practically agreed in K.'s lifetime. She died before the matter was completed, having by her will specifically devised the land comprised in the agreement with H. to trustees upon trust to sell, and stand possessed of the proceeds in trust for B. and her children, and gave all her residuary real and personal estate upon other trusts. K.'s trustees carried out the agreement by purchasing the ground rents at the price of 1298*l.* An order had been made for the administration of K.'s estate. Held, on further consideration, that H.'s executors had an equitable charge of the nature of a vendor's lien for unpaid purchase money on the land comprised in the agreement within the meaning of Locke King's Acts, and that the 1298*l.* must be paid by the specific devisees, not by the testatrix's general estate. (*Re* Kidd; Brooman *v.* Withall.) ... ...*page* 481

LORD'S DAY OBSERVANCE ACT 1781.

Entertainment or amusement—"Keeper of hall—Persons "managing or conducting" entertainment.—By sect. 1 of the Lord's Day Observance Act 1781, the "keeper" of any house, room, or place, which is opened for public entertainment or amusement on Sunday, to which persons are admitted by payment, is liable to forfeit 200*l.*, and the person "managing and conducting such entertainment or amusement" is liable to forfeit 100*l.*; and, by sect. 2, any person who shall "appear, act, or behave himself as master, or as the person having the care, government, or management of any such house, &c., shall be deemed and taken to be the keeper thereof." A hall, which belonged to a company in liquidation, was let to a society for Sunday lectures, which the jury found to be entertainments or amusements in contravention of the Act. Wilson, who had been secretary of the company before the liquidation, and afterwards acted as solicitor to the liquidator, let the hall to the society for these lectures. A licence for music and dancing on week days had been granted to him in respect of the hall, but he had no personal interest in the hall. Ward and King each acted as chairman at one of these lectures; each of them introduced the lecturer, and then left the platform and sat amongst the audience. Held, that Wilson was not the "keeper" of the hall, and that Ward and King were not persons "managing or conducting" the entertainment or amusement within the meaning of the Act, and that they were not liable to the penalties. (Reid *v.* Wilson and Ward; Reid *v.* Wilson and King.) 299, 739

LUNACY.

Person lawfully detained as a lunatic, though not found so by inquisition—Person appointed to exercise powers of committee—Tenant for life—Settled land—Exercise of power of sale—Jurisdiction.—The court has no jurisdiction to authorise a person who has been appointed to exercise the powers of a committee of the estate of a tenant for life of settled land who is lawfully detained as a lunatic, though not so found by inquisition, to exercise on behalf of the lunatic the power of sale vested in the lunatic by the Settled Land Act 1882. The lunatic must be so found by inquisition before such an order can be made. (*Re* Martha Baggs, a person lawfully detained as a lunatic.) 138

Person through mental infirmity incapable of managing her affairs.—Management and administration.—Having regard to the language of sect. 116 of the Lunacy Act 1890, sect. 27 (4) of the Lunacy Act 1891, and rule 56 of the Rules in Lunacy 1892, the intention of the Legislature is that persons who, through mental infirmity arising from disease or age, are incapable of managing their affairs, shall, for the purposes of management and administration, be in all respects treated as lunatics. A master in lunacy or a judge has jurisdiction to appoint a receiver of the dividends alone of Government and other securities standing in the name of a lunatic, without ordering a transfer of such securities into the name of the receiver, and in some cases that would be the proper course to adopt; but the usual practice is to order the securities to be transferred into court, and then to let the receiver obtain the dividends from the Paymaster-General. (*Re* Frances Browne (a person through

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mental infirmity incapable of managing her affairs.) ... ...page 365

Practice—Exhibits to affidavit—Inspection.—Documents appearing as exhibits to an affidavit made in lunacy form as much a part of the affidavit as if they were actually annexed to and filed with the affidavit; and consequently anyone entitled to see the affidavit has the right to inspection of the exhibits likewise. (*Re* Emma Jane Hinchliffe.) 532

—— Settlement—Lunatic tenant for life—Appointment of new trustees—Exercise of power on behalf of lunatic—Vesting order—Jurisdiction—Lunacy Act 1890.—Where a person of unsound mind, but not so found by inquisition, was tenant for life under a settlement of a sum of consols, and as such had power to appoint new trustees of the settlement, and an order was made by a master in lunacy authorising the sister of the tenant for life to exercise on her behalf the power of appointment by appointing two persons named as new trustees, and directing that upon their appointment the right to call for a transfer of the consols should vest in them, the Court held that the order was correct; but that in similar cases arising in the future the Bank of England should have for their guidance some kind of certificate by the master of the execution of the deed of appointment. (*Re* Shortridge, a person of unsound mind.)... 799

Settlement—Tenant for life—Person incapable of managing his affairs—Person appointed to exercise powers of committee—Power of sale—Jurisdiction.—A settlement made in 1858 contained a power for the then tenant for life to sell the settled estates with the consent of the trustees. The present tenant for life having through mental infirmity become incapable of managing his affairs, his son had been appointed to exercise certain powers on his behalf. The son applied for an order authorising him to exercise the power of sale. Held, that the court had jurisdiction to make the order. (*Re* X., a person through mental infirmity incapable of managing his affairs.) 139

MAINTENANCE.

Maintenance of suit—Action for libel—Common interest.—The defendant advised T. to bring an action for libel against the plaintiff, and provided all the funds for carrying it on. The libel complained of was contained in an article reflecting upon the character of T., and also upon the character and business of the defendant. In that action the present plaintiff obtained a verdict, but was unable to recover any of his costs from T.; he thereupon sued the defendant in this action to recover damages for maintenance. Held, that the defendant had no such common interest in the action for libel as would justify his maintenance of that action, and that he was, therefore, liable in damages. (Alabaster and others *v.* Harness.) 740

MARGARINE ACT 1887.

Admission by seller that substance was margarine—Analysis condition precedent to prosecution—Sale of Food and Drugs Act 1875.—The Margarine Act 1887 provides by sect. 6 that every person selling margarine by retail, save in a package duly branded or durably marked, shall in every case deliver the same to the purchaser in or with a paper wrapper, on which shall be printed in capital letters "margarine;" and by sect. 12, that all proceedings under the Act shall, save as expressly varied by this Act, be the same as prescribed by the Sale of Food and Drugs Act 1875. The Sale of Food and Drugs Act 1875 provides that an inspector may obtain samples of food and drugs, and if he suspect the same to have been sold to him contrary to the provisions of the Act, he shall submit the same to be analysed, and shall notify to the seller his intention to have the same analysed. If it appears from the certificate of the analyst that an offence against some one of the provisions of the Act has been committed, the person causing the analysis to be made may take proceedings for the recovery of the penalty therein imposed. Held, that it was a condition precedent to the right of a purchaser to take proceedings for a penalty under the above Acts that he should obtain a certificate from the analyst, and that this applied even in the case where a person admitted that he had sold margarine contrary to the provisions of the Margarine Act 1887. (Smart and Son, apps., *v.* Watts, resp.) ... ...page 768

MARRIAGE SETTLEMENT.

Covenant to settle after-acquired property—Coverture—Death of husband—Recital.—By their marriage settlement, made in 1839, a husband and wife covenanted with the trustees that if at any time after the solemnisation of the said intended marriage, and "during the life" of the wife, any personal estate should be given, or bequeathed, or come to, or devolve, upon the wife or the husband in her right, then they would do all things necessary to vest such after-acquired property in the trustees upon the trusts of the settlement. The husband died in 1850, and in 1892 the wife became entitled to personal estate under the intestacy of a cousin. Held, that, in the absence of any expressions showing that a covenant of this nature was intended to have a more extended operation, it was to be construed as if the usual words "during the said intended coverture" had been inserted. As the language of the covenant was ambiguous, the court was entitled to read the recital; but either with or without the recital, the covenant did not bind this particular property. (*Re* Coghlan; Broughton *v.* Broughton.)... 136

Covenant to settle wife's other or after-acquired property—Property excepted from settlement—Sale and purchase by wife during coverture—Accumulations of income.—By an ante-nuptial settlement it was declared that if the wife should at the time of the marriage, or at any time during the coverture, become entitled to any property (other than property specifically settled), "except any property of or to which she is at the present time possessed or entitled," it should be settled upon the trusts of the settlement. At the time of the marriage, in addition to her property specifically settled, the wife possessed an undivided moiety of a leasehold house and seven shares in a limited company. During the coverture she sold the moiety and the seven shares. With the proceeds she bought certain debentures and a leasehold house. The full price of the debentures she made up out of accumulations of separate income. The full price of the leasehold house she made up out of such accumulations, and by means of a loan from her bankers. Part of this loan was subsequently repaid by the wife and her husband. Held, upon the construction of the settlement, that the moiety of the leasehold house and the seven shares in the limited company were excluded from the operation of the covenant to settle other or after-acquired property; but Held, that the debentures purchased with the proceeds of sale of the moiety of the leasehold house, and with accumulations of separate income, were within the covenant; and Held, that the leasehold house was the absolute property of the wife, but subject to a charge in favour of the trustees of the settlement of the amount provided out of the sale of the seven shares, and out of accumulations of separate income, including any moneys contributed by the wife towards repayment of the banker's loan. (*Re* Bendy; Wallis *v.* Bendy.) 750

MARRIED WOMAN.

Contract entered into by wife before marriage—Personal judgment against wife—Married Women's Property Act 1882.—The liability of a married woman at common law in respect of a contract entered into by her before marriage is not affected by the Married Women's Property Act 1882, and therefore a plaintiff who has succeeded in an action upon such a contract is not confined to a judgment against the married woman's sepa-

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rate property in the form settled in *Scott* v. *Morley* (57 L. T. Rep. 919; 20 Q. B. Div. 120), but is entitled to personal judgment against the married woman. (Robinson, King, and Co. *v.* Lynes.) ... ...*page* 249

Defendant in action—Costs of unsuccessful appeal —Sequestration — Property subject to restraint upon anticipation.—An order for the payment of costs of an unsuccessful appeal by a married woman cannot be enforced by the issue of a writ of sequestration under sect. 2 of the Married Women's Property Act 1893, as that section only applies to some action commenced by the married woman or proceedings initiated by her, such as a petition or originating summons, and does not extend to appeals. (Hood-Barrs *v.* Cathcart.)... 11

Gift for life for separate use—Power of appointment by will—In default to executors, administrators, or assigns—Release of power of appointment —Absolute interest.—Under the trusts of a will, the testator's two daughters were entitled to the income of certain property in equal shares during their lives for their separate use. The capital of each share was, subject to a power of appointment by will given to each daughter respectively, held by the trustees upon trust to assign and pay over according to the appointment, and in default thereof to the executors, administrators, or assigns of the daughters respectively. The testator died prior to the passing of the Married Women's Property Act 1882, and both daughters married subsequently to the Act without having released their powers of appointment. This was a summons on behalf of the daughters without the concurrence of their husbands, asking for a declaration that they were absolutely entitled to their respective shares. Held, that the policy of the Married Women's Property Act 1882 being to make a married woman a *feme sole*, there must be a declaration that the married women, on releasing their powers of appointment, were absolutely entitled to their shares. (*Re* Davenport; Turner *v.* King.) 875

Infant — Settlement — Covenant to settle after-acquired property—Affirmation during coverture after attaining full age—Disability of coverture. —A married woman, whilst a spinster and an infant, executed a marriage settlement, which contained a covenant by her husband and herself to settle after-acquired property, so framed as to include a reversionary interest to which she was contingently entitled under her grandfather's will. The settlement was not sanctioned by the court under the Infants' Settlement Act. After coming of age she executed a deed, indorsed on the settlement, varying some of its trusts and affirming the covenant. The deed was not acknowledged. After the death of her husband her interest fell into possession, and she claimed to be absolutely entitled to it, on the ground that she was incapable during coverture of affirming the covenant entered into while she was an infant, and that the settlement was not binding on her. Held, that there was no disability to affirm the covenant during coverture, and the fund was bound by the marriage settlement. (*Re* Hodson; Williams *v.* Knight.) 77

Restraint on anticipation — Arrears of income — Equitable execution. — A married woman was entitled as tenant for life to the income of real estate, with a restraint on anticipation; and on the 29th Sept. 1894 certain rent became due to her. Creditors who had obtained judgment against the married woman on the 1st Oct., took a summons on the following day asking for the appointment of a receiver of the rent by way of equitable execution. The rent had not come to the hands of the married woman, being either in the possession of her trustees, or remaining unpaid by the tenants of the property. On the 1st Nov. the summons came before the Divisional Court (Wright and Collins, JJ.), who decided that the restraint on anticipation attached to the overdue rent, and therefore refused to appoint a receiver. The judgment creditors appealed. Held, that the judgment creditors were not entitled to equitable execution over rents of property of which the married woman was tenant for life with power of anticipation, even though such rents were due and payable to her before the date of the judgment sought to be enforced. (Pillers and Pershouse *v.* Edwards.) ... ...*page* 788

—— Payment of costs of unsuccessful action out of income of life estate.—In April 1893 a married woman, entitled to a life interest in certain trust funds and restrained from anticipating, brought an action against her trustees, alleging serious breaches of trust. At the trial she withdrew the charges, and submitted to a judgment under which she was ordered to pay the costs of the action as between solicitor and client, leave being given to her to raise the amount by mortgage of her life interest. The taxed costs amounted to 208*l.*, and were not paid. Her income was 160*l.* a year Held, that sect. 2 of the Married Women's Property Act 1893 was applicable to a pending action; and that one-half of the income of the married woman must be applied yearly by the trustees towards the payment of the taxed costs, until the whole sum was repaid. (*Re* Godfrey; Thorne-George *v.* Godfrey.) 86, 568

—— Sequestration — Married Women's Property Act 1893, sect. 2.—Under a sequestration order to enforce payment of costs owed by a married woman, the sequestrators are not entitled to take rents of property of which she is tenant for life without power of anticipation, that have accrued due subsequently to the date of the order for payment, even though the writ of sequestration was issued after such rents became payable. Sect. 2 of the Married Women's Property Act 1893 does not give the court jurisdiction to alter or vary an order for payment of costs made before the Act came into operation, or to make a new order for payment of the same costs. (*Re* Lumley; Hood-Barrs *v.* Cathcart.) 7

MASTER AND SERVANT.

Wages—Deductions for sick and accident fund—Illegality of deductions.—The appellant had been for some time in the employment of the respondent, and, as a condition of her employment, signed an agreement to become a member of a sick and accident club, and to subscribe a weekly sum to the funds in proportion to her wages. Such sums were deducted weekly from her wages and paid to the treasurer of the club. The appellant was informed of the amount of such deduction when her wages were paid. Held, that the payments to the sick and accident fund must be taken to have been made with the assent of the appellant, and that she could not recover the amounts so deducted from her wages as being deductions made illegal by the Truck Act 1831. (Hewlett *v.* Allen.) 94

METROPOLIS MANAGEMENT ACTS.

Drainage—Buildings divided into two blocks separated by causeway—Main drain under causeway—Premises within same curtilage—Whether drain under causeway is a "drain" or "sewer."—Certain dwellings, which consisted of sets of apartments—were divided into two blocks, separated by a causeway twenty feet wide. The drainage, which was put in by the owner, was by means of branch drains running north and south from each set of apartments into a main drain running east and west under the causeway into a sewer within one hundred feet of the blocks. This main drain was a single nine-inch pipe, and the branch drains were inserted into it. No order of the vestry had been obtained for draining either of the blocks by a combined operation. Held, that the premises were within the same curtilage, and that the main drain under the causeway was a "drain" for the drainage of "premises within the same curtilage," and was not a "sewer" within the meaning of sect. 250 of the

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SUBJECTS OF CASES.

Metropolis Local Management Act 1855, and that therefore the owner of the blocks was liable for the necessary repairs to the same (Pilbrow, app., v. The Vestry of the Parish of St. Leonard, Shoreditch, resps.) ... ...page 697

Drainage—Covered arcade of shops—Drain down the central passage—"One building only"—"Premises within the same curtilage"—"Drain"—"Sewer"—Metropolis Management Act 1855.—The Lowther Arcade, Strand, consists of twenty-five houses and shops, let to various tenants, which are built in two rows, one on each side of a passage which is used in common by those occupying the houses, such use being essential to the enjoyment of each of the houses. The passage is covered in by a roof, and has a gate at each end, which is closed to the public at night. Down the passage runs a drain, which is used as a common drain by all the houses in the Arcade. By sect. 250 of the Metropolis Management Act 1855, the word "drain" in that Act means any drain used for the drainage of "one building only" or "premises within the same curtilage,' and the word "sewer" includes sewers and drains of every description except drains to which the word "drain" interpreted as aforesaid applies. Held, that the Lowther Arcade is not "one building only" nor "premises within the same curtilage" within the meaning of sect 250, and that therefore the drain down the central passage is not a "drain" but a "sewer" within the meaning of the Metropolis Management Act 1855. (The Vestry of the Parish of St. Martin-in-the-Fields v. Bird.) 432, 868

Expense of flagging footway—Owners of houses and lands abutting on street—Open space—Lease to vestry for a public garden.—By sect. 1 of the Metropolis Management Act 1862 Amendment Act 1890 the expense of flagging a footway is to be borne by the owners of the houses and the owners of the land bounding or abutting on the road or street in which such footway is situate. The respondents were the owners of several houses in a square, and the appellants had acquired the residue of a lease of the garden in the square, which had been laid out as a public garden for the benefit of the public, and over which the appellants administered control under the Metropolitan Open Spaces Act 1881. Held, that the appellants, as owners of the garden, must contribute to the expense of flagging the footway of the street upon which the houses of the respondents and the garden abutted. (The Vestry of St. Mary, Islington, apps., v. Cobbett and others, resps.) 573

Height of buildings — Penalty for constituting offence—Six months' notice from the commission or discovery of offence.—Sect. 85 of the Metropolis Management Act 1862 (25 & 26 Vict. c. 102) provides that no building (except a church or chapel) shall be erected on the side of a new street of less width than fifty feet, which shall exceed in height the distance from the external wall or front of such building to the opposite side of such street without consent, &c., nor shall the height of such building be increased so as to exceed such distance, &c., and the section goes on to say, "and every person committing any offence under this enactment shall be liable to a penalty of 5l., and in case of a continuing offence to a further penalty of 40s. for every day during which such offence shall continue after notice." Sect. 107 of the Act provides that no person shall be liable for the payment of any penalty, "unless the complaint respecting such offence has been made before a justice within six months next after the commission or discovery of such offence." The builders of the structure after a conviction against them for an offence under sect. 85 of the statute finished the work, and left the premises; the appellants therefore proceeded for continuing penalties against the respondent, the owner of the structure. The magistrate dismissed the summons now taken out by the appellants against the respondent for continuing penalties. Held, that the respondent was liable for penalties for continuing the offence, as proceedings had been taken by the appellants within six months after the offence complained of had been committed. (London County Council, apps., v. Worley, resp.) ... page 487

Metropolis Management and Building Acts (Amendment) Act 1882.—"Wooden structure of a movable or temporary character"—Bungalow—Erected for exhibition.—The respondents erected a bungalow upon a piece of ground adjoining their factory. The bungalow, which was made partly of wood and partly of corrugated iron, was erected as an advertisement and specimen building to be seen by intending purchasers, and not for use upon the spot where it was then set up. Held, that the the bungalow was not a wooden structure of a movable or temporary character within the meaning of 45 Vict. c. 14, s. 13, so as to require a licence from the county council. (London County Council, apps., v. Humphreys Limited.) 201

Street improvement—Compulsory purchase—Power to take part of building—Interim injunction—57 Geo. 3, c. xxix., ss. 80, 82. — The plaintiffs, who were the owners of a public-house in the defendants' parish, were served with a notice by the defendants under the provisions of 57 Geo. 3, c. xxix., that they required to purchase from them the projecting stone porch, step and cellar-flap which formed part of such house and projected into and prevented them from widening the street in which the public-house was situated. The plaintiffs brought an action for an injunction to restrain the defendants from proceeding to take the parts of the premises specified, and contended that the defendants were bound to take the whole of the premises, and could not take a part only. The plaintiffs applied for an interim injunction to restrain the defendants from proceeding to have the value of the specified parts of the house assessed by a jury. Held, that the court would not grant an injunction, as there was the question of fact to be decided upon the trial of the action as to whether the taking away of the parts required by the defendants would make such an alteration in the house that the defendants ought to be required to take the whole of the house. (Gordon and others v. Vestry of St. Mary Abbotts, Kensington.) 196

MINE.

Coal mines — Daily inspection of guides and conductors—Report—Entry in book.—It is provided by the Coal Mines Regulation Act 1887, s. 49, r. 5, that a competent person, or competent persons, appointed by the owner, agent, or manager for the purpose, shall, once at least in every twenty-four hours, examine the state of the external parts of the machinery, the state of the guides and conductors in the shafts, and the state of the headgear, ropes, chains, and other similar appliances of the mines which are in actual use both above ground and below ground, and shall once at least in every week examine the state of the shafts by which persons ascend or descend; and shall make a true report of the result of such examination, and every such report shall be recorded without delay in a book to be kept at the mine for the purpose, and shall be signed by the person who made the inspection. Held, that the result of the daily examination of the guides and conductors must be entered in the book, as well as the result of the weekly examination of the shafts. (Scott, app., v. Bould, resp.) 577

(*See* COMPENSATION.)

MONEY PAID UNDER COMPULSION OF LAW.

Mistake of fact—Payment of money demanded by summons—Withdrawal of summons after demand for return of money—Right to recover back money paid.—The defendants summoned the plaintiff before a police magistrate to enforce payment of his apportioned part of the cost of making up a street. Before the summons was returnable the plaintiff sent a cheque for the amount to the

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defendants, who sent him a receipt. Shortly afterwards, and before the summons was heard, the plaintiff wrote demanding a return of the money on the ground that he had paid it under a mistake of fact that he was a frontager, and he had since discovered that he was not, and he stated that if the money was not returned he should attend the hearing of the summons. The defendant replied that, as the money had been paid, they would withdraw the summons without the plaintiff's attendance, and by leave of the magistrate the summons was withdrawn. Held, that the money had been paid by the plaintiff under compulsion of legal process, and that he could not recover it back from the defendants. Decision of Day, J. affirmed. Judgment of Lopes, L.J. in *Caird* v. *Moss* (55 L. T. Rep. 456; 33 Ch. Div. 36) distinguished. (Moore v. The Vestry of the Parish of Fulham.)... ... ...*page* 862

MORTGAGE.

Consolidation — Several properties mortgaged by one mortgagor to different mortgagees—All the equities of redemption subsequently conveyed to one assignee—All the mortgages ultimately united by transfer in one person. The owner of several properties mortgaged them to different mortgagees for distinct sums. The mortgagor afterwards, in 1868, mortgaged all the properties by one deed to one mortgagee, the plaintiff's predecessor in title, subject, as to the different properties affected, to the prior mortgages thereon, some of which at that time still remained vested in different mortgagees. In 1885 the mortgage of 1868 was transferred to the plaintiff. All the prior mortgages were ultimately transferred to, or became vested in, the defendants before the plaintiff brought this action for redemption of some of the properties included in the mortgage of 1888 without the rest. The defendants claimed to consolidate all the prior mortgages as against the plaintiff. It was decided by Romer, J. (70 L. T. Rep. 586; (1894) 2 Ch. 328), on the authority of *Vint* v. *Padget* (1 Giff. 446; on app. 2 De G. & J. 611), that, if an owner of two properties mortgages one to A. and the other to B., and then A.'s mortgage is transferred to B., or both are transferred to C., the owner cannot after that redeem B. in the one case or C. in the other, or one of his securities without the other, and that the right to consolidate was enforceable, as a rule, not only against the original mortgagor, but against his assignee of the equity of redemption; and that, applying these principles to the present case, if the original mortgagor had come to redeem the defendants after all the mortgages had become vested in them, he could not have redeemed one of their securities without redeeming the others; and the plaintiff, being his assignee by one deed of all the properties, subject to the defendants' mortgages, was in no better position. The plaintiff appealed. Held, that the case was governed by *Vint* v. *Padget* (*ubi sup.*), which this court could not overrule; and that therefore the appeal must be dismissed with costs. (Pledge v. Carr.) 598

Fixtures—Bill of sale—Business—Executor's right to indemnity—Creditors—Priority.—An executrix of a will, in which the testator gave no power to his executors to carry on his business did carry it on with the knowledge of the creditors. Held, that the principle of *Dowse* v. *Gordon* (64 L. T. Rep. 809; (1891) App. Cas. 190) applied, and the executrix was entitled to be indemnified. In 1887, by indenture of mortgage, which was not registered as a bill of sale, the above testator, a paper manufacturer, granted and conveyed his mill and the fixed machinery and fixtures in and upon the said premises to C. D. to secure 10,000*l.* and interest. Held, that the mortgage deed was valid as to fixed machinery and fixtures. (*Re* Brooke; Brooke v. Brooke.) ... 398

Foreclosure action—Receiver appointed—Rents and profits prior to foreclosure—Form of judgment—Credit given by mortgagee for sum certain.—When in a foreclosure action the plaintiff, in order to avoid opening the foreclosure by claiming payment of rents come to the hands of the receiver in the action between the date of the certificate and the day fixed for the redemption, submits to be charged in account with a sum certain in the hands of the receiver in respect of such rents, the judgment should reserve liberty to either party to apply for payment of any money come to the hands of the receiver. (Lusk v. Sebright.) ... ...*page* 59

Leaseholds — Title — Solicitor — Costs — Scale fee —Taxation.—On the mortgage of leasehold property held under several leases by the original lessee, his solicitors furnished the mortgagee's solicitors with a short statement of dates and particulars of the leases, which were all in the same form, and a form of the covenants. The mortgagor's solicitors sent in a bill for the scale fee under the Solicitors' Remuneration Act 1881, on a mortgage transaction, but the taxing master held that the scale fee did not apply, and reduced the amount. On summons to review taxation: Held, that no title had been deduced: all that was done was to send extracts from the leases; production was not deduction, and the mere production of a lease was not equivalent to deduction of title. (Welby v. Still.) 426

Power of sale—Realisation of security—Contract—Statute of Limitations (21 Jac. 1, c. 16), s. 3.—In 1881 B. advanced to M. a sum which was invested in securities, which were handed to B., who received the dividends thereon. Until 1890, when the securities were sold, B. had sent M. an account appropriating 360*l.* dividends received on the securities towards the debt due to him, and to this M. made no objection. Held, by North J., that the mere sending of an account by the creditor to the debtor, of which no notice was taken by the debtor, could not be regarded as an acknowledgment so as to prevent the debt from being barred by the Statute of Limitations. In 1882 a further advance was made by B. upon similar terms, but with an express agreement by M. to pay any deficiency upon realisation. The securities were sold in 1889. Held, by North, J., that B.'s claim to the deficiency was not statute-barred, as the obligation to pay the deficiency which might arise when the securities were realised did not become a "debt" until the sale of the securities. On appeal: Held, that the contract to pay any deficiency on realising the securities was not a separate one, and did not give rise to an independent cause of action; and that, therefore, the Statute of Limitations applied to the whole debt. (*Re* McHenry; McDermott v. Boyd.) 146

Redemption—Consolidation—Union of mortgages—Equity of redemption in one of the properties previously assigned.—An owner of several properties mortgaged property A. to S., and other properties to different mortgagees, who, in respect of such properties, were the predecessors in title of the defendants. After this, but before these mortgages came into the hands of the same mortgagees, the mortgagor mortgaged property A. (subject to the mortgage to S.) to W., and this security (the mortgage to W.) was on the 14th July 1890 transferred to P., who on the 8th Oct. 1890, in exercise of his power of sale, sold and conveyed property A. to M., subject only to the mortgage to S., which in the meantime, after the mortgage to W., but before the commencement of this action, had become vested in the defendants, together with the mortgages on the other properties made as above-mentioned to the defendants' predecessors in title. At the time that the mortgage on property A. was transferred to P. he was already a puisne mortgagee of all the properties; and at the time P. sold property A. to M. the latter was also already a puisne mortgagee of all the properties. An action having been brought by M. to redeem property A.: Held, that the defendants were not entitled as against M. to consolidate with their mortgage on A. their

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SUBJECTS OF CASES.

securities on the other properties. (Minter v. Carr.)... ... ...page 526

Transfer of first mortgage to owner of equity of redemption—Rights of subsequent mortgagee—Intention.—S. purchased the equity of redemption in a property upon which more than one mortgage was outstanding. He afterwards paid off the first mortgage, and took an assignment to himself of the mortgage debt and all benefits and rights in respect of it, as a transfer, not as a reconveyance. He afterwards assigned the mortgage to the respondent. Held, that as the manifest intention was to keep the security alive, the title of the respondent prevailed over that of a person claiming through a subsequent mortgagee, on the principle of *Adams* v. *Angell* (36 L. T. Rep. 334; 5 Ch. Div. 634) and that the rule in *Toulmin* v. *Steere* (3 Mer. 210 did not apply. (Thorne v. Cann.) 852

MORTMAIN.

Corporation—Debenture stock—Charge on revenue of landed and other property—Interest in land.—Corporation debenture stock was by the Act under which it was created charged on the borough fund, borough rate, the waterworks and gasworks undertakings, and improvement rates, and "the revenues of all landed and other property vested in or belonging to the corporation." Held, that there was only a general charge on the general revenue of the corporation, and not a mortgage or assignment of the rents or any specific property, and therefore no interest in land was created within the Mortmain and Charitable Uses Act 1888. (*Re* Pickard; Elmsley v. Mitchell.) 558

Mortmain Acts (9 Geo. 2, c. 36, 51 & 52 Vict. c. 42)—Effect—Colonial will directing purchase of land in England.—An English statute will not be held to make void a bequest made by a colonial will, on the ground that it contravenes the local law of England, without very clear ground appearing in such statute. The English Statutes of Mortmain do not operate to invalidate a gift of money coupled with an obligation to lay it out in land, bequeathed by a valid will. A domiciled inhabitant of the Colony of Victoria, by his will, which was valid according to the law of Victoria, bequeathed a sum of money to the Mayor and Corporation of the city of Canterbury in England, for the purpose of buying a site for, and erecting, a free library. Held, that the bequest was valid. (The Mayor of Canterbury v. Wyburn and others.) 554

NUISANCE.

Adjoining owners—Damage by overflow of rain-water—Ordinary user of premises—Provision for escape of water for common benefit—Liability of adjoining owner.—An uncovered area belonging to the defendant and inclosed on two sides by his premises, on another side by the plaintiff's house, and on the fourth side by another house, was covered by the defendant with a flat roof, in one corner of which was a gully or hole for the escape of rain-water from the adjoining roofs. The plaintiff had the right of discharging rain-water from his roof on to this flat roof, and thence the water escaped through the gully down another pipe into the area, and so into the defendant's drain. The defendant had not in fact attended to or cleansed the roof or gully, and no complaint of their condition had been made to him, and there was no access to the roof from his premises. In consequence of an obstruction of the mouth of the gully the rain-water accumulated on the flat roof, leaked into the plaintiff's premises, and damaged the same. Held, that, in the absence of negligence, the defendant was not liable for the damage, on the ground that he did no more than was ordinary and reasonable in conducting his own rain-water from the roof to the gully, and also upon the ground that the provision of the gully was for the common benefit. (Gill and others v. Edouin.) 762

Drainage—Sewer—Duty of local sanitary authority.—Sect. 15 of the Public Health Act 1875 provides that every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act. A complaint was preferred by an inspector of nuisances, against the respondent, under sect. 95 of the Public Health Act 1875 (38 & 39 Vict. c. 55), for that he, as owner of certain premises, had suffered a nuisance to arise from certain water-closets being connected with a drain or sewer. In 1863 there was an open drain receiving surface water and sink drainage from houses near thereto, but not from water-closets. The sanitary authority subsequently covered up this drain, and laid down pipes therein for the purpose of receiving the aforesaid water and drainage, and made a rate upon the adjoining properties to defray the expense. From time to time water-closets in the said houses were, unknown to the authority, connected with this drain, amongst them the respondent's. A nuisance was proved to exist, but not that it was caused by the respondent alone. No system of drainage was carried out in the district. It was admitted that the respondent was entitled to drain into the sewer, but it was contended that, if he thereby caused a nuisance, he could be ordered to disconnect his water-closets therefrom. The justices decided that the drain was a sewer vested in the sanitary authority, and that the respondent had not exceeded his rights, and that the authority were in default in allowing the sewer to become a nuisance. Held, on appeal, that, under sect. 15 of the Public Health Act 1875, the sanitary authority were bound to deal with the sewage themselves, and that they could not shirk the obligation and transfer it to those for whose protection they were called into existence as a local authority. (The Wycombe Union, apps. v. Parsons, resp.) ... ...page 428

Landlord and tenant—Injury to house—Vibration—Working of steam-engines on adjoining land of lessor — Estoppel — Derogation from grant — Damages—Remoteness.—The vibration caused by the working of steam-engines on land belonging to lessors adjoining certain buildings demised by them to a lessee necessitated th· pulling down of the buildings as dangerous structures, obliging the lessee to take other premises for his business, which thereby suffered damage. At the date of the demise both lessors and lessee knew that the demised buildings were in an unstable condition, and the lessee was also aware of the existence of the engines on the lessors' land. Held, that the lessee had a cause of action against the lessors on the ground of nuisance; that the lessors were estopped from saying that the buildings were in an unstable condition at the time of the demise; and that, in estimating damages, not merely the loss of the term demised, but also all losses fairly attributable to the wrongful act of the lessors, ought to be regarded. (The Grosvenor and West End Railway and Terminus Hotel Company Limited v. Hamilton.) 362

Pollution of stream—Local authority—Old system of drainage — No aggravation of nuisance — Rivers Pollution Prevention Act 1876.—Proceedings were taken in the County Court against a local board under sect. 10 of the Rivers Pollution Prevention Act 1876, to restrain them from knowingly permitting sewage matter to flow into a stream. That statute provides by sect. 3, that, where sewage matter is carried into any stream along a channel used at the date of the passing of the Act, no one shall be deemed to have committed an offence against the Act if he shows that he is using the best practicable and available means to render the sewage matter harmless. The defendants had succeeded to an old system of drainage, by which the sewage matter was carried into the stream, and the judge dismissed the action on the ground that they had done nothing to aggravate the nuisance. Held, that that was not a sufficient answer to the complaint; that there was evidence that the defendants had

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knowingly permitted sewage matter to flow into the river; and that the case must be remitted to the County Court judge to consider whether they had used the best practicable and available means to render it harmless. (Yorkshire (West Riding) County Council *v.* Holmfirth Urban Sanitary Authority.) ... ...*page* 217

Trees overhanging neighbour's land—Right to cut—Notice.—If a man's trees overhang his neighbour's land his neighbour may cut off the overhanging branches back to the boundary without giving notice to the owner of his intention to do so. A man cannot acquire a right to let his trees overhang his neighbour's land, either by prescription or under the Statutes of Limitation. (Lemmon *v.* Webb.) 647

PARTITION.

Incumbrances on whole estate — Incumbrances on plaintiff's share — Right to partition — No reasonable cause of action—Striking out statement of claim.—A., who was the owner of an undivided third share of the estates in two counties, devised by the will of B., brought an action for partition or sale. The statement of claim showed that the estates in each county were subject to a separate mortgage made by the testator, and that the share of the plaintiff was also subject to two mortgages made by the plaintiff or his predecessor in title. All the mortgagees were made defendants to the action, and the plaintiff asked for the usual inquiry what persons were interested in the property, and whether their shares were incumbered, and what incumbrances there were on the estates. The mortgagees of the entirety of the estates in one county and the mortgagees of the plaintiff's share now moved that the statement of claim should be struck out. There was a similar motion by the mortgagees of the entirety of the estate in the other county. Held, that the plaintiff was not entitled to proceed with the partition action against the wishes of the mortgagees of his own share, and that the statement of claim showed no cause of action against any of the mortgagees, and must be struck out, and the action dismissed as against them. By consent, the action was at the same time dismissed against the owners of the other third share. (Sinclair *v.* James.) ... 483

PARTNERSHIP.

Dissolution—Distribution of assets—Costs of action—Repayment of capital—Priority.—In an action for dissolution of a partnership between two partners, who were entitled to the partnership capital and to divide profits and losses in equal shares, it was found that a larger sum was due from the firm to one partner in respect of capital than to the other. Held, that the partnership assets must be applied, first, in placing the partners on an equality as regards capital, and, secondly, in payment of the costs of the action; and that, if the assets should be insufficient for payment of the costs, the deficiency must be made up by the partners equally. (Ross *v.* White.) 277

PATENTS, DESIGNS, AND TRADE MARKS.

Patent—Contract for sale of patented articles—Threats of legal proceedings—Loss of contract—Injunction—Inquiry as to damages—Measure of damages—Evidence that contract was lost on account of threats—Admissibility.—The plaintiffs, who were manufacturers and patentees of photographic cameras, entered into negotiations with a company for a contract to supply the company with their patent cameras on certain terms. The company's manager before the completion of the contract, wrote to the defendant, also a manufacturer and patentee of photographic cameras, inquiring whether the plaintiffs' camera was an infringement of the defendant's patent; and the defendant wrote in reply declaring the plaintiffs' camera to be an infringement of his patent, and threatening legal proceedings to stop the sale of the plaintiffs' camera. The company then consulted their solicitors, who wrote to the plaintiffs to the effect that the company declined to continue negotiations with them because of the defendant's threats. On the application of the plaintiffs, an injunction was granted restraining the defendant from threatening legal proceedings in respect of the plaintiffs' camera, and an inquiry whether the plaintiffs had sustained any and what damages by reason of the defendant's threats, was directed. The chief clerk found that the plaintiffs had sustained damages from the loss of their contract by reason of the defendant's threats, relying for this finding on the statements in the letter of the solicitors of the company to the plaintiffs and the rest of the correspondence, and adopted, as the measure of the damages, the profit which the plaintiffs would have obtained from the contract if it had been carried out. On a summons by the defendant to vary the chief clerk's certificate: Held, that the letter of the solicitors of the company to the plaintiffs was admissible as evidence to prove that the negotiations for the contract were broken off because of the defendant's threats, and that it was confirmed by the rest of the correspondence. Held, also, that the measure of the damages adopted by the chief clerk was the right measure. (J. H. Skinner and Co. *v.* Perry.) ... ...*page* 110

Patent—Exclusive licence—Power of revocation by licensor—Implied covenant not to revoke.—The defendant, who was the owner of certain patents, by deed granted to the plaintiffs, in Feb. 1891, the exclusive right to use and exercise the patented inventions during the unexpired residues of the terms of the letters patent, or any renewal or extension thereof, and to manufacture, sell, and dispose of the articles manufactured under the letters patent as they should think fit for their absolute benefit. The licence was expressed to be granted in consideration of 150*l.* and certain royalties, and also of the plaintiffs agreeing (*inter alia*) to advertise and push the sale of the inventions, and endeavour to further their success. The deed contained a power for the plaintiffs to determine the licence by giving the defendant six calendar months' notice in writing, but no express power for the defendant to determine the licence. The defendant, being dissatisfied with the plaintiffs for not pushing the inventions sufficiently and for other reasons, began himself to manufacture and sell the articles, subject to the patents, for his own benefit; and in Oct. 1893 sent the plaintiffs written notice purporting to revoke the licence on the ground of their breaches of covenant in not pushing and advertising the inventions, not paying the royalties punctually, and deviating from the specifications in manufacturing the articles. Held, that, having regard to the mutual obligations imposed on the defendant and the plaintiffs by the deed, the intention of the parties was that the licence should not be treated as revocable; and that a covenant must be implied therein not to revoke it until the end of the unexpired residues of the terms of the patents. (Guyot *v.* Thomson.) 124, 416

Patent — Prolongation of patent — Expiration of foreign patent.—The Judicial Committee have not, prior to the passing of the Patents, Designs, and Trade Marks Act 1883 laid down any rule to the effect that where a British patent for a foreign invention precedes any foreign patent, the provisions of sect. 25 of the Patent Law Amendment Act 1852 apply to the case, and therefore a foreign invention first patented in England before the passing of the Act of 1883, may be dealt with under sect. 25, sub-sect. 4, of that Act, on the footing that the Act of 1852 has been repealed as to it. The lapse or expiration of foreign patents are circumstances to be considered in considering the question of the extension of a British patent, but are not conclusive against such extension. (*Re* Semet and Solvay's Patent.) 674

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Patent agent—Registration—Board of Trade Rules—Validity—Action for interdict—Penalty.—The Patents, Designs, and Trade Marks Act 1888, sect. 1, provides (1) that no person shall describe himself as a patent agent unless he is registered under the Act; (2) that the Board of Trade shall make rules for giving effect to the section; (3) that a person *bonâ fide* practising as a patent agent before the passing of the Act shall be entitled to be registered; (4) that an unregistered person describing himself as a patent agent shall be liable to a penalty on summary conviction. The section further provided that the provisions of sect. 101 of the Act of 1883 should apply to the rules so made, which makes them of the same effect as if they were contained in the Act; and provides that they should be laid on the table of both Houses of Parliament. The Board of Trade made rules imposing a registration fee, and an annual fee on all registered patent agents. The name of the respondent, who had *bonâ fide* practised as a patent agent before the passing of the Act, was placed upon the register, but he refused to pay the fees, and his name was removed in accordance with the rules. He still continued to describe himself as a patent agent, and this action was brought to restrain him from so doing, and for an interdict. Held, that the rules were not *ultra vires* the Board of Trade, but in any case (Lord Morris dissenting on this point) their validity could not be questioned in a court of law; but held further, that the right remedy against the respondent was not by proceedings in the Court of Session for interdict, but by summary proceedings for the penalty under the Act. (Chartered Institute of Patent Agents *v.* Lockwood.) *page* 205

Trade mark—Invented word—Geographical name.—The word "Eboline" is not an invented word within the meaning of sub-sect. 1 (*d*) of sect. 64 of the Trade Marks Act 1883, as amended by sect. 10 of the Trade Marks Act 1888, there being a town in Italy called "Eboli," and the word is a geographical name within the meaning of sub-sect. 1 (*e*) of the same section, which sub-section applies not only to the use of the noun substantive, but applies also to the adjectival form of a geographical name. The word "Eboline" cannot therefore be registered. (*Re* Application to Register Trade Mark by Sir Titus Salt, Bart., Sons and Co., Limited.) 386

— Old marks—Change in the name of the firm and removal to new place of business—Leave to amend.—The owner of certain trade marks registered as used before the 13th Aug. 1875 asked for leave to alter them by striking out certain names and addresses and either leaving the spaces blank or filling in the applicant's present firm name and business address. The Comptroller objected so far as it was proposed to leave blanks. The Court gave leave to amend by striking out as proposed, with the substitution proposed by the applicant. (*Re* Brown's Trade Marks.) 156

PHARMACY ACTS.

Sale of poisons—Medicine containing poison—Proprietary medicine—"Patent medicine."—The Pharmacy Act 1868 imposes a penalty of 5*l.* upon any person who sells "poisons" without being duly qualified (sect. 15), and the articles described in the schedule are to be deemed to be "poisons" (sect. 2); and sect. 16 provides that "nothing hereinbefore contained shall interfere with the making or dealing in patent medicines." The defendant, a grocer, sold an ounce bottle of a proprietary medicine which contained one-tenth of a grain of a scheduled poison. The whole bottle, if taken at once by a child in ordinary health, would certainly be injurious and might be fatal, and to an infant would probably be fatal. Held, that a proprietary medicine was not a "patent medicine" within the meaning of sect. 16; and that the defendant had sold a "poison" within the meaning of sect. 15. (Pharmaceutical Society *v.* Armson.) 315

POOR LAW.

Relief—Property of deceased pauper—Claims of guardians for reimbursement—Executor—Right to retain amount of debt out of estate.—Sect. 16 of 12 & 13 Vict. c. 103, provides that, "in the event of the death of any pauper having in his possession or belonging to him any money or property, the guardians of the union or parish wherein such pauper shall die may reimburse themselves the expenses incurred by them in and about the burial of such pauper, and in and about the maintenance of such pauper at any time during the twelve months previous to the decease." Held, that the guardians are ordinary, and not preferential, creditors for the amount claimed by them against the estate of a deceased pauper. S. G. was for several years prior to her death in receipt of outdoor relief from the guardians of the C. Union. The plaintiff was the executor appointed by her will, and after her death directed that her property, consisting of some furniture, should be sold. The plaintiff was a creditor of S. G. in an amount exceeding the proceeds of the sale of the furniture. The guardians of the C. Union claimed to be entitled to so much of the proceeds as would reimburse them for the maintenance of S. G. during the twelve months previous to her death. Held, that the guardians having no greater right than ordinary creditors, the plaintiff, as executor, was entitled to repay his own debt out of the proceeds of the sale. (Laver *v.* Botham and Sons; Guardians of the Poor of the Chesterfield Union, Claimants.) ... ... *page* 570

POOR RATE.

Appeal to sessions—Appearance of assessment committee as respondents—Consent of guardians—Condition precedent—Waiver by appellant—Union Assessment Committee Amendment Act 1864.—Sect. 2 of the Union Assessment Committee Amendment Act 1864 enables an assessment committee to appear as respondents to an appeal to quarter sessions, "with the consent of the guardians of such union, after notice shall have been sent to every guardian." Held, that it is a condition precedent to the appearance of an assessment committee as respondents to an appeal that, after notice had been sent to every guardian they shall have obtained the consent of the guardians to their appearance in that appeal: and if such consent has not in fact been obtained, the appellant cannot waive compliance with the condition precedent so as to enable the assessment committee to be a respondent to the appeal. (Reg. *v.* The Justices of Essex.) 832

Docks—Rateable value—Docks in several parishes—Apportionment—Railway—Prohibition against letting—Hypothetical tenant.—The Hull Dock Company owned and occupied various docks, wharves, and warehouses, forming one system of docks, under one management, situated in several different parishes in the appellant union. Accounts were kept showing the expenses and earnings attributable to the part of the property situated in each parish. Held (affirming the judgment of the court below), that the rateable value of the property in each parish ought to be ascertained upon the principle of taking the profit-earning capacity of the portion of the property in each parish, not by taking the value of the whole property and apportioning it according to the water area of the docks in each parish. The dock company had on their property railway and tramway lines and junctions communicating with the lines of an adjoining railway company, but they were prohibited by statute from letting such lines or from taking tolls in respect of them. Held, that the amount which a hypothetical tenant might have given for such lines, but for the prohibition, ought not to be taken into account in determining their rateable value. (Guardians of Sculcoates Union *v.* Hull Dock Company; Hull Dock Company *v.* Guardians of Sculcoates Union.) 642

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SUBJECTS OF CASES.

Exclusive occupation—Non-rateability of persons to whom dock accommodation is appropriated—Occupation reserved to owners—Licence or demise—Replevin.—An occupation of land which is at all times subject to the control of the owner is not such an occupation as to render the occupier rateable to the poor. (Rochdale Canal Company v. Brewster.)... ... ...page 243

Exemption — Society instituted for purposes of "science, literature, or the fine arts exclusively" —"Supported wholly or in part by voluntary contributions"—Art Union—Distribution of works of art to members of the society by lot.—By 6 & 7 Vict. c. 36 land is exempted from being rated which belongs to a "society instituted for purposes of science, literature, or the fine arts exclusively, and occupied by it for the transaction of its business and for carrying into effect its purposes, provided that such society shall be supported wholly, or in part, by annual voluntary contributions. . . ." The Art Union of London was incorporated as a society for the advancement of the fine arts. Under its bye-laws every subscriber of one guinea became a member of the society for the year, and thereupon became entitled to a copy of one of the annual works of art. Valuable prizes were also given annually to one or more members according to the number of annual subscribers, and a lottery was held by which it was determined which subscriber should be entitled to the work of art given as a prize. A member subscribing ten years without winning a prize in the lottery became entitled to a consolation prize. Held, that the Art Union was entitled to exemption from being rated in respect of the premises occupied by it. (The Art Union of London, apps., v. The Overseers and Chapelwarden of the Royal Precinct of the Savoy, resps.) 40

Liability to rate—Tunnels and drainage works—Exclusive occupation — Easement — Halkyn District Mines Drainage Act 1875 (38 Vict. c. lviii.).—Land may be occupied for the purpose of and in connection with the enjoyment of an easement in such a manner as to make the occupier liable to be rated. Exclusive occupation for the purpose of rating does not mean that no other person has any right on the property, if such joint occupation is subordinate and subject to the regulation and control of the person rated. By a private Act the respondents were empowered to purchase or lease a tunnel and an open cut or watercourse, which a landowner had made for the purpose of draining mines on his land, or an easement or right of drainage through the same. By a subsequent deed the landowner conveyed to the respondents the right to use the tunnels and watercourse, and to extend them, reserving the minerals, and the right to use the tunnels in searching for minerals, and the use of certain shafts, with a covenant to permit him to go down and measure the tunnels and shafts. The respondents put iron tubbing and brick arches in part of the tunnel, and allowed a tramway to be laid down in it. Held, that the respondents had such an occupation of the tunnel and watercourse as to make them liable to be rated in respect thereof. (Assessment Committee of Holywell Union and Churchwardens, &c., of Northop v. Halkyn District Mines Drainage Company; Assessment Committee of Holywell Union and Churchwardens, &c., of Halkyn v. Halkyn District Mines Drainage Company.) 818

Rateable value—Quays—Harbour dues—Dues payable, irrespective of the use of the land to be rated.—The appellants were incorporated by the Blyth Harbour and Dock Act 1882, and were authorised under the Act to levy certain "harbour dues" for every vessel entering or clearing, or remaining within the harbour, and certain "goods dues," in respect of all goods shipped or unshipped, received or delivered within the harbour. The soil of the harbour was not vested in the appellants, but they owned a piece of land adjoining, part of which was excavated so as to be covered with deep water, and part of which was used for the erection of quays. These quays were built under Parliamentary authority. The result of building them was to increase greatly the number of ships using the harbour. The respondents, in rating the appellants in respect of the quays, took into account, as enhancing the rateable value, the harbour and goods dues received by the appellants. Upon a special case being stated: Held, that, as the dues were payable under the Act by all ships entering the harbour, irrespective of any use of the quays, they could not be taken into account in estimating the rateable value of the quays. (The Blyth Harbour Commissioners, apps., v. The Churchwardens and Overseers of the Poor of Newsham and South Blyth and the Assessment Committee of the Tynemouth Union, resps.) ... ...page 34

Valuation list—Valuation of individual hereditaments.—An appeal against "the total of the gross value," or "the total of the rateable value," of a parish under sect. 32 of the Valuation (Metropolis) Act 1869 cannot be preferred on the ground that the valuation of individual hereditaments is incorrect. (London County Council v. Assessment Committee of St George's, Hanover-square.) 409

POWER.

Joint appointment—Power of revocation—Revocation and new appointment by survivor.—A marriage settlement gave the husband and wife a power of appointment among the children of the marriage during their joint lives by deed with or without power of revocation and new appointment, and in default of and subject to such joint appointment, then as the survivor should, after the decease of the other, by deed or will appoint. The power was exercised by the husband and wife jointly by a deed, which provided that "the appointments made by these presents are made subject to the power of revocation and new appointment mentioned in the hereinbefore recited indenture, *i.e.*, the settlement. Held, that, after the death of the wife, the husband could effectually revoke the joint appointment and make a fresh appointment. (*Re* Harding; Harding v. Harding.) 269

PRACTICE.

Action commenced in Mayor's Court—Writ of prohibition—Want of jurisdiction — Appearance by defendant — Waiver of objection. — Where an action has been commenced in the Mayor's Court the defendant does not, by entering appearance, not under protest, and taking other steps, waive his right to object to the jurisdiction so soon as he ascertains exactly what the nature of the plaintiff's claim against him is. Decision of the Lord Chief Justice (Lord Russell) reversed. (Lee v. Cohen.)... 824

Appeal—Order on summons to review taxation—High Court or Court of Appeal—"Matters of practice and procedure." —An appeal from an order made on a summons to review taxation of a solicitor's bill of costs is within sect. 1, subsect. (4) of the Supreme Court of Judicature (Procedure) Act 1894, it being a "matter of practice and procedure"; and therefore such an appeal lies to the Court of Appeal, and not to the High Court. (*Re* Herbert F. Oddy, a Solicitor.) 861

—— Time—Final judgment—Judgment passed and entered.—Rule 27 (1) of the Rules of Court, Nov. 1893, which limits the time for appealing against a final judgment to three months, is not retrospective, and does not apply to a judgment passed and entered before the rule came into operation. (Budgett v. Budgett.) 411

Bill of sale—Consent to satisfaction—Memorandum of satisfaction—Affidavit to verify signature and consent—Deponent not a solicitor.—On an application in respect of a bill of sale having been made to a master in chambers for his direction to enter a memorandum of satisfaction of the bill, it

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appeared that the affidavit of verification of signature and consent, although there were no special circumstances, was made by a person who was not a solicitor. Held, that the mere fact that the deponent of the affidavit is not a solicitor is not of sufficient reason for refusal to enter satisfaction. (*Re* A Bill of Sale; White *v.* Rubery.)*page* 614

Chambers—Motion to discharge order—Appeal—Rehearing—Jurisdiction.—There being no provision in the Supreme Court of Judicature (Procedure) Act 1894, taking away the right of a judge of the Chancery Division to hear a motion to discharge an order made in chambers, the court still has jurisdiction to hear such a motion; the court, however, should discourage such motions with a view to avoiding increase of costs. (Boake, Roberts, and Co. *v.* Stevenson and Howell.)... ... 722

Contempt—Attachment—Notice of motion—Service of copies of affidavits with notice of motion—Proof of service—Order LII., r. 4.—A notice of motion for attachment for disobedience to an order for payment of money into court did not specify the affidavits which were intended to be used on the hearing of the motion, and no evidence was adduced at the hearing that a copy of the affidavit of service of the order had been served with the notice of motion. Held, that the notice of motion was irregular, since it did not appear that copies of the affidavits had been served with the notice of motion. (*Re* Dunning; Sturgeon *v.* Lawrence.) 57

Costs—Delivery of bill—Common order—Bill sent for other purpose—Draft bill of plaintiff's costs sent to defendant's solicitor to enable him to agree costs as part of compromise of action.—On the 3rd Aug. 1894, R. P. commenced an action against W. P., his son and partner, for dissolution of partnership. Notice of motion for a receiver was given, but stood over pending negotiations for a settlement until the 22nd Aug. A draft agreement for settlement was sent on the 15th Aug. by the plaintiff's solicitors to the defendant's solicitors, containing among other clauses the following: "The cost of the action and of this agreement and of the notice of dissolution for the *London Gazette*, shall be paid by W. P. On the 17th the plaintiff's solicitors sent to the defendant's solicitors a draft bill of costs for 48*l.* 19*s.*, with an explanatory letter saying that they were sent in order that the defendant's solicitors might peruse them before completion, and the amount agreed upon might be inserted in the agreement. On the 21st Aug. the parties and their solicitors met, and the agreement was signed by the plaintiff and defendant with the words "Such costs being agreed at 45*l.*" added at the end of the draft clause set out above. The action was abandoned according to the agreement, and on the 27th Aug. W. P. obtained the common order to tax the bill so delivered. The plaintiff's solicitors moved to discharge this order. It was alleged at the hearing of the motion that the amount was agreed under pressure. Held, that the sending the bill under the circumstances stated was not a delivery of a bill within the meaning of the Attorneys and Solicitors Acts, and that, whatever might have been W. P.'s rights to have a bill delivered and taxed on a special application, he was not entitled to the common order to tax, and this order must be discharged with costs. (*Re* Hulbert and Crowe, Solicitors) 748

County Court—Appeal—Absence of judge's note—Shorthand notes—Costs of obtaining.—On an appeal from a County Court on the ground of misdirection, and where it was impossible for counsel to ask the judge to take a note under sect. 121 of the County Courts Act 1888, as the point of law did not arise until after all the evidence had been taken, and the summing up was completed, the appellant obtained and made use of a transcript of a shorthand note of the proceedings taken on the trial of the action. The appellant was successful, and on his application to be allowed the costs of such shorthand note, the Court held that under the circumstances such costs ought to be allowed to him. In general, however, and in ordinary cases, so much only of the shorthand notes as is relevant to the case of the party who applies for them, and is reasonably necessary for the purpose of the appeal, ought to be allowed. (Barber *v.* Burt and others.) ... ...*page* 295

County Court—Collision—Mode of trial—Jury or assessors—County Courts Admiralty Jurisdiction Act 1868, ss. 10, 11, 34—County Courts Act 1888, s. 101.—In an Admiralty cause of collision in a County Court, where one party asks for a jury and the other demands assessors, the trial must be by judge and assessors. (Kelly and Hardy *v.* The Isle of Man Steam Packet Company Limited; *The Tynwald.*)... 731

—— Default summons—Affidavit in support of—Assignee of debt.—In an action in a County Court, to recover a sum of money for goods sold and delivered, the plaintiffs took out a default summons under sect. 86 of the County Courts Act 1888, and at the hearing it appeared that the plaintiffs claimed as assignees of the debt. An affidavit of the defendant's indebtedness was sworn by one of the plaintiffs according to Form 14 B. The learned judge thereupon struck out the case, holding that sect. 86 of the abovementioned Act did not apply to a case where the debt had been assigned, and that the affidavit was insufficient. Leave was given to the plaintiffs to issue an ordinary summons. This they did not do, but they obtained a rule *nisi* for a *mandamus* to hear and determine, &c. Held, that the County Court judge had not declined jurisdiction, (Reg. *v.* The Judge of the Pontypool County Court and Tompkins.) 17

Discovery and inspection of documents—Entries in bankers' pass-books—Affidavit of documents disclosing pass-books—Inspection of bankers' books—Jurisdiction to order—Bankers' Books Evidence Act 1879 (42 Vict. c. 11), s. 7.—Where a plaintiff makes an affidavit of documents to which he schedules his banker's pass-books, the defendant is not debarred from obtaining inspection, under sect. 7 of the Bankers' Books Evidence Act 1879, of the entries in the banker's books. (Perry *v.* The Phosphor Bronze Company Limited) 854

Evidence—Commission—Examination of defendant resident abroad—Application by defendant.—In the exercise of its discretion to grant or refuse a commission to take evidence abroad, the Court has regard to the fact that there is a material difference between a foreign plaintiff and a foreign defendant; and where a defendant was resident in Canada, an application by him to have his evidence taken in that country was, under the circumstances, allowed. (New *v.* Burns.)... 681

—— Documents produced by witness not party to proceedings—Putting in documents *en bloc* or *seriatim*—Referee's report—Motion to vary for rejection of evidence—New trial, analogy of.—Where documents are produced by a witness who is not a party to the proceedings, the proper course is for an adjournment to be made to enable the parties to ascertain which of these documents are material. The parties are not entitled to put in the whole of the documents *en bloc*, or to ask the witness to produce the documents *seriatim*, and question him thereon. (*Re* The Maplin Sands.) 56, 594

—— Evidence taken in another cause or matter—Notice to read such evidence—When such evidence can be read.—Order XXXVII., r. 3, provides that, "an order to read evidence taken in another cause or matter shall not be necessary, but such evidence may, saving all just exceptions, be read on *ex parte* applications by leave of the court or a judge, to be obtained at the time of making any such application, and in any other case upon the party desiring to use such evidence giving two days' previous notice to the other parties of his intention to read such evidence." This rule does not make that evidence which would not before have been evidence, but only does away with the necessity for a formal order in cases in which an order to read evidence taken

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in another matter would formerly have been made; that is, where the issue was the same, and the proceedings were between the same parties or their privies. (Printing and Telegraph Company v. Drucker.) ... ...*page* 172

Examination of judgment debtor—Conduct money—Refusal to answer questions—Writ of attachment—Copies of affidavits not served on respondent—Waiver of objection.—A judgment debtor who attends to be examined as to his means to satisfy the judgment is not entitled, under Order XXXVII., r. 9, to conduct money as a witness, but is entitled to a reasonable allowance for expenses. An order giving leave to issue a writ of attachment may, under some circumstances, be made, though copies of the affidavits to be used in support of the application have not been served upon the respondent. (Rendell v. Grundy.) 564

Order passed and entered—Jurisdiction to rehear—Misrepresentation—Mistake of fact.—When an order has been perfected there is no jurisdiction to rehear the matter, and make a new order or alter the former one, although the order is wrong by reason of some misrepresentation or mistake of fact.—An order was made in a debenture-holders' action that the property comprised in the debentures should be sold out of court, and one of the debenture-holders afterwards applied that the sale and other proceedings under that order should be carried out under the direction of the court. The application was granted subject to L. paying 250*l.* into court as security for the costs, in default of which the application was ordered to be dismissed with costs. L. did not pay in the money. On the sale of the property a sum was available for distribution among the debenture-holders, and L. then applied that, notwithstanding that order, the costs directed to be paid by him should be costs in the action, and that all further proceedings under the order should be stayed on the ground that when the order was made there had been misrepresentation as to the value of the assets. Held, that there was no jurisdiction to alter the former order and to make the order asked. (Preston Banking Company v. Allsup and Sons Limited.) 708

Parties—Joinder of plaintiffs—Different causes of action—Order XVI., r. 1—Order XVIII., rr. 1 and 2.—Order XVI., r. 1, deals only with the parties to an action, and has no reference to the joinder of several causes of action. The several shippers or consignees of different shipments of goods shipped on board the same ship for carriage from and to the same places, joined as plaintiffs in one action against the shipowners on the bills of lading claiming damages for short delivery. Held, that they were not entitled so to join under the Judicature Rules. (Smurthwaite and others v. Hannay and others.) 157

—— Non-joinder of defendant—Joint contractor who cannot be found — Staying proceedings until joinder—Discretion of court—Order XVI., r. 11; Order XXI., r. 20.—One of two joint contractors, who is sued alone, has not an absolute right to have the other joint contractor joined as a defendant; and though as a general rule, when they are both within the jurisdiction, an order ought to be made that they shall both be joined as defendants, yet the court or judge will properly refuse, in the exercise of their discretion, to make such an order when one of them cannot be found by the plaintiff. (Robinson v. Geisel and others.) 70

Payment into court—Admission as to possession of money.—The practice, as settled in *Freeman* v. *Cox* (8 Ch. Div. 148) with reference to what constitutes an admission by a defendant that he has money in his hands for which he is liable to account to the plaintiff, on which he will be ordered on an interlocutory application to pay it into court, will not be extended. (Neville v. Matthewman.) 282

—— Money for which trustee liable, but not actually in his hands.—Money cannot be ordered to be paid into court under Order LV., r. 3 (*d*), unless it is actually in the hands of an executor, administrator, or trustee, and it is not sufficient that he is responsible for it, and that it ought to be in his hands. (Nutter v. Holland.) ... ...*page* 508

Payment into court—Verdict for sum less than that paid into court—Power of judge to order balance to be paid to the defendant—Order XXII., r. 5.—Order XXII., r. 5, provides that when the liability of the defendant, in respect of the claim or cause of action in satisfaction of which payment into court is made, is not denied in the defence, the money paid into court shall be paid out to the plaintiff "unless the court or judge shall otherwise order." In an action of slander, the defendant paid money into court, and his liability was not denied in the defence. At the trial the jury gave a verdict for the plaintiff for one farthing. The judge ordered that amount to be paid out of court to the plaintiff and the balance to be paid out to the defendant. Held, that the judge had power to make the order. (Gray v. Bartholomew.) 867

Payment of money into court by plaintiff in satisfaction of defendant's counter-claim—Order XXII., r. 4—Supreme Court Funds Rules 1886, r. 30—Printed form of request for lodgment of money.—The plaintiff in an action desired to pay a sum of money into court in satisfaction of a claim made in two paragraphs of the defendant's counter-claim, but the Paymaster-General refused to issue the necessary direction to the Bank of England to receive the money on the ground that the printed form of request for lodgment of money authorised for use in the pay office did not contain any statement applicable to the circumstances of the case. On a motion *ex parte* on behalf of the plaintiff for directions as to the payment of the money into court: Held, that the plaintiff was entitled to make the payment into court, and that a statement which was applicable to the circumstances of the case should be inserted in the printed form of request. (Hutchinson v. Barker.) 625

Remitting action to County Court—Action of contract—Counter-claim for unliquidated damages—Jurisdiction to remit.—An action of contract in the High Court, in which not more than 100*l.* is claimed, may be remitted to the County Court, under sect. 65 of the County Courts Act 1888, though a counter-claim for unliquidated damages is set up by the defendant. (Guilford v. Lambeth.) 256, 738

Stop-order—Effect of—Stop-orders against share of person interested in income only containing no words referring to income—Certificates of paymaster-General treating stop-orders as affecting capital only—Mortgage not disclosing prior settlement—Stop-order by mortgagees—Priority.—The court may, applying the principle of *Macleod* v. *Buchanan* (10 L. T. Rep, 9; 4 De G. J. & Sm. 265) look at that which appears on the face of a stop-order and construe the stop-order in a way which will not render it a nullity The object of obtaining a stop-order is to give effectual notice not to an officer of the court, but to the court itself. Where no person has been misled by the paymaster's certificates based on a mistaken view of the effect of a stop-order and no questions of gravity and difficulty have arisen in consequence of such certificates or order, the court is at liberty to give effect to the stop-orders according to their true construction. In view of the practice in the Paymaster-General's office of regarding stop-orders on funds in court as not affecting income where income is not mentioned on the face of the stop-orders, care should be taken in drawing up stop-orders to express on the face of them plainly what it is, whether capital or income, which is to be restrained, and where the operation of stop-orders is not so limited they should be treated at the paymaster's office as extending both to capital and income. (Mack v. Postle.) 153

—— Interlocutory or final order—Summons in administration action—Order for payment to annuitant under will. — In the course of an action to administer the estate of a deceased testatrix, in which further consideration had been

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adjourned, the plaintiffs, the executors and trustees of the will, took out a summons asking that they might be at liberty to make certain payments, out of moneys in their hands, to one of the annuitants, on account of his interest under the will. North, J. acceded to the application. Held, that the order of North, J. was interlocutory and not final; and that, therefore, an appeal from it, not being brought within fourteen days, was too late, and must be dismissed with costs. (*Re* Gardner; Long *v.* Gardner.)... ...*page* 412

Vacation business—Appeal—Interlocutory proceeding—Order of single judge of Court of Appeal—Motion to discharge or vary.—An application to the Court of Appeal to discharge or vary an order made under sect. 52 of the Supreme Court of Judicature Act 1873 is not an appeal within the meaning of sect. 1 of the Supreme Court of Judicature (Procedure) Act 1894, and consequently leave to appeal is not required. (Boyd *v.* Bischoffsheim.) 531

Writ—Service out of the jurisdiction — Amendment of claim.—The indorsement on a writ for service out of the jurisdiction issued under Order XI. can be amended under Order XXVIII. (Holland *v.* Leslie.) 33

—— Service out of the jurisdiction — Concurrent writ—Application for leave to serve concurrent writ—Evidence in support—Application before service of original writ—Service of incorrect copy of concurrent writ—Necessary parties—Separate relief against defendant out of the jurisdiction. —A person entitled to a share of property in Canada, which was vested in a trustee resident in Canada, mortgaged his interest, and subsequently became bankrupt. The trustee in bankruptcy brought an action against the mortgagees, and the Canadian trustee, claiming as against the mortgagees an account and redemption of the mortgage, and as against the trustee that he might be directed to pay the amount found due to the mortgagees, and for an account. The plaintiff obtained leave to issue a concurrent writ for service upon the Canadian defendant; the application for leave was made before service of the original writ upon the defendants within the jurisdiction, and the affidavit in support did not state that the Canadian trustee was a necessary or proper party to the action, or that the plaintiff had a good cause of action against him. The copy of the concurrent writ which was served upon the Canadian defendant was not marked "concurrent." Held, that the defendants within the jurisdiction should have been served before the application for leave to serve the writ out of the jurisdiction was made; that the application was not supported by proper evidence; that the copy of the writ served upon the Canadian defendant was not a true copy. Held, that the Canadian defendant was not "a necessary or proper party" to the action against the mortgagees, since the action claimed separate relief against the different defendants. Held, therefore, that the order giving leave to serve the concurrent writ must be discharged, and service of the writ on the Canadian defendant must be set aside. (Collins *v.* North British and Mercantile Insurance Company.) ... 58

—— Service out of the jurisdiction — Defendant resident in Scotland — Action of tort — Co-defendants within the jurisdiction — Discretion —Comparative cost and convenience—Order XI., rr. 1 (g), 2, 4.—By Order XI., r. 1 (g), service out of the jurisdiction of a writ of summons may be allowed whenever "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction." In an action of tort, in respect of the issuing of an alleged false and fraudulent prospectus, which was brought against three defendants, two of whom resided within the jurisdiction, but the third was resident at Edinburgh: Held that, under the circumstances of the case, and considering the comparative cost and convenience of all parties to the action, the action was one in which service on the defendant who resided at Edinburgh ought to be allowed. (Williams *v.* Cartwright and others.) ... ...*page* 834

Writ—Special indorsement—Informality or omission—Amendment after summons for judgment.—Where a special indorsement on a writ is defective by reason of some omission or informality, it may be amended without leave under Order XXVIII., r. 2, and the court has jurisdiction to give judgment under Order XIV., although the summons for judgment was taken out before such amendment was made. (Roberts *v.* Plant.) 878

PRINCIPAL AND SURETY.

Co-sureties—Contribution—Bankruptcy of one co-surety—Payment of whole debt by and assignment thereof to other co-surety—Proof for whole debt —Mercantile Law Amendment Act (19 & 20 Vict. c. 97), s. 5.—A surety who has paid off the whole debt and taken an assignment thereof from the creditor, is entitled to prove in the bankruptcy of his co-surety for the full amount of the debt, but cannot receive more by way of dividends than the proportion of the whole debt which his co-surety is bound to contribute. One of three co-sureties executed a deed of assignment in favour of his creditors. The principal debtor, a company, went into liquidation, and the creditor sent in a claim against the estate of the bankrupt surety. The two other co-sureties paid off the principal creditor, and took an assignment of the whole debt and the benefit of the creditor's claim against the bankrupt co-surety. Held, that the solvent co-sureties were entitled to prove against the estate of the bankrupt co-surety for the whole amount of the debt, but not to receive dividends amounting to more than the proportion of the whole debt for which the bankrupt co-surety was liable, namely, one-third. (*Re* Parker; Morgan *v.* Hill.) 327, 557

Discharge of surety—Giving time—Covenant to indemnify retiring partner—Overdraft at bank.—The general principle of equity, that where there is a contract with a principal and a surety, and time is given to the principal without the assent of the surety, and without reserving the rights of the creditor against him, the surety is released, applies to a case where the parties who, as between themselves, have become principal and surety, were originally both principal debtors to the creditor. Where a person had become surety to a bank for an overdraft to an agreed amount, the fact that the bank agreed with the principal to allow him to increase his overdraft beyond the agreed amount for a limited time: Held, not to be such a giving of time to the principal as would discharge the surety, the bank's rights in respect of the original overdraft not being affected. A bank which has agreed to give an overdraft cannot refuse to honour cheques, within the limit of that overdraft, which have been drawn and put into circulation before any notice has been given to the drawer that the limit is to be withdrawn. (Rouse *v.* Bradford Banking Company Limited.) 522

PUBLIC HEALTH ACTS.

Liability for paving, &c., expenses—"Owner"—Soil of turf common vested in lord of manor, subject as regards surface to charitable trusts.—By the Public Health Act 1875, s. 4, "owner" is defined to mean "the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would receive the same if such land or premises were let a rack-rent." By sect. 150 the expenses incurred by a local authority in sewering, levelling, paving, &c., a private road are made recoverable from the "owners" of the land abutting on such road. By an Inclosure Act and an award made thereunder, the soil of a common was vested in the lord of a manor, subject to certain rights of turbary in favour of certain cottages, which rights had been

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held by the court to constitute a charitable trust. Held, that, notwithstanding the lord of the manor was prevented by the Inclosure Act from letting the common at a rack-rent, he was "owner" thereof within the meaning of sect. 4, and therefore liable under sect. 150 to contribute to the expenses incurred by the local authority in making a road upon which the common abutted. (*Re* Christchurch Inclosure Act; Meyrick *v.* Attorney-General.) ... ... *page* 122

Sanitary authority—Non-performance of statutory duty—Penalty—Liability of sanitary authority to action for damages.—By sect. 29 (1) of the Public Health (London) Act 1891 the duty of sweeping and cleansing the streets, and removing all street refuse, so far as is reasonable and practicable, is imposed upon the sanitary authority; by sect. 29 (2) the sanitary authority is liable to a penalty for non-performance of this duty. The plaintiff sued the defendants to recover damages for injuries sustained by her through the non-removal of snow within the defendants' district. Held, that the duty imposed upon the defendants was created solely by the statute, and that there was nothing in the statute to show that the defendants were intended to be liable otherwise than in a penalty for the non-performance of the duty, and that the action therefore was not maintainable. (Saunders *v.* The Holborn District Board of Works.) 519

Unsound food—Fruit sold wholesale—Sale in bulk under condition that unsound portion be destroyed—Liability to seizure in hands of retail dealer—Questions for magistrates and jury—*Bona fides* of sale—Public Health (London) Act 1891.—In order to convict a person under sub-sect. 3 of sect. 47 of the Public Health (London) Act 1891, of having sold for the food of man an article unfit for the food of man, it is necessary to prove that the article, at the time it was found in the purchaser's possession, was liable to be seized for one or other of the reasons stated in sub-sect. 1 of the section. That is to say because being diseased, unsound, unwholesome, or unfit for the food of man, it was exposed for sale or deposited in some place over which the purchaser had control for the purpose of sale or preparation for sale. Further, assuming such facts to be proved, it is a question for the magistrates or jury, having regard to all the circumstances of the sale, to say whether or not the article was intended for the food of man by the defendant when sold by him; and whether, if it was represented at the time of sale not to be so intended, such representation was made *bonâ fide*, (Reg. *v.* Dennis.) 436

RAILWAY AND CANAL COMMISSION.

Jurisdiction — Removal of a railway station — "Reasonable facilities for the receiving and forwarding and delivering of traffic"—Rebuilding of new station—Station not in actual use—Railway and Canal Traffic Act 1854.—A railway company ceased to use one of its branch lines for passenger traffic, and pulled down a station which had formerly been in use by passengers on the line. No obligation to maintain the station in use was imposed on the company by any of its private Acts of Parliament. Upon an application being made to the Railway and Canal Commissioners about five years afterwards, they ordered the company, under sect. 2 of the Railway and Canal Traffic Act 1854, to afford reasonable facilities for the receiving and forwarding and delivering of passenger traffic on the line in question. The company appealed. Held, that the order was, in effect an order to the company to build and open a new station, and that the jurisdiction of the commissioners to order a railway company to afford "all reasonable facilities," under sect. 2 had reference only to a railway or a station in actual use. The commissioners therefore had no jurisdiction to order a new station to be built. (The Darlaston Local Board *v.* The London and North-Western Railway Company.) 461

RAILWAY COMPANY.

Arches underneath permanent way—Temporary letting of interiors of arches for purpose of profit—Implied powers.—Any mode of user by a railway company of its own land is permissible so long as it is not inconsistent or incompatible with the business for which compulsory powers have been intrusted to them by the Legislature, and is not prejudicial to the legal rights of others. There is nothing to prevent a railway company from temporarily letting (with power to resume possession on short notice) the interiors of their arches in order to produce a profit to themselves, provided that such a course does not interfere with the use of their railway. (Foster *v.* The London, Chatham, and Dover Railway Co.)...*page* 855

Bye-law—Invalidity of bye-law—Passenger travelling with a ticket on the day on which ticket was not available—No intention to defraud—Penalty provided by bye-law.—The bye-law of a railway company provided that, "any passenger using, or attempting to use, a ticket on any day for which such ticket is not available, or using a ticket which has been already used on a previous journey, is hereby subjected to a penalty not exceeding forty shillings." No fraud, or attempt to commit fraud, was alleged or suggested against the appellant. The justices convicted the appellant under the above bye-law. Held, that the above bye-law, being repugnant to sect. 5 of the Regulation of Railways Act 1886, is an invalid one, and the conviction therefore must be quashed. (Huffam, app., *v.* North Staffordshire Railway Company, resps.) 517

Damage to undertaking—Debenture-holders' action—Receiver—Power of receiver to borrow—Emergency—Preservation of property—First charge on assets of company—Sanction of court—Jurisdiction—Order XVI., r. 9.—The Court has jurisdiction to empower the receiver appointed in a debenture-holders' action to borrow money as a first charge on the assets of the company, in priority to the debentures, where such a course is necessary for the preservation of the property of the company in a case of emergency. (Greenwood *v.* The Algesiras (Gibraltar) Railway Company. The Same *v.* The Same.) 133

Enactment as to rate at which one company shall forward traffic of another—Complaint as to overcharge—Jurisdiction of court to entertain.—By the special Act of the B. Railway Company it was enacted that the T. Railway Company should forward and afford all reasonable facilities for goods and mineral traffic destined for or coming from the undertaking of the B. Railway Company from or to certain specified places at rates per mile not greater than the lowest rate which should for the time being be charged by the T. Railway Company for like traffic to or from certain other specified places. It was further enacted that, if at any time, on application made by the B. Railway Company to the Railway Commissioners sitting as arbitrators, the said Commissioners should decide that the T. Railway Company had failed to give any of the facilities therein provided, the B. Railway Company should have running powers over the lines of the T. Railway Company. Held, that there was nothing to oust the jurisdiction of the court to entertain the complaint of the persons aggrieved by an overcharge; and that neither the special Act nor the Railway and Canal Traffic Act 1888 conferred upon the Railway Commissioners exclusive jurisdiction. (The Barry Railway Company *v.* The Taff Vale Railway Company.) 688

Negligence—Duty to passenger—Refusal to stop train—Overcrowding—Robbery of passenger.—It is not the legal duty of a railway company to delay a train in order to give a passenger who has been robbed the opportunity of giving the alleged thief into custody. The appellant was a passenger by the respondents' railway. While the train was at a station a gang of men forced their way into the carriage in which the appellant was seated, and assaulted and robbed him. The appellant

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complained to the station-master, and asked him to detain the train in order that the police, of which there was a sufficient force in the station, might take the men into custody and search them. The station-master refused to do this, and started the train. If the men had been arrested and searched at once, the property might have been recovered. The appellant brought an action against the company alleging negligence in not delaying the train, and in allowing the carriage to be overcrowded. Held, that the statement of claim disclosed no cause of action on either ground. (Cobb *v.* The Great Western Railway Company.) ... ...*page* 161

New company—Covenant to make and construct, and afterwards to maintain accommodation works—Personal service—Specific performance—Lostwithiel and Fowey Railway Act 1892.—In 1873 a landowner conveyed certain lands to the L. Railway Company for the purpose of their Act, and the company thereby covenanted to execute specified accommodation works, and to perform certain services, namely, to convey to and deposit on wharves connected with the railway timber and other produce from a wood belonging to the landowner. The L. Company took possession of the lands and made their railway. In 1892 the undertaking was by Act of Parliament transferred to the C. Railway Company "subject to the contracts obligations, debts, and liabilities of" the L. Company. The accommodation works were allowed by the landowner to remain unmade without objection, but the present tenant for life brought an action against the two companies to compel specific performance of the covenants. Held, that sect. 6 of the Act of 1892 meant that the C. Company were to take the property and undertaking of the L. Company, and to perform the contracts and obligations, and satisfy the debts and liabilities, dealing not with the L. Company but directly with the covenantees; that there was a continuing liability which could be specifically performed; and that the covenant for conveyance and deposit of the produce of the wood being part of a larger contract, might be ordered to be specifically performed. Declaration, that the covenants ought to be specifically performed by the C. Company, nothing being said about the L. Company's costs, the costs of the plaintiff to be paid by the C. Company. (Fortescue *v.* Lostwithiel and Fowey Railway Company and others.) 423

Notice to treat—Purchase of surface and minerals except coal—Right of owner to work coal—Compensation—When to be made.—In the case of a notice under the Railway Clauses Act 1845, to treat "for the purchase of land, and the stone, sand, clay, and gravel, within or under the same," but excepting coal, the owner of the coal is not entitled to claim present compensation in respect of the coal; he may get his coal subject to the due protection of the railway undertaking on the surface, and if such due protection prevents his working the coal, or renders it more costly, he is then entitled to compensation, but not before. Sects. 77 and the following sections of the Railways Clauses Act 1845 apply not merely where no mines and minerals are taken by the railway company with the land, but also in every case in which the railway company has purchased with the land certain specified subjacent minerals, but has left the others to the owner. (*Re* The London and North-Western Railway Company and Lord Gerard.) 548

Railway passenger—Injury to—Negligence—Misfeasance—Liability of railway company—Action founded on contract or tort—Costs.—Where a passenger contracts with a railway company by taking a ticket entitling him to be carried on a given journey, and he is injured thereon by a misfeasance for which the company are liable, an action brought by the passenger in the High Court of Justice is founded upon tort and not upon contract, within the meaning of sect. 116 of the County Courts Act 1888, and he can recover his full costs if the verdict be for 20*l.* and not merely costs on the County Court scale. (Taylor *v.* The Manchester, Sheffield, and Lincolnshire Railway Company.) ... ...*page* 596

RATING.

Appeal against poor rates—Costs—Service of notice of appeal on both churchwardens and overseers and assessment committee—Appearance of both parties as respondents—Liability of unsuccessful appellant to two sets of costs—Union Assessment Committee Amendment Act 1864.—An unsuccessful appellant, who has been ordered to pay the respondent's costs in an appeal to quarter sessions against a poor rate, is not, in the absence of special reasons, liable to pay two sets of costs, although he has served notice of appeal on the churchwardens and overseers of the parish, and also on the assessment committee of the union, as required by sect. 1 of the Union Assessment Committee Amendment Act 1864, and although these two parties have appeared as respondents. Accordingly, where notices of such appeals were served both on the assessment committee and on the churchwardens and overseers, and both the assessment committee and churchwardens and overseers appeared as respondents, and where the appeals were, at the request of the appellant and with the consent of both sets of respondents, respited from sessions to sessions to abide the result of one appeal, and were finally by consent dismissed with costs to the respondents, it was held that the appellant, who had already paid the costs of the churchwardens and overseers, was not liable to pay the costs of the assessment committee, as there was only one question of principle involved in each appeal, and therefore two sets of costs ought not to be allowed as against the appellants. (Reg. *v.* The Justices of Essex; *Ex parte* The West Ham Assessment Committee.) ... 296

Lighting and Watching rate—Land—Coal mines—Property other than land—43 Eliz. c. 2, s. 1.—Coal mines are property other than land rateable to the relief of the poor under the statute 43 Eliz. c. 2, and are, therefore, liable to be rated at the higher rate imposed on such property by the Lighting and Watching Act 1883. Judgment of the court below affirmed. (Thursby and another *v.* Churchwardens, &c., of Briercliffe with Extwistle.) 849

Rateable hereditament—River formed into a canal with new cuts and channels—Towing-path—Exclusive occupation—Ownership.—By virtue of certain private Acts of Parliament the respondents, and their predecessors in title, were empowered to scour, enlarge, and deepen a certain river, and to do other acts necessary for improving the navigation, and to make new channels by means of artificial cuts, and to set out towing-paths, and to keep them in repair. Held, that the respondents were not rateable either in respect of the natural bed of the river, or of the towing-paths, it not being shown that they had either the ownership or the exclusive occupation of such paths. (Assessment Committee of Doncaster Union *v.* Manchester, Sheffield, and Lincolnshire Railway Company.) 585

RECEIVER.

Order to pay to creditors—Payment to solicitor of creditors—Defalcation by solicitor—Liability of receiver.—A judgment having been obtained against the defendant, and other actions having been commenced against her, a receiver of her property was appointed. The order appointing the receiver directed him to receive an annuity to which the defendant was entitled, and in the first place to pay the sum of 1*l.* per week to the defendant, and then to pay to the plaintiffs the amount of their judgment debt, and, after satisfaction of such judgment debt, to pay *pari passu* any debts owing by the defendant to other creditors. The receiver paid the weekly sum to the defendant, but handed over the balance of the amount received by him to the solicitor who had

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acted for the plaintiffs in the actions against the defendant, and who also acted as private solicitor to the receiver himself. The solicitor appropriated the money so paid to his own use. Held, that the receiver must refund the money paid to the solicitor, as he had not complied with the order directing him to pay the amounts received by him to the plaintiffs. (Ind, Coope, and Co. Limited *v.* Kidd; Aitcheson and Co *v.* Same.) *page* 203

RECEIVER AND MANAGER.

Receiver and manager appointed by court—Liability upon contracts.—A receiver and manager of a business, appointed by the court, is personally liable upon contracts made in the course of carrying on the business, unless such contracts were made upon the terms that he should not be personally liable. (Burt and others *v.* Bull and another.) 810

RECOGNISANCE.

Receiver of rents and profits of real estate—Sureties—Extent of liability. Upon the appointment of a receiver of the rents and profits of the real estate of a testator, a recognisance in the usual form was entered into by him with two sureties. The receiver insured the buildings on part of the real estate in his own name, as receiver, and was allowed the premiums paid in respect thereof on passing his accounts. A fire having occurred, he received the insurance money and misapplied a portion of it. He also received the dividends on a sum of consols representing the proceeds of sale of real estate, and which was liable to be laid out in the purchase of other real estate, for which he had not fully accounted, and he also received out of court a sum of money forming part of the testator's personal estate to be applied in repairs of the real estate, part only of which was so applied, and the balance was unaccounted for. The receiver having absconded, the sureties were held liable for the several sums so received by the receiver, and not accounted for, there being no equity for relieving the sureties in respect of any such sums. (*Re* Graham; Graham *v.* Noakes.) 623

RESTRICTIVE COVENANT.

Construction—Baker's shop - Restaurant—"Similar business." The lessee of certain premises covenanted that he would not carry on there the business of a keeper of a restaurant similar to that carried on by the tenant of a certain public-house to which a fully licensed restaurant was attached. For some time the lessee carried on the business of a refreshment house, including the sale of cold meat, without any objection from the lessors. He then assigned the lease to the defendant, who, in addition to the articles formerly sold, commenced selling soups, entrées, hot meats, and vegetables. The defendant had no licence, and his establishment presented the appearance of a confectioner's shop. Held, that the defendant was carrying on a similar business within the meaning of the covenant, but that he was at liberty to carry on business in the same way as his assignor. (Drew *v.* Guy.) 220

RIGHT OF WAY.

Closed by Act of Parliament—Repeal by subsequent Act—Effect of—Injunction.—By virtue of an Act of Parliament passed in 1819, and which was to be in force for a limited period, certain roads and bridle-paths were stopped up and discontinued, in order that a new turnpike road might be made; and the sites of the old roads and bridle-paths were vested in the adjoining owners, in exchange for the lands given by them for the purposes of the Act. The Act of 1819 was repealed by an Act of 1856. Held, that there was no reviver of the old roads and bridle-paths, which were intended to be stopped for ever by the Act of 1819. (Gwynne *v.* Drewitt.) 100

SALE OF GOODS.

Hiring agreement—Delivery by hirer to auctioneer for sale—Receipt in good faith and without notice—"Delivery under any agreement for sale"—"An agreement for sale, pledge, or other disposition thereof"—Factors Act 1889.—N. obtained possession, under a hiring agreement, of a piano the property of the plaintiffs. The agreement provided that on the payment by N. to the plaintiffs of a certain sum by monthly instalments, the piano was to become the property of N. After paying some of the monthly instalments, but before the whole sum had been paid, N. delivered the piano to the defendant, an auctioneer, for sale by auction. The defendant sold the piano, and paid the purchase money, less commission, to N. In an action by the plaintiffs against the defendant for wrongful conversion of the piano, the jury found that the defendant had received the piano in good faith, and without notice of any lien or other right of the plaintiffs in respect of it. Held, on further consideration, that N. had agreed to buy and had obtained possession of the piano within the meaning of sect. 9 of the Factors Act 1889; that the word "person" in sect. 9 was not limited to a mercantile agent, but applied to any person who, having bought or agreed to buy goods, and having obtained possession with the consent of the owner, made such a delivery thereof as is mentioned in the section; that the words "agreement for sale, pledge, or other disposition," included a delivery of goods to be sold by the person receiving for the benefit of the person delivering, and that the defendant was therefore not liable to the plaintiffs for conversion. (Shenstone and Co. *v.* Hilton.) ... ...*page* 339

SCOTCH LAW.

Contribution between joint tort-feasors — Law of Scotland—*Quasi*-delicts.—The rule laid down by the case of *Merryweather* v. *Nixan* (8 T. R. 186), that there can be no right of contribution between joint tort-feasors, does not apply to the law of Scotland. In Scotland a right of relief exists and is available for a co-delinquent whose acts or omissions are not tainted with fraud or other moral delinquency. (Palmer *v.* Wick and Pulteneytown Steam Shipping Company.) 163

SETTLED LAND.

Glebe lands—Inclosure Act—Award to vicar "and his successors"—Settlement—Land taken by railway company under compulsory powers—Payment into court of purchase money—Improvements — Terminable rentcharge — Redemption—Capital moneys.—An award under an Inclosure Act to a vicar "and his successors" does not constitute a settlement within the meaning of sect. 2 of the Settled Land Act 1882. The proceeds of the sale of glebe lands, taken by a railway company under its compulsory powers, and paid into court under sect. 69 of the Lands Clauses Consolidation Act 1845, may be dealt with under sect. 32 of the Settled Land Act 1882, as "money liable to be laid out in the purchase of land to be made subject to a settlement." (*Ex parte* Vicar of Castle Bytham and *Ex parte* Midland Railway Company.) 606

Sale by tenant for life—Several persons constituting tenant for life—Separate solicitors—Costs.—On a sale of settled land by several persons constituting the tenant for life under the Settled Land Act 1882, they are entitled out of the proceeds to the costs of separate solicitors employed by them to peruse the conveyances on their behalf. (*Re* Smith; Smith *v.* Lancaster.) 511

Will—Trust for sale—Statutory powers of sale and management—Capacity of trustees.—A petition was presented, under the Settled Estates Act 1877 and the Settled Land Acts 1882 to 1892, by the trustees of the will of a testator and his other surviving children and adult grandchildren, asking that his two daughters (the then trustees), or other the trustees for the time being of his will,

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might be authorised to sell for cash, or to grant at fee farm rents, the whole or any portion of the lands devised by the testator, with power to make proposals for separate sales, and subject to the approval of the court in each case to lay out any part of the land for streets, open spaces, sewers, drains, or watercourses. The petition was heard on the 29th July 1893, on which occasion the judge held that he could confer the powers asked for, but declined to confer them upon the testator's two daughters, and ordered the petition to stand over, with liberty to amend, with a view to the appointment of other trustees. The petition now came on for rehearing. There was evidence that it had been found impossible to induce any capable and responsible person to consent to incur the responsibility of undertaking the onerous duties of the trusteeship, which included laying out land for building purposes, and carrying on the manufacture of bricks and tiles; and also that one of the daughters had been accustomed during the life of the testator to assist him in keeping the accounts of the business, and writing out cheques for the payment thereof, and had thus obtained a full and accurate knowledge of business and family affairs; and that since the testator's death both his daughters had taken an active part in the management of his business, and in checking the accounts thereof. Held, that, under these exceptional circumstances, the powers asked for should be granted to the testator's two daughters as the trustees of his will, during their joint lives. (*Re* Peake's Settled Estates.) ... ...*page* 371

SETTLEMENT.

Illegal marriage—Illegitimate child—*En ventre sa mère* at date of settlement—Two persons within the prohibited degrees went through the ceremony of marriage and shortly afterwards executed a settlement whereby a certain sum belonging to the lady was settled upon trust after the death of the survivor of them for the child, children, or other issue of the marriage, or all or any one or more of them as the lady should appoint; and in default of appointment upon trust for the child or children of the lady by her husband, and in default of a child or children to take under the last-mentioned limitation, upon trust for the lady in case she should survive her husband, which happened. There were ten children, of whom the eldest, a daughter, was born within one month after the date of the execution of the settlement. An originating summons was taken out by the executors of the surviving trustee of the settlement for the determination (*inter alia*) of the question who were entitled to the settled fund. Held, that, although the child *en ventre sa mère* at the date of the settlement might have taken under it if apt words had been used to describe her, such as the child already begotten and not yet born, yet she could not take under the limitation in favour of the children of the marriage, or of the child or children of the lady by her husband, as there was not, at the date of the settlement, any evidence of reputation of paternity of the illegitimate child not then born. (*Re* Shaw; Robinson *v.* Shaw.) 79

SHIPPING.

Charter-party—Running days—How computed.—The term "running days" in a charter-party must, in the absence of any indication to the contrary, be taken to mean calendar days, and not periods of twenty-four hours. (*The Katy.*) 60

Necessaries—Master's liability—Maritime lien on ship.—Disbursements and liabilities of the master of a vessel which give rise to a maritime lien are those for which, by virtue of his general authority and without express authority, a master can pledge his owner's credit; and a liability cannot be created in the master, within the meaning of sect. 1 of the Merchant Shipping Act 1889, for the purpose of attaching a lien to the vessel in priority to existing mortgages. (*The Orienta.*) 343

Salvage—Fire—Services rendered by steamship to vessel lying alongside jetty—Amount of award.—A fire broke out on board a vessel which was lying alongside a jetty at the entrance to a dock. The vessel was under repairs, with no steam up, and had no one but her master and a watchman on board. At the request of her master a steamship, which had just arrived, hove alongside, and, getting her hose on board the burning vessel, extinguished the fire, which, if it had remained unchecked, would have caused very serious damage. The services were such as might have been rendered by a fire engine on shore. The value of the salved vessel was 9500*l.* The defendants tendered 200*l.* The Court upheld the tender, being of opinion that the services were not of such a character as to require that the award should be assessed upon the same liberal principles as obtain in the ordinary cases of sea salvage rendered by one ship to another. (*The City of Newcastle.*) ... ...*page* 848

Wreck—Obstruction to harbour—Owner—Harbours Act 1847—Removal of Wrecks Act 1877—Liability for expenses of removal.—By sect. 56 of the Harbours, Docks, and Piers Clauses Act 1847 "the harbour master may remove any wreck or other obstruction to the harbour . . . and the expense of removing any such wreck . . . shall be repaid by the owner of the same." A ship of the appellants became a total loss, and was abandoned by the owners. There was no evidence that the loss was caused by their default. The wreck lay in such a position as to be an obstruction to the harbour of the respondents, and was removed by them. They then brought an action against the appellants to recover the expenses of such removal. Held, that the appellants were not liable, for that sect. 56 of the Act of 1847 points to ownership at the time that the expense of removing the obstruction was incurred, not to ownership at the time that the obstruction was created. (Arrow Shipping Company Limited *v.* Tyne Improvement Commissioners; *The Crystal.*) 346

SHOP HOURS ACT 1892.

Offence created—Penalty omitted.—The Shop Hours Act 1892 enacts by sect. 3, that no young person shall be employed in or about a shop for a longer period than seventy-four hours, including meal times, in any one week; by sect. 4, that in every shop in which a young person is employed a notice shall be kept exhibited by the employer in a conspicuous place referring to the provisions of this Act, and stating the number of hours in the week during which a young person may lawfully be employed in that shop; and by sect. 5, that where any young person is employed in or about a shop contrary to the provisions of this Act, the employer shall be liable to a fine not exceeding one pound for each person so employed. Held, that the respondent was not liable to a fine under sect. 5 for having employed a young person in a shop in which the notice required by sect. 4 was not kept exhibited. (Hammond, app., *v.* Pulsford, resp.) 767

SOLICITOR.

Costs—Conveyance of property—Completion of conveyance—Purchase and sub-sale—Scale fee—Taxation—Plan, charge for preparation of.—Where a purchase and a sub-sale by the original purchaser of a portion of the property are completed by means of a conveyance by the original vendor to the sub-purchaser of portion of the property and a second conveyance by the original vendor to the original purchaser of the remainder of the property, the solicitor of the original purchaser, having acted for him in the whole transaction, is entitled to charge the scale fee as on a purchase by his clients for the whole amount of the original purchase money, and also the scale fee as on a sale by his clients for the amount paid by the sub-purchaser. A solicitor is not entitled to charge his client with the costs of a plan, the preparation of which does not involve

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the skilled labour of a surveyor; such a charge is covered by the scale fee. (*Re* Read.) ... ...*page* 189

Costs—Scale charges—Auctioneer paid a fixed sum for taking bids — Amount paid by client — Solicitor otherwise conducting sale — Right to scale charge — General Order under Solicitors' Remuneration Act 1881, sect. 4, sched. I., part 1, r. 11.—A solicitor is not entitled to the scale fee for conducting a sale by auction if the client is charged with a fixed fee on each lot, paid to the auctioneer for merely attending in the auction-room and receiving the bids, although the solicitor has done the whole of the other work in connection with the sale. (Drielsma *v.* Manifold.)... 62

—— Taxation — General Order 1882, schedule I., part 1—Conveyance of freehold property—Advowson in gross. — A solicitor, employed in the purchase of an advowson in gross, was allowed, on the taxation of his bill by the taxing master, costs according to the scale prescribed by schedule I. to the General Order under the Solicitors' Remuneration Act 1881. Held, on an application to review the taxation, that the taxing master's certificate must be affirmed, there being no distinction between corporeal and incorporeal property for the purposes of the schedule, as there was deduction of title in both cases, and an advowson in gross being freehold. (*Re* Earnshaw-Wall.) 173

Mortgage—Collateral security—Deposit of share warrants payable to bearer—Fraud of solicitors' partner—Liability of firm—Scope of business.—The plaintiff, who was a client of the firm of H., M., and R., consulted R. as to obtaining a loan on the security of certain freehold property. The transaction was carried out entirely by R., and in Aug. 1891 the loan was obtained upon a mortgage of the property to two trustees who were also clients of the firm. Upon R.'s representations that the mortgagees required additional security, the plaintiff handed to R. share warrants of a mining company payable to bearer. In 1893 R. absconded, having misappropriated the share warrants. The plaintiff then brought an action against the mortgagees, and also against H. and M. As against the mortgagees the plaintiff claimed redemption of the property comprised in the mortgage and of the share warrants; and, as against H. and M., a declaration that their late firm of H., M., and R., acting as solicitors for the plaintiff, obtained the share warrants from him upon an untrue representation that they were required by way of collateral security for the mortgage debt, and that the firm were guilty of a breach of duty to the plaintiff in regard to the share warrants, and that the defendants H. and M. were jointly liable with R., and also severally liable, to make good to the plaintiff the loss sustained. It was proved that none of the defendants had any knowledge of the circumstances under which R. obtained possession of the share warrants. On the other hand, it was proved that the plaintiff had always dealt with R. as a member of the firm; that on two previous occasions the firm, through R., had received the same share warrants from the plaintiff in order to obtain loans thereon for him; and that the firm were in the habit of receiving and holding for clients securities payable to bearer. Held, that the defendants, the mortgagees, were not liable; but that R. was acting within the scope of his apparent authority in receiving and holding the share warrants for the purpose of the loan; and that consequently the defendants H. and M. were jointly and severally liable to make good his defalcations, *i.e.*, the actual sum produced by the sale of the share warrants together with interest thereon. (Rhodes *v.* Moules.) 599

STAMP DUTY.

Stamp Act 1891—"Bond, covenant, or instrument of any kind whatsoever"—"Security"—"Lease or tack."—In the first case the appellants entered into an agreement to pay a yearly rent of 3000*l.*, payable quarterly, to a railway company for the right of placing a specified number of their machines in the stations of the railway company. Either the appellants or the railway company were to be at liberty to put an end to the agreement by three months' notice in writing. In the second case, the appellant, a theatrical and musical agent, entered into an agreement by which a telephone company agreed to establish and maintain for her telephonic communication from her head office to her branch offices, and to a large number of theatres, hotels, and other places. The appellant covenanted to pay by quarterly instalments the annual sum of 11*l.* 5*s.* per line, the minimum amount to be payable being calculated on the rent of forty-five lines, being 506*l.* 5*s.* per annum. The agreement was to be in force for ten years, and thereafter from year to year determinable by either party on three months' notice. Held, that neither of these instruments was a lease or tack, but that they were securities for the payment of sums of money at stated periods for an indefinite period, and were therefore chargeable with stamp duty at the rate of 2*s.* 6*d.* for every 5*l.* payable by the appellants in each case. (Sweetmeat Automatic Delivery Company Limited *v.* Commissioners of Inland Revenue; Jones *v.* Same.) ... ...*page* 763

STATUTES OF LIMITATION.

Legacy charged on a contingent reversionary interest in real estate—"Present right to receive"—Real Property Limitation Act 1874—Effect of charge—Remedy by mortgage and sale—Right of foreclosure. D. O., who died in 1823, by his will devised his real estate, subject to certain trusts for the benefit of M. H. P. during her life (in the events which happened), to the four children of E. O. in equal shares as tenants in common in fee simple. M. H. P. died in 1893. E. O. the younger, one of the children of E. O., who died in 1854, by his will charged his debts on his real estate, and devised his real estate and his interest under the will of D. O. to his wife M. O. for life, and after her death he charged the same with a sum of 8000*l.*, which he bequeathed to his four children in equal shares. M. O. died on the 10th Feb. 1880. In this year 1844*l.* was paid to each of the four children on account of their respective legacies of 2000*l.* No steps were taken to realise the testator's interest under the will of D. O., nor was any further payment or acknowledgment made in respect of these legacies. Held, that the "present right to receive" the 8000*l.* accrued in 1880; that, on the authorities, the charge created by the will of E. O. the younger gave a remedy by sale or mortgage, and not by foreclosure, and that the period of limitation was therefore defined by sect. 8 (and not by sects. 1 and 2) of the Real Property Limitation Act 1874. (*Re* David Owen, deceased.) 182

Mortgage to building society—Subsequent equitable mortgages—Priority—First mortgage paid off and mortgage deed given up to mortgagor with statutory receipt indorsed—No principal or interest ever paid or acknowledgment given to second mortgagee—Right to land extinguished—Action by third mortgagee to enforce his security.—The first defendant, who had mortgaged certain hereditaments to a building society, subsequently in Sept. 1874 gave a mortgage in the form of a first mortgage of the same property to P. to secure a sum of money advanced out of funds belonging to P. as a trustee for the other defendants, who were the wife and children of the first defendant. In 1877 the mortgagor gave an equitable mortgage on the same property to a bank. The principal and interest secured by the first mortgage to the building society having all been paid off, the society in May 1880 gave up the mortgage deed to the mortgagor with the statutory receipt indorsed on it. In 1880 the plaintiff, having paid off to the bank the sum owing them on their

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equitable mortgage, received from them the title deeds they had held, and from the mortgagor a deed purporting to be a first mortgage on the same property. P. died in 1890, and in June 1893 his executor executed to the defendants, P.'s three *cestuis que trust*, a conveyance of the same property under the mortgage of 1874; but it appeared by the recitals that no principal or interest had ever been paid under that mortgage, and it appeared at the trial that no acknowledgment of the mortgagee's title had ever been given until after the expiration of the statutory period. The mortgagor had been in possession throughout. The plaintiff brought an action to enforce his mortgage against the land and the mortgagor, and also against the three other defendants who claimed, under the mortgage to P. in 1874, to be entitled to a charge on the land in priority to the plaintiff. Held, that the mortgagor having been in possession of the property throughout, P. (or those claiming under him) could at any time before the completion of the statutory period, notwithstanding the existence, during the earlier part of such period of a prior legal mortgage, have brought a foreclosure action, and such an action being an action to recover land within the meaning of the earlier provisions of the Act of 2 & 4 Will. 4, c. 27, the case consequently fell within the scope of sect. 34 of that Act; and Held accordingly, that (under that section) the statutory period having expired without any payment of principal or interest having been made, or any acknowledgment of the mortgagee's title given, not only was the mortgagee's remedy against the land barred; but his interest in it was extinguished (and could not therefore be revived by a subsequent acknowledgment by the mortgagor), and that upon such extinguishment the legal estate vested in the mortgagor, and from him passed to the plaintiff under the subsequent deeds. (Kibble *v.* Fairthorne.) ... ...*page* 755

Personal action—Debt due from foreign ambassador—Recall of ambassador—Accrual of cause of action.—A writ cannot be issued against the ambassador of a foreign State accredited to the Sovereign of this country while he is so accredited, or while he remains in this country for a reasonable period after he has presented his letters of recall, and the Statute of Limitations (21 Jac. 1, c. 16) does not begin to run against his creditors during that time. The provisions of Order XI., which enable a plaintiff, with leave, to issue a writ for service out of the jurisdiction, do not affect the provisions of sect. 19 of 4 & 5 Anne, c. 16, which enable a plaintiff, when a defendant is beyond the seas when the cause of action accrues, to bring his action, after the defendant has returned, within the time limited by the Statute of Limitations (21 Jac. 1, c. 16). (Musurus Bey *v.* Gadban and others.) 51

eal property — Tenant at will — Entry on land under building agreement—Agreement to take a lease—Implied trust.—In 1790 the trustees of the Marquis Camden entered into a building agreement with certain persons as to a piece of land in Camden Town, and these persons entered into possession of the land under the agreement. By this agreement they agreed to develop the land as a building estate, and the trustees agreed that, as the houses were built, they would grant leases of them for the residue of the term of ninety-nine years from 1790. By these leases, a certain agreed amount of ground rent was to be secured to the trustees. Houses were accordingly built; but when the agreed amount of rental had been secured to the trustees, no leases of the houses afterwards erected were in fact made. The plaintiff, who was the successor of the persons who had entered into possession of the land in 1790 under the agreement, so far as concerned two houses as to which no lease had in fact been made, remained in possession till 1890, when the defendants, the successors of the trustee of 1790, resumed possession. Neither he, nor his predecessors, ever paid any rent, nor gave any acknowledgment of title to the trustees of 1790 or their successors. In an action to recover possession of the two houses, he contended that he and his predecessors, having been tenants at will within sect. 7 of 3 & 4 Will. 4, c. 27, were entitled to the fee simple under that statute. Held, that the title of the defendants to the two houses in question, had not been barred by the statute. (Warren *v.* Murray and others.) ... ...*page* 458

STOCK EXCHANGE.

Principal and agent—Broker and client—Outside broker—Running stock against client—Differences—No contract with third party.—In an action by an outside broker against a client to recover the balance of account for stocks and shares alleged to have been bought and sold for him, it appeared as to part of such stocks and shares that the broker appropriated certain stocks that he already held to the client's account, without the latter's knowledge. Held, that there had been no contracts made by the broker with a third party for the client's benefit, and that therefore the broker could not recover differences or commissions in respect of such shares. Further, as to other stocks and shares it appeared that the broker after buying them for the client resold them without the latter's knowledge, and subsequently bought them back again, but charged the client with the differences, as though such stocks had been kept open on his account, and it was held that no real continuing contracts had been in existence for the benefit of the client, and consequently no real differences had arisen which the broker was entitled to recover from the client. (Skelton *v.* Wood.) 616

SURVEYOR OF HIGHWAYS.

Debts contracted on behalf of parish by predecessor—Liability.—The plaintiffs brought an action for the price of certain slag sold and delivered to one W. H., then a surveyor of highways, for the purpose of repairing roads. W. H. remained surveyor until his death, at which time he had in his hands moneys of the parish more than sufficient to defray the debt, but his estate was found to be insolvent. The defendant was appointed surveyor in succession to W. H., and the plaintiffs then sought to recover the debt from him. Held, that no action would lie. (Frodingham Steel and Iron Company *v.* Bowser.) 433

TENANT FOR LIFE AND REMAINDERMAN.

Capital and income—Option to trustees of will, shareholders in a company, to take half of a dividend in new shares—Application of proceeds of sale of such shares.—P. M. by his will gave all his property to trustees upon trust to sell the same and invest the proceeds of sale, and pay the income thereof to his wife during life or widowhood, and after her death to divide the corpus between the persons therein mentioned, with power to postpone conversion. The testator at the time of his death in 1889 was the registered holder of twenty ordinary shares in a company. In 1893, in pursuance of special resolutions, the directors offered to shareholders a number of ordinary shares of the value of 10*l.* on which 2*l.* 10*s.* was to be paid, and proposed to issue dividend warrants for one half the dividend then about to be declared, with the consent of the shareholders to apply the other half in the payment of the 2*l.* 10*s.* per share on the new issue, or to pay it in cash to the shareholders who declined the allotment. The allotment offered to the trustees of the testator's will was, according to the quotations at the time of the allotments, worth 19*l.* 10*s.*, being a premium of 17*l.* They treated it as the property of the tenant for life and renounced their right in her favour. Accordingly fourteen shares were allotted to her. After the death of the tenant for life these new shares were

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sold. Held, on the facts, that the company intended to distribute its accumulated profits in dividends so far as the special resolutions purported to sanction such a division; that, on the principle of *Rowley* v. *Unwin* (2 K. & J. 138), the proceeds of sale of the new shares ought to be applied in payment, first, of the dividend to which the tenant for life was entitled, and the balance ought to be applied as capital moneys of the trust. (*Re* Peter Malam; Malam *v.* Hitchens)... ... ...*page* 655

TITHE.

Redemption money and expenses—Jurisdiction of County Court.—The County Court has now, since the Tithe Act 1891, jurisdiction to hear and determine applications for redemption money and expenses incident to the redemption of a tithe-rentcharge. (Reg. *v.* His Honour Judge Paterson and Clarke.) 671

TRADE NAME.

Avoidance of registration as trade mark—Right to restrain manufacture of similar article under the same name—Limits of right to name apart from registration—Form of injunction.—The plaintiff and his predecessor in title had for thirty-four years manufactured and sold a sauce called "Yorkshire Relish," which name was conspicuous on the wrappers of the bottles of sauce. In 1884 the plaintiff registered the words as a trade mark, having previously successfully restrained their user in connection with sauces not made by him. In 1893 the defendants obtained an order removing the mark from the register. Until Nov. 1893 there had been no other sauce of the same name, but the defendants then commenced to sell a sauce called "Yorkshire Relish." The plaintiff thereupon brought an action, and moved in it to restrain the defendants from passing off sauce not of the plaintiffs manufacture as the plaintiff's goods by the term "Yorkshire Relish" or otherwise. The labels of this sauce did not in general resemble the plaintiff's, and analysis showed the two sauces to be quite different. The Court found that dealers previous to the appearance of the defendants' sauce knew that "Yorkshire Relish" was made by the plaintiff, and was of opinion that an unwary purchaser might have taken the defendants' label for a new one of the plaintiff's. Held, that, according to *Reddaway* v. *Bentham Hemp Spinning Company* (67 L. T. Rep. 301; (1892) 2 Q. B. 639), an injunction could be obtained without proving fraud if the plaintiff showed (as in the opinion of the court he had shown) that "Yorkshire Relish" meant a sauce manufactured by him as distinguished from that made by others, and that the defendants so described their sauce as to be likely to mislead purchasers; that the defendants had not taken such precautions as were incumbent on them by the decision in *Seixo* v. *Provesende* (14 L. T. Rep. 314; 1 Ch. App. 192) and other cases. An injunction was therefore granted, following the form approved by Lords Watson and Macnaghten in *Montgomery* v. *Thompson* (64 L. T. Rep. 750, 751; (1891) A. C. 221-224). (Powell *v.* Birmingham Vinegar Brewery Company.)... 393

TRAMWAY.

Purchase of undertaking by local authority—Terms of purchase—Valuation of tramway.—By sect. 43 of the Tramways Act 1870, which was incorporated in the private Act of the Scotch appellant, company, and was re-enacted in the private Act of the London company (33 & 34 Vict. c. clxxi., s. 44), it was provided that the local authority might, after the expiration of twenty-one years from the passing of the Act, by notice in writing, require the company to sell to them their undertaking upon terms of paying to them the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever), of the tramway, and all lands, buildings, works, materials, and plant of the company, such value, in case of difference, to be determined by a referee nominated by the Board of Trade. Held, that the value of the tramways must be measured by the cost of construction at the date of the sale, subject to a proper deduction for depreciation, not on the basis of a rental valuation. (Edinburgh Street Tramways Company *v.* Lord Provost of Edinburgh and others; London Street Tramways Company *v.* London County Council.) ... ...*page* 301

TRUST.

Investment—Insufficient security—Solicitor acting for mortgagor and mortgagee — Trust money handed to solicitor as agent for the purpose of obtaining title deeds—Liability of solicitor.—A solicitor acted both for mortgagor and mortgagee in respect of an improper investment of trust funds on mortgage of property which turned out to be an insufficient security for the money advanced. The solicitor introduced the security to the notice of the mortgagee, who was also the trustee of the trust funds, but did not advise the trustee as to the propriety or sufficiency of the security; and the trustee in making the advance acted upon his own judgment. After the advance had been decided upon, a cheque for the amount of the mortgage money was handed by the trustee to the solicitor for the purpose of paying it to the mortgagor's bankers with whom the title deeds of the property had been deposited as security for a temporary loan to the mortgagor, and obtaining the title deeds from them; but the solicitor paid the cheque into the bank of his firm to the firm's account, and on the following morning called at the mortgagor's bank, paid in a cheque of his firm for the amount of the mortgage money, and received the title deeds from the bank. Held, that the solicitor was not liable to make good the loss of the trust funds occasioned by the improper investment. (Brinsden *v.* Williams.) 177

TRUSTEE.

Breach of trust—Equitable mortgage—Consent of tenants for life—Married woman restrained from anticipating—Assignee of life interest—Replacement of trust funds—Impounding life interests of beneficiaries—Equities.—The effect of the Trustee Act 1888 is not to curtail the previously existing rights and remedies of trustees, but to enlarge the power of the court. The equity, therefore, of trustees to impound the life interest of a beneficiary who has instigated a breach of trust exists as much since the Trustee Act 1888 as before, and will, in a proper case, be enforced by the court as against the assignee for value of the life interest of such beneficiary.. But where a married woman, entitled for her separate use for life, with a restraint on anticipation, has, at the instigation of her husband, consented in writing to what she believed to be a mere change of investment, but which was, in fact, a breach of trust, the Court will not, in the exercise of its judicial discretion, order the removal of the restraint on anticipation, in order that the trustees may impound her life interest to indemnify themselves for replacing the trust funds. (Bolton *v.* Curre.) 752

Investment—Loan to firm—Payment of interest by firm—Liability of partners—Statute of Limitations (21 Jac. 1, c. 16)—Mercantile Law Amendment Act 1856 —By his will, dated in 1870, a testator, who died in that year, empowered his trustees to invest certain moneys by placing the same "on deposit in the hands of the firm of B., T., and Co., should they be willing to receive it, at interest:" but if not, then upon the usual securities, with liberty "to call in, vary, and transpose investments." At the date of the testator's death a considerable sum belonging to him was on deposit with the said firm, which then consisted of W. and H. The trustees left it in the hands of the firm, and subsequently added other sums to it. H. died in 1875. Later on in the same year W. admitted two new partners into the firm.

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By a deed of dissolution of April 1883, W. retired from the partnership by arrangement, and the continuing partners agreed to pay the debts and liabilities of the firm, including the debt due to the testator's trustees. Down to March 1891 the continuing partners paid interest on the debt, in the name of the firm of B., T., and Co., to the person beneficially entitled. An action was brought by the beneficiaries under the will to have the money restored. Held, that W. was liable for the debt due, the case being taken out of the Statute of Limitations by the payment of interest by the firm after W.'s retirement therefrom. (*Re* Tucker; Tucker *v.* Tucker.)... ...*page* 453

VENDOR AND PURCHASER.

Conditions of sale—Delay in completion of purchase—Wilful default of vendors—Interest on unpaid purchase money—Compensation to purchaser for delay in completion.—Mortgagees acting under their statutory power of sale entered into a contract for the sale of property, partly freehold and partly copyhold, subject to the conditions that, if from any cause whatever other than wilful default on the part of the vendors, completion should be delayed beyond the 29th Sept. 1893, the purchaser should pay interest on the unpaid purchase money from that day until the day of actual completion, and that the purchaser, paying her purchase money, should be entitled to possession from the 29th Sept. 1893. On the 15th Sept. the purchaser discovered from a search of the court-rolls of the manor that neither the vendors nor their mortgagor had been admitted to the copyhold portion of the property, and required the vendors to procure admittance so that she might obtain the legal estate therein. Correspondence followed; and it was not until the 10th Oct. that the vendors took steps to obtain admittance, and, owing to differences with the steward of the manor, their admittance did not take place until the 14th Dec. Meanwhile the vendors had refused the purchaser's offer to complete on the vendors giving an undertaking to get themselves admitted so that the purchaser might be admitted on their surrender, and had refused to permit the purchaser to enter into possession until completion took place, thereby causing her inconvenience and loss. The purchaser had on the 29th Dec. 1893 deposited the unpaid purchase money at a bank and given notice to the vendors that she should refuse to pay interest thereon and also should claim compensation for the delay. Completion actually took place on the 17th Jan. 1894. On a summons under the Vendor and Purchaser Act 1874: Held, that the delay up to the 17th Dec. 1893 was caused by wilful default on the part of the vendors, and the purchaser was liable to pay interest only from that day to the day of actual completion, but that the compensation claimed by the purchaser could not be recovered on a summons under the Vendor and Purchaser Act 1874. (*Re* Wilson and Stephens' Contract.)... ... 388

Specific performance—Rescission of contract—Condition empowering vendor to rescind if purchaser insists on requisition or objection—Purchaser kept in suspense as to rescission while vendor negotiating with alternative purchaser.—A vendor is in every case bound to exert himself in good faith and with due diligence, so that the contract may, so far as he is concerned, be carried out at the date fixed for completion, and if he has shown want of good faith and of due diligence, he cannot properly say that at the date fixed for completion he was able, ready, and willing to carry out the contract on his part. The purchaser is entitled to say that the vendor cannot play fast and loose with the contract and yet hold the purchaser bound; for, even where time cannot be said strictly to be of the essence of the contract, a vendor cannot be allowed wilfully and for his own purposes outside the contract, to prevent completion on the day fixed, and then to say that the delay was not essential, and that he ought to be allowed to complete at such later time as may be convenient to him. (Smith *v.* Wallace.) ... ...*page* 814

Summons for return of deposit—Sale by auction—Condition precluding inquiry or objection as to prior title whether appearing in abstract or not—Defect in prior title discovered by purchaser *aliunde*—Purchaser precluded from objecting in respect of defect.—A purchaser of real estate at public auction paid a deposit on the purchase money, and signed an agreement to complete the purchase according to the conditions of sale, the third of which provided that the title should commence with a conveyance on sale of a certain date, and that the prior title whether appearing in any abstracted document or not should not be required, investigated or objected to. The purchaser afterwards discovered *aliunde* what he regarded as a serious defect in the prior title; but it was not suggested that the alleged defect was known to the vendor when framing the conditions of sale. On a summons under the Vendor and Purchaser Act 1874 for a declaration that the vendors had not shown a good title to the property, and for an order for repayment of the deposit with interest and costs: Held, that the purchaser was precluded by the third condition of sale from making any objection in respect of the alleged defect in the prior title, and that the summons must be dismissed. (*Re* National Provincial Bank *v.* Marsh.) 629

Title—"Rentcharge"—Land and easement purchased from limited owner—Perpetual rent payable by a corporation—Charge on rates leviable by corporation—Lands.—Whenever a rent is reserved upon the sale of land to promoters, under sect. 10 of the Lands Clauses Consolidation Act 1845, that rent becomes *ipso facto* charged upon the rates and tolls by sect. 11. When land is sold reserving a rent, that rent may properly be called a rentcharge, even if it is in law a rent-sèck, as, by virtue of 4 Geo. 2, c. 28, s. 5, a right of distress has become incident to it. (*Re* Lord Gerard and Beecham's Contract.) 272

Title—Voluntary deed—Subsequent sale for value by voluntary grantee—Requisitions—Repudiation of title—Specific performance—13 Eliz. c. 5—27 Eliz. c. 4.—The mere existence of a voluntary deed in the title of vendor is not, of itself, sufficient to justify a purchaser in repudiating the contract directly he discovers that fact. (Noyes *v.* Paterson.) 228

VESTRY.

Improper expenditure of rates—Obtaining decision of legal point as to rights of water company—Advising resistance to legal charge—Injunction. (Attorney-General *v.* The Vestry of Camberwell.)... 478

VOLUNTARY SETTLEMENT.

Construction—Gift to children as a class—Period for ascertaining class.—By a voluntary settlement the settlor covenanted to pay to trustees a fund to be held, in default of appointment by the settlor, upon trust to divide the same among the children of A., who, being a son or sons, should attain twenty-one, or, being a daughter or daughters, should attain twenty-one or marry, to the intent that the fund should be in addition to the portions provided for such children by a previous settlement, under which all the children of A., who, being sons, should attain twenty-one, or being daughters should attain that age or marry, would be entitled to take subject to any appointment by A. The settlor died without exercising his power of appointment, and the sum was duly paid to the trustees of the voluntary settlement. Two children of A. had attained twenty-one, and A. was living and might have more children. An originating summons was taken out for the determination of the question whether, under the voluntary deed, only those children of A. who were living when the first attained twenty-one were entitled to the fund, or whether any future

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children of A., who might be born, would be entitled to share in it. Held, that only those children of A. who were living when the first attained twenty-one were entitled to the fund. (*Re* Knapp; Knapp *v.* Vassall.)... ... ...*page* 625

WARRANTY.

Warranty given in error to another's agent—Damage—Right of principal to sue the warrantor.—The plaintiffs entered into a contract with the defendant to supply the defendant's ship, then at Newcastle, New South Wales, with coal. The plaintiffs sent a telegram from London to their house in Newcastle, New South Wales, with instructions as to drawing upon the defendant for the price of the coal. The telegram contained a code word "journee" which meant "after this vessel is loaded owners order her to proceed to R." By a mistake in the transmission of the telegram, the code word "jounce" was substituted for "journee." "Jounce" meant an order to proceed to C. The plaintiffs' house in Newcastle informed the master of the ship of the instructions they had received. The master doubted the accuracy of the instructions, and the plaintiffs' house gave him a letter confirming the contents of the telegram. The master accordingly proceeded with the ship to C. The result of the ship's going to C. instead of to R. was a loss to the defendant, for which the defendant counterclaimed against the plaintiffs in an action by the plaintiffs for the price of the coal. The jury found that the master acted reasonably under the circumstances. Held, that the letter given by the plaintiffs to the master, though a warranty to the master was not a warranty on which the defendant could sue the plaintiffs; that on the finding of the jury the defendant had no right of action against the master, and could not therefore claim to sue the plaintiffs in order to avoid a multiplicity of actions; that the plaintiffs had not by the giving of the letter constituted the master their agent. (Brown *v.* Law.) 770

WATER.

Subterranean springs—Interference with flow of water—Tunnel for draining mine—*Mala fides*—Indirect motive—Works undertaken for purpose of extorting compensation.—The plaintiffs were owners of waterworks, purchased by them from a company which had constructed the waterworks under the powers of a special Act authorising the company to take the water from certain specified springs. Sect. 49 prohibited any person other than the company from diverting, altering, or appropriating, in any other manner than by law they might be legally entitled, any of the waters supplying or flowing from the springs, or from sinking any well or pit, or doing any act, matter, or thing whereby the waters of the springs might be drawn off or diminished in quantity. There was no provision for compensating landowners whose rights might be affected by the section. The company had appropriated the water of the springs, and the plaintiffs continued to do so. The defendant, who owned land adjoining the springs, proposed to construct on his own land, an underground drift or tunnel, the effect of which would be seriously to diminish, if not to cut off entirely the flow of water at the springs. His professed object was to drain some beds of stone lying under his land, so that he might be able to work them. The evidence showed, however, that he was not acting *bonâ fide*, and that his real object was to force the plaintiffs to compensate him. Held (reversing the decision of North, J., that what the defendant proposed to do would not be in breach of his legal rights, and that therefore no injunction could be granted to restrain him. But held (affirming the decision of North, J.), that, even if the defendant were actuated by a malicious or improper motive, he could not be interfered with. (The Corporation of Bradford *v.* Pickles.) 319, 793

WATER COMPANY.

Fire-plugs—Cost of maintaining—Liability of local authority—Implied request—Waterworks Clauses Act 1847.—The defendant board was constituted in 1874, and as the urban sanitary authority of the district had the control and management of the streets. The plaintiffs under the powers of a special Act of 1852, which incorporated the Waterworks Clauses Act 1847, had before 1874 fixed certain fire-plugs in the district and had since maintained them, and now brought an action to recover the cost of such maintenance for six years prior to the date of the action, alleging that they were fixed at the defendants' request. It was admitted that there was no express request, but it was contended that a request ought to be implied amongst other things from the user of the plugs by the defendants, and from their statutory duty to fix and maintain plugs. Held, that sect. 66 of the Public Health Act 1875 imposed no duty on the defendants which could be enforced by the plaintiffs; that "such fire-plugs" mentioned in sect. 40 of the Waterworks Clauses Act 1847 referred to fire-plugs fixed under sect. 38 "at the request of the town commissioners"; and that there was nothing in the evidence upon which the court ought to imply any such request by the defendants, or any agreement between the plaintiffs and defendants under sect. 66 of the Public Health Act 1875, and therefore the defendants were not liable. (Grand Junction Waterworks Company *v.* The Brentford Local Board.) ...*page* 240

WATER RATE.

Nonpayment—Summons—Limitation of time.—It is provided by Jervis' Act (11 & 12 Vict. c. 43) that in all cases where no time is already or shall hereafter be specially limited for making a complaint, upon which justices have authority to make an order for the payment of money, such complaint shall be made within six calendar months from the time when the matter of such complaint arose. Held, that the above provision applied to a complaint made against the respondent for the nonpayment of water rates more than six months after the same had been due and demanded. (East London Waterworks Company, apps., *v.* Charles, resp.) 200

Supply for domestic purposes—Fixed bath—Right to demand supply for, without extra charge—Lambeth Waterworks Act 1848, ss. 37, 38, 39.—The defendants, a water company, had been in the practice of making a special charge of 10s. per annum for the supply of water to fixed baths in dwelling-houses in their district, their Act providing that they could make a special agreement as to charge in the case of water supplied "for other than domestic purposes," and that "a supply of water for domestic purposes" should "not include a supply of water for baths, horses, cattle, or for washing carriages, or for any trade or business whatsoever." The plaintiff, who had long occupied a house in the district, containing a fixed bath supplied with water from the defendants' main, had until recently paid the charge of 10s. per annum, but now refused to do so, or to sever the connection between his bath and the main, contending that he was entitled to the supply upon payment of the ordinary rate for water for domestic purposes. Held, that, upon the proper construction of the Act, the supply of water to the fixed bath was "for other than domestic purposes." (Walker *v.* The Lambeth Waterworks Company.) 75

WATERWORKS.

Stopcock in pavement of public street out of repair—Power in water company to repair stopcock and break up street for that purpose—Duty in company to keep stopcock in repair—Negligence.—The plaintiff suffered personal injury from a fall caused by tripping up over the cover of a stopcock which was fixed in the pavement of a street over the service pipe which supplied water from the main

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of a water company to a house in the street. This cover was out of repair, and, in order to repair it, it would have been necessary to break up the surface of the street. In an action for damages against the water company, the jury found that the cover had been negligently left out of repair by the person whose duty it was to repair it. Held, that, as the company was the only person having a statutory authority to break up the street for the purpose of repairing the cover to the stopcock, a duty was imposed on them to keep it in repair so as not to be dangerous to the public. (Chapman *v.* The Fylde Waterworks Co.) ...*page* 539

Supply of water—Sewage works.—A rural sanitary authority, acting under the provisions of the Public Health Act 1875, empowering them to construct sewage works, and in pursuance of a sewage scheme approved of by the Local Government Board, had constructed a well into which water from the Thames flowed by gravitation through a six-inch pipe; and, with the consent of the Conservators of the Thames, had laid down a pipe for the purpose of drawing water from that river by means of a pump. They had also constructed large automatic flushing chambers capable of holding many gallons of water, and were laying down about three miles of iron water pipes, generally in the same trenches in which the sewers ran, to convey water to the flushing chambers for the purpose of flushing their sewers, but without the intention to supply the water thus obtained by them to any person for any purpose whatever. A water company incorporated by Act of Parliament, and under legal obligation to supply water to any persons requiring it who resided within the limits fixed by the Act of the company for the supply of water by them, were willing to supply water to the rural sanitary authority for the purpose of flushing their sewers, but the rural sanitary authority could obtain for themselves unfiltered water fit for the sewage work at much less cost than the water company could supply their pure filtered water, and neither the rural sanitary authority nor any person residing within the limits fixed for the supply of water by the water company were under any legal obligation to take their water from the water company. On a special case stated for the opinion of the court: Held, that "supply of water" under the Public Health Act 1875 means passing of water from one person who has it to another person who requires it, and that the works in course of construction by the rural sanitary authority were not waterworks for the supply of water within the meaning of the Public Health Act 1875, and was not an infringement of the rights of the water company. (West Surrey Water Company *v.* Guardians of the Chertsey Union.) 368

Waterworks rate—Recovery—Summary procedure—Order to pay—Demand.—On a summons being taken out by a waterworks company for a water rate against the owner of a house which was under the annual value of twenty pounds the magistrate dismissed the summons, on the ground that no demand had been made before a summons was issued, holding that, until such demand for payment was made, omission to pay was not a neglect or refusal to pay within the meaning of the Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17), and that in the absence of any such demand up to the date of the summons no matter of complaint had arisen upon which a court of summary jurisdiction had authority to make an order for the payment of money. Held, on a case stated for the court, that, having regard to the language of sects. 70 and 74 of the Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17), a formal demand was not essential as a condition precedent to the right of a water company to take proceedings in a court of summary jurisdiction to recover payment of a rate under sect. 140 of the Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20). (The East London Waterworks Company, apps., *v.* Kyffin, resp.) 615

WEIGHTS AND MEASURES.

Milk churns or cans—Churn used for conveyance of milk—Measure for use for trade—False or unjust.—The appellant, a farmer, supplied milk to a customer, to whom he sent it through a railway company in churns or cans professing to contain a specific amount of imperial measure, and containing a gauge whereby the quantity of the milk was marked. Both the railway company and the purchaser relied on the accuracy of the guages. Two of the churns, on being tested by the respondents' inspector, were each found to contain two pints less than the gauge indicated. The appellant was summoned and convicted under sect. 25 of the Weights and Measures Act 1878 (41 & 42 Vict. c. 49), for having in his possession for use for trade measures which were false or unjust. Held, that the conviction was right. The churns used came within the meaning of sect. 25, and were measures for use for trade. The essence of the legislation is, that for trade purposes dealings in quantities should be carried on with respect to accurate and not with respect to rough standards of weight and quantity. (Harris, app., *v.* The London County Council, resps.) ... ...*page* 344

WILL.

Charitable gift—Bequest of annuity to regiment on appointment of next lieutenant-colonel—Gift conditional on uncertain future event—Validity—Rule against perpetuities — Uncertainty. — A testator by his will bequeathed an annuity "to be provided to the 'Central London Rangers'" (a volunteer regiment), "on the appointment of the next lieutenant-colonel." The plaintiff had been at the date of the will, and still was, lieutenant-colonel of the regiment, the testator having been at the date of the will, and of his death, the honorary colonel. The plaintiff brought this action for a declaration that the annuity was a valid bequest, and was now vested in him as commanding officer of the regiment, and claiming that a sufficient part of the testator's estate might be appropriated to provide for the annuity, or that the same might be otherwise properly secured. The defendant, who was executor of the will, contended that the bequest was void for infringing the rule against perpetuities, and also for uncertainty, as no appointment of a lieutenant-colonel had been made since the date of the will, and such an appointment might never be made. Held, that the gift was conditional on the appointment of the next lieutenant-colonel, which appointment might not be made for an uncertain time, or might never be made, and the gift, therefore, depended on an uncertain future event, and was consequently void, as transgressing the limits of the rule against perpetuities. (*Re* Lord Stratheden and Campbell, deceased; Alt *v.* Lord Stratheden and Campbell.) 225

Construction — Beneficiary — Administration with will annexed granted to surviving beneficiary.—By her will, the testatrix gave all her property to her friend Jane C. B. "for her own use, and also for the education, maintenance, and placing out in business of her son Harry E. B."; but in case the said Jane C. B. should die during the minority of the said Harry E. B., the testatrix directed "the money arising from all the property to be laid out or invested" by her executor "for his use and benefit until he shall attain the age of twenty-one, when whatever remains shall be handed over to him." Jane C. B. died before the testatrix, but after the said Harry C. B. had attained the age of twenty-one. The executor renounced, and, there being no known next of kin of the testatrix, and the Queen's Proctor declining to interfere; the Court granted administration with the will annexed to Harry E. B., the surviving beneficiary. (In the Goods of Angelica Arms, deceased.) 699

—— Charitable gift—Particular charity—Charity ceasing to exist before the testator's death — *Cy-près* — Lapse. — A testator, by his will

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made in Aug. 1883, gave various charitable legacies, and amongst them one in the following terms: "To the rector for the time being of St. Thomas's Seminary for the Education of Priests in the diocese of Westminster, for the purposes of such seminary, 5000*l.*; and I direct that the said rector shall at his discretion make a settlement thereof by deed in the name of proper trustees, so as to make the same a permanent fund; and I direct that the candidates to be educated out of the income of this bequest shall be nominated from time to time by the rector for the time being of such seminary; and I request, but not as a condition of this bequest, that a yearly mass for the repose of my soul may be said at the said seminary in perpetuity, and that a yearly mass for the same object may be said during life by each of the priests who may have been educated wholly or in part in this foundation." The testator died in June 1893. At the date of the will there existed at Hammersmith a seminary for the education of Roman Catholic priests for the diocese of Westminster, known as St. Thomas's Seminary, having a rector and vice-rector, and a complete staff of professors and teachers. This seminary was closed in March 1893, and the buildings were sold, the students being removed to the seminary at Oscott, near Birmingham, which had a rector and a vice-rector, and a staff of professors and teachers of its own. Held, that St. Thomas's Seminary which existed at the date of the will had ceased to exist at the testator's death; that the bequest was not a general charitable gift, but a gift to a particular institution; and that the legacy was not to be applied *cy-près*, but lapsed and fell into the residue. (*Re* Rymer; Rymer *v.* Stanfield.) ... ...*page* 174, 590

Construction—Devise of real estate for life—Devisee appointed residuary legatee.—After directing payment of his funeral expenses and his just and lawful debts, a testator gave his residence, describing it "as well as all my lands, tenements, and hereditaments," to my dear wife . . . for and during the term of her natural life, whereso-ever and whatsoever, real and personal;" then, after bequeathing some pecuniary legacies, the testator proceeded, "And to this my last will and testament I appoint and direct and make my dear wife . . . sole executrix to this my will, and also at the same time I appoint and make her my residuary legatee." Held, that the widow took an estate for life only in the testator's real estate, which, subject to such life estate, passed to the testator's heir-at-law. (*Re* Morris; Morris *v.* Atherden.).. 179

—— Devise to charity of reversionary interest in land—Will made before passing of Mortmain and Charitable Uses Act 1891—Death of testatrix after passing of Act.—The effect of the Mortmain and Charitable Uses Act 1891 is to repeal the provisions contained in sect. 4 of the Mortmain and Charitable Uses Act 1888, so far as they relate to assurances by will in the case of testators dying after the passing of the latter Act, and a gift therefore by will of land to a charity is valid, notwithstanding the fact that the interest so given is reversionary. (*Re* Hume; Forbes *v.* Hume.) ... 609

—— Discretion in trustees to apply legacies for benefit and advancement—Legatees entitled to sole beneficial interest—Right to payment of legacies.—A testator by his will gave to his executor and trustee a sum of 1200*l.* and three sums of 1000*l.* in these terms: "I desire that 1200*l.* sterling shall be invested for the benefit of my eldest son J. A. on his attaining the age of twenty-one years . . . such sum to be applicable to his professional or other advancement, at the discretion of my executors and trustees." He gave very similar directions as to the investment and application of the three sums of 1000*l.* for the benefit of his sons C. S., Y., and W. A., and proceeded: "The sums specified in the four preceding paragraphs should be very judiciously invested, as they are intended specially for the advancement and promotion in life of the respective recipients." J. A. and C. S. having attained twenty-one: Held, that they were entitled to insist upon payment of the sums of 1200*l.* and 1000*l.* to themselves. (*Re* Johnston; Mills *v.* Johnston.).. ... ...*page* 392

Construction—Gift to "the nearest relatives then living"—Time when class to be ascertained.—A testator, who died in April 1879, by his will, dated in March 1870, gave his residuary estate to his wife for life, and, after her death, to "the nearest relatives then living (to be hereafter named in the codicil)." He died without having executed any codicil. Held, that the class must be ascertained at the death of the testator—namely his next of kin by blood at that date—but tha t only those members of the class could take who survived the wife. (*Re* Nash; Prall *v.* Bevan.) 5

—— Legacy—Direction to set apart—Interest.—T. S., by his will, gave all his residuary real and personal estate to trustees upon trust to pay certain legacies and annuities, and proceeded, "and my trustees will hold the sum of 2000*l.* upon trust to invest the same in good security, and to pay the same to the five sons of my late brother J. S., that is to say, to Richard S., R. S., N. S., J. S., and A. Y. S., 400*l.* each when they shall attain the age of twenty-one years respectively, and if one or more of them die before reaching the said age, their shares to be equally divided among their survivors; and, as to all the rest of my estate, I give the same to T. S. Hall." Held, on an originating summons taken out by one of the five sons of J. S., that the will directed the severance of the fund for the benefit of the five legatees, and that they were entitled to interest on their legacies from the day of the testator's death. (*Re* Snaith; Snaith *v.* Snaith.) 318

—— Loan by testator—Appointment of debtor as executor — Release of debt — A testator, who had lent his brother-in-law 100*l.*, appointed the brother-in-law one of the executors of his will, and after giving certain legacies proceeded: "I give to my brother-in-law the sum of 500*l.* in consideration of his undertaking to be my executor, and carrying out my instructions and wishes to the best of his ability. The instructions are contained in letters addressed to him." And after making another bequest proceeded: "I give, devise, and bequeath all my real and personal property, of what nature or kind soever, not hereinbefore otherwise disposed of, to E. C. H., to be by her used according to her discretion (as regards the interest) during her lifetime for the benefit of such members of the H. family as may from time to time most require it, and at her death the principal sum is to be divided (at her discretion) with the above idea in view. She is responsible to no one for the use of the interest of the money, and can retain what sum she wishes for her own use; but I wish that, in case of her marriage or death, the sum should be reserved for the above object, and that no husband she may marry shall have any control over the same." The testator left a document headed "general instructions" to his brother-in-law, which was undated and unsigned, and contained the following passage: "The hundred pounds I lent you does not form part of the money I left you; it is cancelled." The document had not been communicated to the brother-in-law in the testator's lifetime. On summons: Held, that the debt of 100*l.* due from the testator's brother-in-law was not cancelled; and that E. C. H. was absolutely entitled to the testator's residuary estate for her life free from any trust, with a power to appoint the principal among those members of the H. family living at her death who most required it. (*Re* A. H. Hyslop (deceased); Hyslop *v.* Chamberlain.) 373

—— Specific devise — Number of house left in blank — Void for uncertainty. — A testator who had four sons, devised to his eldest son in fee "all that newly-built house, being No. —, Sudeley-place . . . with the piece of ground in the rear thereof." He then bequeathed three other houses in almost similar terms to his other three sons. In

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each case the number of the house was left in blank. The testator had recently erected these four freehold houses in Sudeley-place; they were unnumbered at the date of his will, but were numbered shortly before his death. The will contained no residuary devise. Held, that, as the testator had himself intended to select the house for each son, and the descriptions in the will were indistinguishable, the devises must be held void for uncertainty, and the eldest son declared to be entitled as heir-at-law. (Asten *v.* Asten.) ...*page* 228

Description—"Thereto belonging"—Evidence of testator's intention.—In this case the plaintiff claimed to be seised in fee simple and entitled to the rent and profits of a certain garden called the "malthouse garden," J. S. by his will gave and bequeathed "the malting-office with the two adjoining cottages, and the garden and out-offices thereto belonging" to J. D. the plaintiff, and by a codicil of a subsequent date devised all his real and personal estate, not otherwise disposed of, to T. S. the defendant. The question raised was, whether the "malthouse garden" claimed passed by the devise to the plaintiff. Held, that the malthouse garden passed under the devise, and that the words "thereto belonging" referred to the whole subject of the first part of the devise, viz., the malthouse and the two cottages; and that evidence of the intention of the testator was not admissible, as there was no latent ambiguity in the language of the will. (Downe *v.* Sheffield.) 292

Devise of lands—Charge of legacy—Executor's power of sale.—A testator, who beneficially devised lands in fee, charged them with so much of a legacy of 7000*l.*, which he bequeathed to his executors upon certain trusts, as his personalty should be unable to bear. The devisee, who was one of the executors, mortgaged the real estate during the life of his co-executor, and the personalty being insufficient to pay the legacy of 7000*l.*, this action was brought to have it paid out of the realty. The question arose whether the legacy had priority over the mortgage, and whether by virtue of this charge of the legacy the executors had power to sell the real estate and give a good discharge for the purchase money. Held, that the charge of a legacy did not give the executor such a power. (*Re* Rebbeck; Bennett *v.* Rebbeck.) 74

Direction to disentail and resettle—"All other estates and hereditaments subject to the limitations of" a settlement—Money liable to be laid out in purchase of lands to be settled to the uses of the same settlement.—G. L. B. by his will directed his son A. F. B. within six months of the testator's death or of his said son attaining twenty-one whichever should last happen to effectually disentail the manor of T., and certain estates in the county of Cornwall held therewith "and all other estates and hereditaments then subject to the limitations of a settlement of the 3rd March 1854, and the will of J. F. B. deceased or either of them, and to execute an effectual resettlement thereof" to the uses thereinafter declared. G. L. B. was at the date of his will and of his death, which happened in the year 1888, tenant for life, and A. F. B. tenant in tail in remainder expectant on the death of G. L. B. of the said manor and estates under the settlement of 1854. Under the provisions of that settlement and of the will dated the 15th Jan. 1859 of J. F. B., large sums of money were in the hands of the trustees of the settlement to be laid out in the purchase of other lands convenient to be held therewith to be settled to the uses of the settlement. Held, having regard to the terms of the will of G. L. B. and the use of the expression "all other estates and hereditaments then subject to the limitations of the settlement of the 3rd March 1854," that the testator was referring to that which was to become vested in A. F. B. by virtue of the limitations of the settlement, and consequently that a proper disentailing assurance and resettlement must include the funds in the hands of the trustees of the settlement. *Re Duke of Cleveland's Estates* (69 L. T. Rep. 735; (1893) 3 Ch. 244; 62 L. J. 955, Ch.), discussed and applied. (Basset *v.* St. Levan.) ... ...*page* 718

German form—German domicile—Two Englishmen named in will to deal with property in England—Refusal of probate—Limited administration.—A domiciled German subject died in Germany, leaving a will in German form by which he requested the court of the district to appoint two persons to be his executors, and who were to have the rights and position of an unlimited general attorney of the heirs, and were to hold their powers irrevocable by the heirs. These executors, when appointed, were to get in the estate, pay debts, invest the balance, and perform other functions of trustees. In a subsequent paragraph of his will, the testator declared that his estate in England was to be wound-up by two English gentlemen, whose addresses in this country were given, and who were to realise all the property owned by the testator in this country, and to hand over the proceeds to the trustees or testamentary executors to be nominated by the German court. To enable this to be done the two Englishmen were to have power to sell all movable and immovable property belonging to the testator in England, to collect claims, pay debts, give receipts, and, in general, to undertake for the heirs all necessary legal matters, with power to bind the heirs. Held, upon construction of the will, according to the law of the testator's domicile, that these persons were not executors according to the tenor; and that they were only entitled to a limited grant of administration for the use and benefit of the testamentary executors nominated by the German court. (In the Goods of Franz Briesemann, deceased.) 263

Gift of New Three per Cent. Annuities—Codicil—Gift of 2¾ per Cent. New Consols—Specific gift.—A testator, by his will dated the 3rd Oct. 1887, gave to trustees 10,000*l.* New Three per Cent. Bank Annuities upon trust to apply the dividends in certain payments to his wife, and after her death he directed the stock to be sold, and the proceeds to be divided between forty-six charities therein named, and he gave his residuary estate to his sister and her son equally. By a codicil, dated the 28th Feb. 1891, the testator, after reciting the above gift and that the said Bank Annuities d been converted into 2¾ per Cent. Consols, bequeathed to his trustees 15,000*l.* 2¾ per Cent. Consols then standing in his name, upon trust to apply the dividends in making the payments to his wife directed by his will, and he further directed that, in addition to those payments, his trustees should, out of such dividends, during the life of his wife, make further annual payments to the charities therein mentioned, and in all other respects confirmed his will. The testator's wife died in Jan. 1892, and the testator in March 1894. On summons: Held, that the bequest to the charities by the will had not been revoked by the codicil; the gift was demonstrative, not specific, and therefore the latter part of sect. 25, sub-sect. 2 of the National Debt (Conversion) Act 1888 had no application; the case fell within the first branch of the sub-section, and there was a valid gift of 10,000*l.* 2¾ per Cent. New Consols in trust for the charities. (*Re* Shepherd; Churchill *v.* St. George's Hospital.) 516

Leaseholds—Expenses of repair, whether payable out of corpus or income.—T. D. by his will gave (*inter alia*) the residue of his leasehold property upon trust, out of the rents to pay certain annuities, with a proviso that before any payment on account of the annuities his trustees should, out of the rents and profits, pay all the costs, charges, and expenses incurred by his trustees in performing the trusts of his will, the annuities, if necessary, abating proportionately. And the testator gave the corpus of the residue of his property as therein mentioned. After T. D.'s death portions of his leasehold property were from time to time sold in an administration suit, and the proceeds

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paid into court. In 1892 the trustees, in compliance with a notice from the lessors, executed repairs to some of the unsold leasehold property, the cost of which exceeded the value of the residue of their terms. Held, that the cost of repairs was payable out of the income, and not out of the proceeds of sale of leaseholds standing in court. (Debney *v.* Eckett.) ... ...*page* 659

Perpetuity—Remoteness—Direction to carry on business till gravel-pits worked out, and then sell—Trusts of proceeds for unascertained class—Gift to children of testator for life with remainder to their issue—Original or substitutional gift.—A testator gave his real estate and residuary personal estate to trustees, directing them to carry on his business of a gravel contractor until his gravel pits were worked out, and then to sell them, and the freehold land on which they were situate, and the horses, carts, and stock-in-trade, by auction, with power for his sons, or any of them, to bid at such sale; and to hold the proceeds "in trust for such children of mine then living, and such issue living of any child or children then deceased, as shall, being sons, attain the age of twenty-one years, or, being daughters, attain that age or marry, in equal shares" *per stirpes*. And until such sale his sons should continue to be employed in the business as theretofore. Held, that the trust for sale, and the trust of the proceeds of sale, were both void for remoteness, as contravening the law against perpetuities. The testator directed his trustees to hold the ultimate residue of his real and personal estate upon trusts for sale, conversion, and investment, and to divide the income thereof equally amongst all his children during their respective lives, and from the death of any such child, whether before or after the testator's death, to hold the corpus whereof the income was or would have been payable to such child "upon trust for all or any the child or children of such child who, being a son or sons, attain the age of twenty-one years, or, being a daughter or daughters, attain that age or marry under that age, and, if more than one, in equal shares." Held, that the children of a daughter of the testator, dead at the date of his will, could not take under the residuary gift. (*Re* Wood; Tullett *v.* Colville.) 184, 413

Power of appointment—Real estate—Conversion—Foreigner—Summons—Form of—Practice.—E. H., by will, vested one-ninth share of real estate in England in trustees upon trust for his daughter Emma for life, with remainder to her children, and in default of children, upon trust for such persons as she should by deed or will appoint, and in default of appointment upon trust for her next of kin. Emma H. married C., a domiciled Frenchman, who died in 1858. In 1876 the real estate was sold in a partition action, and the share of Emma C. was paid out to the trustees, and invested by them in Metropolitan Board of Works Stock. By her will, made in 1892 in the French language, Emma C. gave and bequeathed to the defendant T. "all the personal property and rights (*tous les biens et droits mobiliers*) which I may have at my death, and which may constitute my estate, without any exception or reserve, in whatever place or locality the said property or rights may be situate, or due, or existing." Emma C. died in France in 1892, and without ever having had issue. On summons to determine who were entitled to the share of Emma C.: Held, that the power was well exercised, and the fund in question passed by the operation of the will to the defendant T., the appointee; also that a summons of this nature should not be in a general form, but should be framed in the form of specific questions, to which the court could give categorical answers. (*Re* Harman; Lloyd *v.* Tardy.) 401

Power of appointment to wife, illegitimate and childless, among her "relations"—Validity of appointment to children of her "brothers and sisters"—Construction of term "relations"—Class—Powers Law Amendment Act 1874.—T. D. by his will, after giving to his wife L. D. a life interest in his property, gave one moiety of the residue thereof to his wife's relations as she might direct. L. D. survived T. D., and by her will purported to exercise this power in favour of the children of her "brothers and sisters." L. D. was illegitimate and childless. Her "brothers and sisters" were children of her father and mother born after their marriage. L. D. had been brought up with and recognised as one of the children of her father and mother, and T. D. was aware of her illegitimacy. L. D. being now dead: Held, that T. D. contemplated those persons who would have been his wife's relations if her birth had taken place after the marriage of her parents. Upon a further question as to the validity of the appointment to one of the children of a "brother" of L. D., who was living at L. D.'s death: Held, that the power was non-exclusive; that the statute 37 & 38 Vict. c. 37, s. 1, did not affect the law as laid down in *Pope* v. *Whitcombe* (3 Mer. 689), and the class to take was confined to the next of kin living at the death of the widow. (*Re* Deakin; Starkey *v.* Eyres.) ... ...*page* 838

Probate—Suit for revocation—Plea of undue execution—Evidence of both attesting witnesses—*Omnia præsumunter rite esse acta*—Costs.—In a suit for revocation of probate on the ground of undue execution, both the attesting witnesses swore that the will was not signed by them in the testator's presence, but their evidence did not coincide upon other matters. Held, that the presumption of law, *Omnia præsumuntur rite esse acta*, must prevail. The testator died in 1885, leaving a will appointing three of his sons (the plaintiff and defendants) executors. The will was drawn, from an earlier duly executed will, by a retired doctor who had made wills for other poor persons in the locality, there being no solicitor within twelve or fourteen miles, and it was admittedly signed by the testator, with his mark, in the presence of the doctor, who had prepared it, the two attesting witnesses, and a nurse. Of these four persons, the attesting witnesses alone survived. The plaintiff, soon after the funeral, expressed distatisfaction with the will, and wrote several letters charging his mother and brothers with fraud and undue influence, and stating that the estate would be wasted in law if the defendants insisted on upholding the will, probate of which was, however, granted in common form in 1886 Although the plaintiff took legal advice at that time, no active steps was taken to set aside the will until 1893. The evidence of the two attesting witnesses was in disagreement on many points; but, upon the main point in contest, they both agreed, namely, that they put their signatures to the will in another room to that in which the testator was, and out of sight of the testator. Their signatures and the mark of the testator appeared on the face of the will, and the attestation clause, which was on the back of the document, was admittedly written in another room and after the mark and signature had been affixed to the document. One of the attesting witnesses, a doctor, had made affidavits in 1886, in which he stated that the will was duly executed. The Court refused to allow the evidence of the two attesting witnesses to rebut the presumption of law, and gave judgment for the defendants in favour of the will, with costs. (Dayman *v.* Dayman.) 699

Shifting clause—Gift over on succession to earldom—"Person for the time being entitled to possession or receipt of rents and profits"—Infant tenant in tail.—A testatrix, who died in 1861, by her will, dated in 1859, devised hereditaments to uses in strict settlement, and, after directing that every male person who under the will should become beneficially entitled to the possession or to the receipt of the rents and profits of the hereditaments should take and use certain names and arms, with a gift over in default of compliance, directed that if any person who under the will

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"would (if this present proviso had not been inserted) for the time being be entitled to the possession, receipt, or enjoyment of the rents, issues, and profits" of the hereditaments as tenant for life or in tail by purchase should be under the age of twenty-one, the trustees of the will should enter into possession or receipt of the rents, issues, and profits of the hereditaments, and during such minority hold and continue such possession or receipt with full powers of management; and the testatrix declared that, if "any person for the time being entitled to the possession or to the receipt of the rents and profits" of the hereditaments should succeed to a certain earldom, then and in such case and immediately thereupon the hereditaments should go over as if such person were dead without issue. In 1882 the defendant, an infant, who was born in 1877, became entitled as tenant in tail in possession by purchase, and in Sept. 1893 he succeeded to the earldom. Held, that the defendant did not come within the meaning of the words "entitled to the possession or receipt of the rents and profits" in the shifting clause when he succeeded to the earldom, and that therefore the event had not happened which would bring the shifting clause into operation. (Leslie *v.* The Earl of Rothes.) ... ...*page* 134

Will and codicils—Additional or substitutional bequests—Surrounding circumstances—Extrinsic evidence.—The testator executed a will of 1885, and two codicils of 1890 and 1892 respectively. These documents were found, each in a separate envelope, at his bankers after his death. The codicil of 1892 contained no revocation clause. After the death of the testator there was found at his residence an altered copy of the codicil of 1890, which had served as a draft of the later codicil. Between the dates of the codicils the testator's property had largely increased in value. The benefits conferred by the later codicil were larger in amounts than those mentioned in the earlier codicil; but the same class of persons were benefited in both documents, the terms of which were almost identical, and contained almost identically the same powers, provisions, and limitations. On the draft the testator had written an indorsement which made it quite clear that he thought and intended the second codicil to be in substitution for the first. Held, that evidence of surrounding circumstances was admissible; and that, upon that evidence, taken in connection with the documents themselves, the later codicils must be taken to be in substitution for the former. (Wainewright *v.* Wainewright.) ... ...*page* 265

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All the Cases Argued and Decided

IN THE

HOUSE OF LORDS, THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, THE SUPREME COURT OF JUDICATURE, AND THE RAILWAY AND CANAL COMMISSION COURT.

FROM SEPTEMBER 1894 TO FEBRUARY, 1895.

[In future the letters N. S. will be omitted from references to the present Series.]

House of Lords.

April 10, 12, 13, *and May* 10.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, ASHBOURNE, MACNAGHTEN, MORRIS, and SHAND.)

HAMLYN AND CO. *v.* TALISKER DISTILLERY COMPANY. (*a*)

ON APPEAL FROM THE FIRST DIVISION OF THE COURT OF SESSION IN SCOTLAND.

Contract—Sale of goods—Arbitration clause—Conflict of laws—Question whether lex loci contractûs *or* lex loci solutionis *is to prevail—Arbitration clause.*

Where a contract is entered into between parties residing in places where different systems of law prevail, the question which law is to prevail is to be decided by the intention of the parties as gathered from the whole contract.

A vendor resident in Scotland, and a purchaser resident in England, agreed for the sale and purchase of goods to be delivered in Scotland. The agreement contained a clause that any dispute should be "settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way." The vendor brought an action against the purchaser in the Scotch court for non-acceptance of the goods according to contract. The purchaser pleaded the arbitration clause. The Scotch court held that the arbitration clause, not being good according to Scotch law, afforded no defence to the action.

Held (reversing the judgment of the court below), that the intention of the parties, gathered from the whole contract, was that it should be governed by English law, and that the arbitration clause, being good in English law, and not fundamentally opposed in principle to the law of Scotland, was a good defence to the action.

THIS was an appeal from a judgment of the First Division of the Court of Session in Scotland (Lords Adam and M'Laren, Lord Kinnear dissenting), reported in 21 Ct. Sess. Cas. 4th series, 204, and 31 Sc. Law Rep. 143, who had affirmed a judgment of the Lord Ordinary (Lord Kyllachy) in an action brought by the respondents against the appellants for non-acceptance of goods under an agreement.

The agreement, which was executed by both parties in England, was a follows:

Memorandum of agreement between Messrs. Roderick Kemp and Co., of Talisker Distillery, Carbost, North Britain, distillers, of the one part; and Messrs. Hamlyn and Co., 153, Cheapside, in the City of London, merchants, of the other part.—Whereas the said R. Kemp and Co. agree to sell, and the said Hamlyn and Co. agree to purchase, all grains made by the said Roderick Kemp and Co., or their nominees or assigns, averaging about 800 to 1000 bushels per week (with the exception of about two quarters required for the use of the said Kemp and Co.) at the price of 1*s.* 8*d.* per quarter (eight bushels), according to the number of quarters of corn or malt put into the mash tub. It is further agreed that the said Hamlyn and Co. supply and erect at the aforementioned distillery one of Messrs. Petry and Hecking's patent drying machines, such machines to remain the property of the said Hamlyn and Co.; and that the said Roderick Kemp and Co. shall thereupon work and keep in proper repair the said drying machine, supplying all steam and labour, &c., necessary for properly drying the grains for the said Hamlyn and Co., and will bag up in the said Hamlyn and Co.'s sacks, and deliver the grains f.o.b., Carbost, to their order, or otherwise, as required. This contract be in force for 10 (ten) years from time of erection. At the expiration of the said ten years the said Hamlyn and Co. to be at liberty to take away the said drying machine without let or hindrance. Should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way. As witness the hands of the said parties this 27th day of January 1892.—Hamlyn and and Co.; Roderick Kemp and Co.—Witnessed the above signatures: David Lyall, clerk, 80, Ockenden-road, Islington.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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The defendant pleaded (*inter alia*) that the action was excluded by the clause of reference in the memorandum of agreement, The plaintiffs replied that the clause was a submission to unnamed arbitrators, and was therefore invalid by the law of Scotland, by which the case was to be governed, though admitted to be good by the law of England. The Lord Ordinary and the majority of the judges of the First Division upheld this contention, Lord Kinnear dissenting, and being of opinion that the case should be governed by English law.

Sir *H. James*, Q.C., *Graham Murray*, Q.C. (of the Scotch Bar), and *Ruegg* appeared for the appellants.

The *Lord Advocate* (Balfour, Q.C.) and *Danckwerts* for the respondents.

Graham Murray, Q.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 10.—Their Lordships gave judgment as follows:

The LORD CHANCELLOR (Herschell).—My Lords: On the 27th Jan. 1892 an agreement was entered into between Roderick Kemp and Co., of the Talisker Distillery, Carbost, Isle of Skye, and Hamlyn and Co., of London, under which Hamlyn and Co. were to supply to the distillery a patent drying machine, which was to be worked by the distillery company, who were to bag up and deliver to Hamlyn and Co. dried grain free on board at Carbost to their order, or otherwise as required. The agreement concluded with a clause in the following terms: "Should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way." This agreement was made between the parties in England. Shortly after the contract was entered into, Alexander Grigor Allan became the sole partner in the firm of Roderick Kemp and Co., and the present action was instituted by him in Scotland in respect of an alleged breach of the contract. The defenders pleaded that the Court of Session had "no jurisdiction," and that "the action is excluded by the clause of reference in the memorandum of agreement." These pleas were repelled by the Lord Ordinary, and his judgment was affirmed by Lord Adam and Lord M'Laren in the Inner House, Lord Kinnear dissenting. During the course of the litigation the pursuer died, and is now represented by the respondents. It is not in controversy that the arbitration clause is according to the law of England a valid and binding contract between the parties, nor that according to the law of Scotland it is wholly invalid inasmuch as the arbiters are not named. The view taken by the majority of the court below is thus expressed by Lord Adam: "So far as I see, nothing is required to be done in England in implement of the contract. That being so, I am of opinion with the Lord Ordinary that the construction and effect of the agreement, and of all and each of its stipulations, is to be determined by the *ex loci solutionis*—that is, by the law of Scotland." It is not denied that the conclusion thus arrived at renders the arbitration clause wholly inoperative, and thus defeats the expressed intention of the parties, but this is treated as inevitably following from the rule of law that the rights of the parties must be wholly determined by the *lex loci solutionis*. I am not able altogether to agree with the view taken by the learned Lord that everything required to be done in implement of the contract was to be done in Scotland, inasmuch as it appears to me that the arbitration clause which I have read to your Lordships does not indicate that that part of the contract between the parties was to be implemented by performance in Scotland. That clause is as much a part of the contract as any other clause of the contract, and certainly there is nothing on the face of it to indicate, but quite the contrary, that it was in the contemplation of the parties that it should be implemented in Scotland. The learned judges in the court below treat the *lex loci solutionis* of the main portion of the contract as conclusively determining that all the rights of the parties under the contract must be governed by the law of that place. I am unable to agree with them in this conclusion. Where a contract is entered into between parties residing in different places, and where different systems of law prevail, it is a question, as it appears to me, in each case with reference to what law the parties contracted, and according to what law it was their intention that their rights either under the whole or any part of the contract should be determined. In considering what law is to govern, the *lex loci solutionis* is a matter of great importance. The *lex loci contractûs* is also of importance. In the present case the place of the contract was different from the place of its performance. It is not necessary to enter upon the inquiry, which was a good deal discussed at the bar, to which of these considerations the greatest weight is to be attributed, namely, the place where the contract was made or the place where it is to be performed. In my view they are both matters which must be taken into consideration, but neither of them is of itself conclusive. and still less is it conclusive, as it appears to me, as to the particular law which was intended to govern particular parts of the contract between the parties. In this case, as in all such cases, the whole of the contract must be looked at, and the contract must be regulated by the intention of the parties as appearing from the contract. It is perfectly competent to those who, under such circumstances as I have indicated, are entering into a contract, to indicate by the terms which they employ which system of law they intend to be applied to the construction of the contract, and to the determination of the rights arising out of the contract. Now, in the present case it appears to me that the language of the arbitration clause indicates very clearly that the parties intended that the rights under that clause should be determined according to the law of England. As I have said, the contract was made there; one of the parties was residing there. Where under such circumstances the parties agree that any dispute arising out of their contract shall be "settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way," it seems to me that they have indicated as clearly as it is possible their intention that that particular stipulation, which is a part of contract between them, shall be interpreted according to and governed by the law not of Scotland but of England, and I am aware of nothing which stands in the way of the intention of the parties thus indicated by the contract

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they entered into, being carried into effect. As I have already pointed out, the contract with reference to the arbitration would have been absolutely null and void if it were to be governed by the law of Scotland. That cannot have been the intention of the parties; it is not reasonable to attribute that intention to them if the contract may be otherwise construed; and for the reasons which I have given, I see no difficulty whatever in construing the contract between the parties as an indication that the contract, or that term of it, was to be governed and regulated by the law of England. But then it is said that the Scotch court is asked to enforce a law which is against the public policy of the law of Scotland, and that although the parties may have so contracted, the courts in Scotland cannot be bound to enforce the contract which is against the policy of their law. I should be prepared to admit that an agreement which was against a fundamental principle of the law of Scotland, founded on consideration of public policy, could not be relied upon and insisted upon in the courts of Scotland; and if according to the law of Scotland the courts never allowed their jurisdiction to try the merits of a case to be interfered with by an arbitration clause, there would be considerable force in the contention which is insisted upon by the respondents. But that is not the case. The courts in Scotland recognise the rights of the parties to a contract to determine that any disputes under it shall be settled, not in the ordinary course of litigation, but by an arbitration tribunal selected by the parties. If in the present case the arbitrators had been named, the courts in Scotland would have recognised, and given effect to, and enforced the arbitration clause, and would by reason of it have declined to enter upon a trial of the merits of the case. That being so, I have been unable to understand upon what fundamental principle of public policy it can be said to rest as a foundation that where an arbitrator is not named, an agreement between the parties to refer a matter to arbitration ought not to be enforced. It is not necessary to inquire into the history of the distinction which has arisen in the courts of Scotland between arbitration clauses where arbiters are named and clauses with an unnamed arbiter. It is sufficient to say that when once it is admitted, as it must be, that the courts of Scotland do enforce and give effect to an arbitration clause and hold their hands from the determination of the merits by reason of the parties having agreed upon it, it seems to me to follow that if this arbitration clause is to be interpreted according to the law of England, and is therefore a valid arbitration clause, there is no reason why the courts of Scotland should not give effect to it just as much as if it were a valid arbitration clause according to the law of Scotland. But then it is argued that an agreement to refer disputes to arbitration, deals with the remedy, and not with the rights of the parties, and that consequently the *forum* being Scotch, the parties cannot by reason of the agreement into which they have entered, interfere with the ordinary course of proceedings in the courts of Scotland. Stated generally, I should not dispute that proposition so far as it lays down that the parties cannot, in a case where merits fall to be determined in the Scotch courts, insist by virtue of an agreement, that those courts shall depart from their ordinary course of procedure. But that is not really the question which has to be determined in the present case. The question which has to be determined is, whether it is a case in which the courts of Scotland ought to entertain the merits and adjudicate upon them. If it were such a case, then no doubt the ordinary course of procedure in the Scotch courts would have to be followed; but the preliminary question has to be determined whether by virtue of a valid clause of arbitration the proper course is for the courts in Scotland not to adjudicate upon the merits of the case but to leave the matter to be determined by the tribunal to which the parties have agreed to refer it. Viewed in that light, I can see no difficulty, but the argument that to give effect to this arbitration clause would interfere with the course of procedure in the *forum* in which the action is pending seems to me entirely to fail. For these reasons I move your Lordships that the judgment appealed from be reversed. The question then arises, what course should be taken in the present case—whether the action should be stayed until the arbitration is completed, or whether the House should make an order remitting the cause to be determined pursuant to the arbitration clause. I am quite satisfied, upon that part of the case, with the suggestion which will be made by Lord Watson, and I think that there is really no difficulty in the manner in which he proposes to give effect to the contract between the parties.

Lord WATSON.—My Lords: This action was brought in the Court of Session by a Scotch distiller, who died during its dependence, and is now represented by the respondents, against the appellant firm, who are merchants in London, concluding for damages in respect of their breach of a mercantile contract. For the purposes of this appeal it is sufficient to say that the contract, which was made in England, but fell to be mutually performed in Scotland, contains this provision: "Should any dispute arise out of this contract, the same to be settled by two members of the London Corn Exchange, or their umpire, in the usual way." In defence the appellants pleaded—"(1) No jurisdiction; (2) the action is excluded by the clause of reference." Both pleas were exclusively founded upon the agreement to refer. They were repelled by the Lord Ordinary (Kyllachy), and, in the First Division, by Lords Adam and M'Laren, Lord Kinnear dissenting. The learned judges of the majority were of opinion, with the Lord Ordinary, that, inasmuch as Scotland was admittedly the *locus solutionis*, the whole stipulations of the contract, including the clause of reference, must be governed by Scotch law. In that view the agreement to refer, being to arbiters unnamed, was plainly invalid, and their Lordships accordingly sent the case to proof before the Lord Ordinary. With reference to the two pleas which have been repelled, I wish to observe that, although they seem to have become stereotyped in cases like the present, they do not correctly represent the rights of a defender, who relies upon a valid contract to submit the matter in dispute to arbitration. The jurisdiction of the court is not wholly ousted by such a contract. It deprives the court of jurisdiction to inquire into and decide the merits of the case, whilst it leaves the court free to entertain the suit, and to pronounce a decree in conformity

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with the award of the arbiter. Should the arbitration, from any cause, prove abortive, the full jurisdiction of the court will revive, to the effect of enabling it to hear and determine the action upon its merits. When a binding reference is pleaded *in limine* the proper course to take is either to refer the question in dispute to the arbiter named or to stay procedure until it has been settled by arbitration. The latter course was adopted in *Caledonian Railway Company* v. *Greenock and Wemyss Bay Railway Company* (10 Ct. Sess. Ca., 3rd series, 892), where the reference was to arbiters unnamed, but had been confirmed by statute. I cite that case, not as establishing, but as illustrating, the rule of procedure, which was in force long before its date. The first question in this appeal is whether the law of England or the law of Scotland applies to the interpretation of the clause of reference. If the law of Scotland must prevail, the judgments appealed from are unimpeachable. If, on the other hand, the contract must be governed by English law, the clause of reference is obligatory according to that law; and in that event the further question arises whether the courts of Scotland ought to give the same effect to it as if it had been a binding Scotch covenant. Upon the first of these questions I have been unable to arrive at the same conclusion with the courts below. When two parties living under different systems of law enter into a personal contract, which of these systems must be applied to its construction depends upon their mutual intention, either as expressed in their contract or as derivable by fair implication from its terms. In the absence of any clear expression of their intention it is necessary and legitimate to take into account the circumstances attendant upon the making of the contract and the course of performing its stipulations contemplated by the parties, and amongst these considerations the *locus contractûs* and the *locus solutionis* have always been regarded as of importance, although English and Scotch decisions differ in regard to the relative weight which ought to be attributed to them when the place of contracting is in one *forum* and the place of performance in another. In the present case it does not appear to me to be necessary to discuss the relative value of these considerations, because, in my opinion, the clause of reference is expressed in terms which clearly indicate that the parties had in contemplation, and agreed that it should be interpreted according to the rules of English law. If they had stipulated that all disputes arising out of the contract were to be decided in the Court of Session, I should have been of opinion that they had in view the principles of Scotch law, and meant that their mutual stipulations should be construed according to these principles. And, to my mind, their selection from the membership of a commercial body in London of a conventional tribunal which is to act "in the usual way," or, in other words, in the manner which is customary in London, indicates, not less conclusively, that, in agreeing to such an arbitration, they were contracting with reference to the law of England. Upon the assumption that the contract must be read in the light of English law, the respondents maintained that, in so far as concerns the agreement to refer, that law is inadmissible. They argued that the agreement relates, not to the substance of the contract, but to the remedy which the parties were to pursue; and that, according to a well-known principle of general law, all questions touching the remedy must be decided according to the rules of the *forum* in which the remedy is sought. They also contended that the Lords of Sessions were not bound to recognise any reference to unnamed arbiters, whatever might be its validity elsewhere, to the effect of excluding their own jurisdiction, because its recognition would be contrary to the policy of Scotch law. Neither of these contentions is, in my opinion, well founded. It has never, so far as I am aware, been seriously disputed that, whatever may be the domicile of a contract, any court which has jurisdiction to entertain an action upon it must, in the exercise of that jurisdiction, by guided by what are termed the curial rules of the *lex fori*, such as those which relate to procedure or to proof. *Don* v. *Lippman* (2 Sh. and McL. 682), which is the leading Scotch authority upon the point, has settled that these rules include local laws relating to prescription or limitation. But all the rules, noticed by Lord Brougham in his elaborate judgment as belonging to that class, refer to the action of the court in investigating the merits of a suit in which its jurisdiction has been already established. I can find no authority, and none was cited to us, to the effect that, in dealing with the prejudicial question whether it has jurisdiction to try the merits of the cause, the court ought to disregard an agreement to refer which is *pars contractus*, and binding according to the law of the contract, because it would not be valid if tested by the *lex fori*. Without clear authority I am not prepared to affirm a rule which does not appear to me to be recommended by any considerations of principle or expediency. One result of its adoption would be that, if two persons domiciled in England made a contract there, containing the same clause of reference which occurs in this case, either of them could avoid the reference by bringing an action before a Scotch court, if the other happened to be temporarily resident in Scotland, or to have personal estate in that country capable of being arrested. The second reason advanced by the respondents, for denying effect to the reference, would have been more plausible if it had been the law of Scotland that no private agreement could exclude, to any extent, the jurisdiction of the ordinary tribunals. I am not disposed to hold that Scotch courts are bound to give effect to every stipulation in a foreign contract, unless it is shown to be *contra bonos mores*, in the sense of the law which they administer. There may be stipulations which, though not tainted with immorality, are yet in such direct conflict with deeply-rooted and important considerations of local policy, that her courts would be justified in declining to recognise them. But the law of Scotland has, from the earliest times, permitted private parties to exclude the merits of any dispute between them from the consideration of the court by simply naming their arbiter. The rule that a reference to arbiters not named cannot be enforced, does not appear to me to rest upon any essential considerations of public policy. Even if an opposite inference were deducible from the authorities by which it was established, which establish the rule, the rule has been so largely trenched upon by the legislation of the last fifty years, both in general and in local and personal Acts, that I should hesitate to affirm that the policy upon which it was originally based

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could now be regarded as of cardinal importance. For these reasons I am of opinion that the interlocutors appealed from ought to be reversed, and the cause remitted, with directions to sist procedure in *hoc statu*, in order that the matters in dispute may be settled by arbitration, in terms of the contract. Such an order will leave the parties at liberty, in the course of the reference, to avail themselves of the provisions of the Arbitration Act 1889; and will enable the Court of Session, in the event of any lapse of the reference, to try and dispose of the merits of the case.

Lord ASHBOURNE.—My Lords: I concur. The substantial question to be determined is whether the law of Scotland or the law of England is to be applied to the interpretation of the arbitration clause in question. One of the parties was a Scotch distiller, and the parties on the other side were merchants in London. The contract was made in England and was (apart from the arbitration clause) to be performed in Scotland. That clause, set out in the case, is of the highest importance. There is no absolute rule of law as to the way in which the intention of the parties to a contract with reference to the law of a particular place is to be ascertained. Were it not for the arbitration clause I should assent to the conclusion that the parties contracted solely with a view to the application of the law of Scotland. Having regard, however, to the terms of that clause, I am led to the conclusion that the parties intended that it should be interpreted by the rules of the law of England alone. A contract which provided that disputes should be settled by arbitration by two members of the London Corn Exchange, or their umpire, "in the usual way," distinctly introduces a reference to the well-known laws regulating such arbitrations, and these must be the laws of England. This interpretation gives due and full effect to every portion of the contract, whereas the arbitration clause becomes mere waste paper if it is held that the parties were contracting on the basis of the application of the laws of Scotland, which would at once refuse to acknowledge the full efficacy of a clause so framed. It is more reasonable to hold that the parties contracted with the common intention of giving entire effect to every clause, rather than of mutilating or destroying one of the most important provisions.

Lords MACNAGHTEN and MORRIS concurred.

Lord SHAND.—My Lords: I also am of opinion that the appeal in this case should be sustained, and the judgment complained of reversed for the reasons which have already been so fully stated, and it would serve no good purpose to repeat them. From the terms in which the clause of reference is expressed, in a contract to which, it must be observed, a firm of merchants in London and carrying on business there, is one of the parties, I think it is to be inferred to be *pars contractus* that the agreement which it contained for the settlement of disputes which might arise out of the contract, was to be interpreted and governed by the law of England; and I am further of opinion that there are no such considerations of public policy at the basis of the rules of Scottish law in reference to the necessity of arbiters being named in order to create a binding obligation to refer, as can warrant the courts in Scotland, in an action brought there, in refusing to give effect to the law and practice as to arbitrations in England. In accordance with the ordinary practice in Scotland, I think that procedure in the present action should be stayed, to allow the arbitration to be proceeded with in England as provided by the contract.

Interlocutors appealed from reversed. Cause remitted to the Court of Session with directions. Respondents to pay the costs of this appeal, and below.

Solicitors for the appellants, *Ranger, Burton,* and *Co.*, for *Finlay* and *Wilson*, Edinburgh.

Solicitors for the respondents, *R. S. Taylor, Son,* and *Humbert*, for *A. Mustard*, Edinburgh.

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, May 23.

(Before LINDLEY, LOPES, and DAVEY, L.JJ.)

Re NASH; PRALL *v.* BEVAN. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Will—Construction—Gift to "the nearest relatives then living"—Time when class to be ascertained.

A testator, who died in April 1879, *by his will dated in March* 1870, *gave his residuary estate to his wife for life, and, after her death, to "the nearest relatives then living (to be hereafter named in a codicil)." He died without having executed any codicil.*

Held, that the class must be ascertained at the death of the testator—namely, his next of kin by blood at that date — but that only those members of the class could take who survived the wife.

Tiffin *v.* Longman (15 *Beav.* 275) *not followed.*
Spink *v.* Lewis (3 *Bro. C. C.* 355) *approved.*
Order of Kekewich, J. varied.

BY his will, dated the 24th March 1870, Samuel Nash, after desiring that his debts, funeral, and testamentary expenses should be paid and satisfied by his wife Elizabeth as soon as conveniently might be after his decease, declared as follows:

Secondly, I give, devise, and bequeath unto my beloved wife Elizabeth all and every my household furniture, linen, wearing apparel, books, plate, pictures, china, and also all and every sum and sums of money which may be in my house or about my person or which may be due to me at the time of my decease, and also all and every other my estate and effects, freehold and leasehold whatsoever and wheresoever, whether in possession or expectancy, to and for my beloved wife Elizabeth's own use and benefit during her natural life; and thirdly, after the decease of my beloved wife Elizabeth I desire that the sum of two hundred pounds be paid out of the rental of the remaining property to the London City Mission, and that the nearest relatives then living (to be hereafter named in a codicil) shall receive the benefit equally among them after the aforesaid sum has been paid to the aforenamed society.

The testator appointed his wife Elizabeth sole executrix of his will.

The testator died on the 20th April 1879 without leaving any codicil to his will, and without any child, parent, brother, sister, uncle, aunt,

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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nephew, or niece, but with two great-nieces, him surviving.

The will was duly proved by the testator's widow on the 26th May following.

The testator's widow died on the 20th Jan. 1893 intestate, leaving part of the testator's personal estate unadministered, and on the 7th March following letters of administration, with the will annexed, of the estate so left unadministered were granted to Sarah Ann Prall, the wife of John Albert Prall, one of the two lawful great-nieces and only next of kin of the testator.

On the 14th March 1893 Mr. and Mrs. Prall took out an originating summons for the determination (*inter alia*) of the question whether the residuary gift in the will was valid and capable of taking effect, and, if so, who under the terms of the will and in the events which had happened was or were entitled to the legal and beneficial interests in the residuary real and personal estates respectively of the testator.

The treasurer of the London City Mission was made a defendant, but there being practically no pure personalty, proceedings were ordered to be discontinued against him, he giving up all claim to the 200*l.* legacy.

On the 6th April 1894 Kekewich, J. made an order declaring that, upon the true construction of the will, and in the events which had happened, the residuary gift was a good and valid gift, and that the parties entitled under it were the persons (other than the testator's wife, deceased) who would have been the next of kin by blood of the testator if he had survived his wife and died immediately after her.

The plaintiffs appealed, asking by their notice of appeal that the order made by Kekewich, J. might be reversed so far as it declared that the residuary gift contained in the will was a good and valid gift; and that in lieu thereof it might be adjudged that the residuary gift was invalid and ineffectual, and that the testator died intestate as regarded such residue. Or, in the alternative, in case the court should hold the residuary gift to be good and valid, that the order should be reversed so far as it held that the persons entitled under the gift were the persons (other than the testator's wife, deceased) who would have been the next of kin by blood of the testator if he had survived his wife and died immediately after her; and that in lieu thereof it might be adjudged that the parties entitled under the gift were such of the next of kin by blood of the testator (other than his wife) who were living and ascertainable at the date of his decease, and who also survived his wife.

The appeal now came on to be heard.

J. M. Gover for the appellants.—It was decided by Kekewich, J. that the residuary gift was a good and valid gift, and that, upon the death of the testator's widow, the property passed to those persons who would have been the next of kin by blood of the testator if he had survived his wife and died immediately afterwards. That I submit was a wrong order, for, there being no codicil and the persons who were to take at the death of the testator's wife not therefore being indicated, the gift altogether failed; and I say that the next of kin according to the Statutes of Distribution should take the property. Assuming, however, that that is not so, and if the gift is good and valid, then I say that the parties entitled under it are such of the next of kin by blood of the testator (other than his widow) living and ascertained at his death as survived his widow. [He was stopped by the Court.]

Edward Ford for the respondents.—The class is to be ascertained at the death of the tenant for life. [DAVEY, L.J.—The case of *Spink* v. *Lewis* (3 Bro. C. C. 355) seems to be an authority directly the other way, although *Tiffin* v. *Longman* (15 Beav. 275) is in favour of your contention.] I admit that the term "nearest relatives" means next of kin by blood. He referred also to

Bullock v. *Downes*, 9 H. of L. Cas. 1;
Eagles v. *Le Bruton*, L. Rep. 15 Eq. 148; 42 L.J. 362, Ch.

No reply was called for.

LINDLEY, L.J.—This is an appeal from a judgment of Kekewich, J., declaring that, upon the true construction of the will, and in the events which have happened, the residuary gift is a good and valid gift, and that the parties entitled under it were the persons (other than the testator's widow) who would have been the next of kin by blood of the testator if he had survived his wife and died immediately afterwards, or, in other words, that the class of "nearest relatives" was to be ascertained at the death of the tenant for life, and not at the death of the testator. The appellants contend that the gift was to the next of kin by blood of the testator, to be ascertained at his death, but that only such of them were to take as survived the tenant for life. For reasons which I will give presently I think the appellants' contention is right. [His Lordship read the provisions of the will as above set forth, and continued:] The gift is to "the nearest relatives." Whose nearest relatives are meant? As the testator has not made any reference to those of anyone else, I suppose he must mean his own. Then follow the words "then living," which clearly mean living at the death of the widow, the tenant for life. Then we have "to be hereafter named in a codicil;" but the testator has left no codicil, so we cannot give effect to that phrase. What then is the law applicable in this state of circumstances? In the case of *Bullock* v. *Downes* (9 H. of L. Cas. 1), it was held that, under a gift after a life interest, to such next of kin by blood of the testator as would under the Statutes of Distribution "have become and been the entitled thereto in case" the testator "had died intestate," the persons entitled were to be ascertained at the death of the testator. We must give some effect to the words in the will "then living," which, as I have said, in my opinion mean living at the death of the testator's widow. As regards the words "nearest relatives," they mean something different from those who would be entitled under the Statutes of Distribution; they must mean relatives by blood, which was the view taken by Kekewich, J. I propose to vary the order of Kekewich, J. in accordance with the appellants' contention, by declaring that the class of persons entitled to take must be ascertained at the death of the testator, namely, his next of kin by blood at that date, but that only those members of the class take who survived the widow. That will make the order right, or as nearly right as on so imperfect a will the court

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can make it. The costs of all parties will come out of the estate.

LOPES, L.J.—I am of the same opinion, and I have nothing to add.

DAVEY, L.J.—The real question is, whether the class of "nearest relatives" is to be ascertained at the death of the testator, or at the death of the tenant for life. It is contended for the respondents that it is to be ascertained at the death of the tenant for life, and it is true that there is some authority for that contention in certain cases decided by Lord Romilly, to which I will presently refer. Now, it was settled in *Bullock* v. *Downes* (9 H. of L. Cas. 1) that under a gift, after a son's decease, to "such person or persons of the blood of me as would by virtue of the Statutes of Distribution of Intestates' Effects have become and been then entitled thereto in case I had died intestate," the persons entitled were to be ascertained at the death of the testator. But Lord Romilly (then Sir John Romilly), in *Tiffin* v. *Longman* (15 Beav. 275), held that, in the case of a gift to "relations" claiming at a particular period, the class was to be ascertained at the death of the tenant for life, as fixed by the Statute of Distributions, if he had died at that time. In *Holloway* v. *Radcliffe* (23 Beav. 163), where, after a prior life interest, the gift was to "legal personal representatives in such and the like manner as if the same had been to be paid under the Statute of Distributions," he held that the next of kin, according to the statute, to be ascertained at the death of the testator, were entitled (though he intimated that a slightly different set of words might have imported a present, rather than a past, ascertainment of the class, that is, at the death of the tenant for life). In *Eagles* v. *Le Breton* (L. Rep. 15 Eq. 148), where the gift was "to pass to my relatives at the death of my sisters," Lord Romilly is reported to have held that the next of kin might be ascertained at the death of the tenant for life. (a) I can find no ground for the distinction made in these three cases, and it is not consistent with the meaning which the court has attached to the words "relations" and "relatives." A gift to "nearest relatives" is equivalent to a gift to nearest of kin—that is to say, nearest of kin by blood. From the case of *Bullock* v. *Downes* (9 H. of L. Cas. 1), to which I have already referred, it is clear that the class to take is to be ascertained at the death of the testator. Then I find in Mr. Jarman's book on Wills (5th edit., vol. 2, p. 983) a passage to which I referred in the course of the argument, and with which I agree, as follows: "Where a testator directed personal estate and the produce of real estate to be laid out for accumulation for ten years, and then a certain part thereof divided among such of the testator's next of kin and personal representatives as should be then living, Lord Thurlow held that the next of kin at the testator's death surviving the specified period were entitled; for it was plain that the testator meant some class of persons of whom it was doubtful whether they would live ten years" (*Spink* v. *Lewis*, 3 Bro. C. C. 355). That seems to me to be good sense, good logic, and good law. I therefore think that the order appealed from should be varied, as Lindley, L.J., has suggested.

Order varied.

Solicitors for the appellants, *C.* and *E. Woodroffe.*

Solicitors for the respondents, *Lee, Ockerby,* and *Everington,* agents for *Thomas Buss,* Tunbridge Wells.

(a) But see the head-note and the erratum at the commencement of the volume (L. Rep. 15 Eq.), and the report of the case in 42 L. J. 362, Ch., from which it appears that Lord Romilly really decided that the class was to be ascertained at the death of the testatrix, and not at that of the tenant for life. It is, therefore, an authority not against but in favour of the view taken by the court in the present case.—REP.

June 6 *and* 18.

(Before LINDLEY and DAVEY, L.JJ.)

Re LUMLEY; HOOD-BARRS *v.* CATHCART. (a)

APPEAL FROM THE CHANCERY DIVISION.

Married woman—Separate estate—Restraint on anticipation—Sequestration—Married Women's Property Act 1882 (45 *&* 46 *Vict. c.* 75), *s.* 1—*Married Women's Property Act* 1893 (56 *&* 57 *Vict. c.* 63), *ss.* 1, 2.

Under a sequestration order to enforce payment of costs owed by a married woman, the sequestrators are not entitled to take rents of property of which she is tenant for life, without power of anticipation, that have accrued due subsequently to the date of the order for payment, even though the writ of sequestration was issued after such rents became payable.

Decision of North, J. (70 L. T. Rep. 622) *affirmed.*

Sect. 2 *of the Married Women's Property Act* 1893 *does not give the court jurisdiction to alter or vary an order for payment of costs made before the Act came into operation, or to make a new order for payment of the same costs.*

APPEAL by Hood-Barrs from a decision of North, J. (70 L. T. Rep. 622).

Hopkinson, Q.C. and *Denniss* for the appellant.—The rents which we seek to restrain Mrs. Cathcart from receiving being in arrear, they are, so far as regards the restraint on anticipation, on the same footing as if they had been actually paid. They can no longer be "anticipated," and they can therefore be sequestrated. Restraint upon anticipation prevents a married woman from anticipating accruing payments, but, when received, her judgment creditor can take them:

Re Glanvill; Ellis v. *Johnson,* 54 L. T. Rep. 411; 31 Ch. Div. 532;
Cox v. *Bennett,* 64 L. T. Rep. 380; (1891) 1 Ch. 617, 623.

Income in arrear at the time when it is attempted to put the sequestration in force may be taken under the order. The day after the rents accrued due Mrs. Cathcart could herself have assigned them. [DAVEY, L.J.—The cases of *Chapman* v. *Biggs* (48 L. T. Rep. 704; 11 Q. B. Div. 27) and *Dracott* v. *Harrison* (17 Q. B. Div. 147) are undoubtedly in point, and are authorities against your contention; but *Re Andrews*; *Edwards* v. *Dewar* (53 L. T. Rep. 422; 30 Ch. Div. 159) seems to be to some extent in your favour.] The Married Women's Property Act 1882 altered the law as laid down in *Pike* v. *Fitzgibbon* (44 L. T. Rep.

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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562; 17 Ch. Div 454). The appeal in the case of *Hood-Barrs* v. *Cathcart*, which has recently been argued in the other branch of this court, and in which judgment has been reserved, raises substantially the same point as occurs in this case. [LINDLEY, L.J.—We are aware of that, and we do not propose to give judgment in the present case until that appeal has been disposed of and we learn the result of it.] Other decisions relating to the question are the following:

Hyde v. *Hyde*, 59 L. T. Rep. 529; 13 Prob. Div. 166;
Claydon v. *Finch*, L. Rep. 15 Eq. 266;
Stanley v. *Stanley*, 37 L. T. Rep. 777; 7 Ch. Div. 589.

Then we say that regard must be had to the Married Women's Property Act 1893. That Act came into force on the 5th Dec. 1893. Sect. 2 enacts that in any action or proceeding instituted by a woman the court shall have jurisdiction to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment. That Act authorises the sequestration order to be made. The orders being for payment of costs, and made on applications by motion or summons by Mrs. Cathcart herself, they were made in a "proceeding instituted" by her, notwithstanding that the matter in which they were made was initiated by the petition of the appellant or Messrs. Lumley:

Salt v. *Cooper*, 43 L. T. Rep. 682; 16 Ch. Div. 544;
Re Clagett's Estate; *Fordham* v. *Clagett*, 46 L. T. Rep. 719; 20 L. T. Rep. 637.

Mrs Cathcart appeared in person, but did not address the court.

Cur. adv. vult.

June 18.—The following written judgment of the Court (Lindley and Davey, L.JJ.) was delivered by

DAVEY, L.J.—This is an appeal from North, J. against an order made by him on the 28th April 1894, dismissing with costs a motion by Mr. Hood-Barrs in this matter. It was heard by Lindley, L.J. and myself. In this case Mr. Hood-Barrs was appellant, and Mrs. Cathcart was respondent. By orders in the matter of 9th June 1893, 21st June 1893, and 19th Oct. 1893, Mrs. Cathcart has been ordered to pay to Mr. Hood-Barrs costs, which have been taxed at 115*l.* 1*s.* 2*d.*, 32*l.* 10*s.*, and 59*l.* 15*s.* 6*d.* The order of 9th June 1893, was made on a motion made by Mrs. Cathcart, and is an order for payment of costs by Mrs. Cathcart simply without more. The orders of 21st June and 19th Oct. were also made on applications by motion and summons of Mrs. Cathcart, and each of these orders contains the direction that execution for such costs against Mrs. Cathcart be limited to her separate property, not subject to any restraint against anticipation unless, by virtue of sect. 19 of the Married Women's Property Act 1882, such property shall be liable to execution, notwithstanding such restraint. By an order of the 15th Jan. 1894, it was ordered that Mr. Hood-Barrs be at liberty to issue a writ of sequestration to recover the above three sums of costs against the separate estate of Mrs. Cathcart, restricted on the same terms as those I have read from the two last orders. Mr. Hood-Barrs' motion was—(1) To continue an injunction, granted by the vacation judge on the 29th March 1894, to restrain Mrs. Cathcart from receiving the rents due on the 25th March, and then in arrear from her tenants; or, in the alternative, that a second writ of sequestration might be issued; or, lastly, that a receiver be appointed of the rents in arrear. The learned judge has held that the rents in arrear could not be taken in execution under the existing writ of sequestration, and that the plaintiff was not entitled to a fresh writ or to a receiver for the purpose of taking these arrears in execution on any of the then orders for costs above mentioned. The general question involved in this case was dealt with in the judgment delivered by the other division of this court in the case of *Hood-Barrs* v. *Cathcart*, and it follows from that decision that the learned judge took a correct view of the general question, and that his judgment on the main point ought to be affirmed in this case. But the appellants raised another point, founded on the 2nd section of the Married Women's Property Act of last year (56 & 57 Vict. c. 63). That section is as follows: "In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property, or otherwise as may be just." It was said that these are orders for payment of costs, and inasmuch as they were made on applications by motion or summons by Mrs. Cathcart herself, they were made in a "proceeding instituted" by her, notwithstanding that the matter in which they were made was initiated by the petition of the present appellant or Messrs. Lumley. It is unnecessary to decide whether that contention was correct. Assuming it to be so, we are of opinion that the section does not give the court jurisdiction to alter or vary an order for payment of costs made before the Act came into operation, or to make now a new order for payment of the same costs. We are therefore of opinion that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Hood-Barrs* and *Co.*; *H. R. Elton.*

Wednesday, July 18.

(Before the LORD CHANCELLOR (Herschell), LINDLEY and DAVEY, L.JJ.)

CADOGAN v. THE LYRIC THEATRE LIMITED. (a)

APPEAL FROM THE CHANCERY DIVISION.

Practice—Equitable execution—Appointment of receiver—Profits or earnings of business—Receipts of theatre—Rents and profits of land—Rules of Court 1883, *Order L., r.* 15 (*a*).

A receiver appointed at the instance of a judgment creditor is not entitled to carry on the business of the judgment debtor, or to take the profits derived from it, though he is entitled to prevent the debtor from carrying on such business.

A judgment creditor of a company, who carried on the business of theatrical proprietors, and held a

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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lease of a theatre, which lease they had mortgaged, not being able to obtain satisfaction of his judgment, was held entitled to have a receiver appointed by way of equitable execution of the rents and profits of the company's land, without prejudice to the rights of prior incumbrancers, and delivery of possession of the property to the receiver; but the receiver was not to be allowed to take the receipts at the doors of the theatre, such receipts not differing from the earnings of any other business.

Holmes *v.* Millage (68 *L. T. Rep.* 205; (1893) 1 *Q. B.* 551) *applied.*

Decision of Kekewich, J. reversed.

The plaintiff in this action advanced the sum of 2000*l.* to the defendant company, who carried on the business of theatrical proprietors, which was to be repaid out of the profits of their theatre. The lease of the theatre had been mortgaged by the defendant company. Default had been made in payment, and the plaintiff on the 1st June obtained from Stirling, J. judgment for 2000*l.*, the judgment not to be enforced if monthly instalments of 50*l.* were paid. Nothing was paid under the judgment, and the plaintiff applied to Kekewich, J. for the appointment of a receiver by way of equitable execution of the rents due or becoming due to and profits earned by the company. It was stated that there was a performance going on at the theatre from which considerable profits were being realised. The defendants adduced evidence to show that there were no rents to receive, and it was argued that the court had no jurisdiction to appoint a receiver by way of equitable execution of the profits or earnings of a theatre. Kekewich, J. was of opinion that money paid at a theatre for a licence to enter and remain for a certain time was strictly analogous to rent, and might properly be styled "rents and profits" of the theatre. And he made an order appointing a receiver of the rents and profits of the company by way of equitable execution.

The company appealed.

Ingpen for the appellants.—The court has no jurisdiction to appoint a receiver in this case. Equitable execution is only equitable relief in aid of legal jurisdiction, and even where there is jurisdiction special circumstances are necessary to be shown before the court will interfere. Here a receiver by way of equitable execution has been appointed of the company's rents and profits, the latter being the earnings of the theatre. There are no rents, and the court ought not to appoint a receiver where there is nothing to receive. As regards the profits, it has been held that the court has no jurisdiction to enforce satisfaction of a judgment debt by appointing a receiver of the future earnings of the judgment debtor:

Holmes v. *Millage*, 68 L. T. Rep. 205; (1893) 1 Q. B. 551.

[Davey, L.J.—In *Harris* v. *Beauchamp* (70 L. T. Rep. 636; (1894) 1 Q. B. 801) a similar point had to be considered.] Yes; and in that case the question was as to whether or not special circumstances were necessary in order to justify the making of an order for the appointment of a receiver at the instance of a judgment creditor. The court held that the circumstances of the case must be such as would have enabled the Court of Chancery to make such an order before the Judicature Acts; and that the court had no jurisdiction to appoint a receiver merely because under the circumstances of the case it would be a more convenient method of obtaining satisfaction of a judgment than the usual mode of execution. Order L., r. 15 (*a*), provides that, in every case in which an application is made for the appointment of a receiver by way of equitable execution, the court or a judge, in determining whether it is just or convenient that such appointment should be made, shall have regard to the amount of the debt claimed by the applicant, to the amount which may probably be obtained by the receiver, and to the probable costs of his appointment; and may, if they or he shall so think fit, direct any inquiries on these or other matters before making the appointment. I submit that it is not "just and convenient" in this case to appoint a receiver. He can have no power to manage the business of the company, and the effect will be to stop that business altogether. Therefore I say that the order is altogether irregular, and should be discharged. But in any event the order in its present form is wrong. The proper course would be for the judgment creditor to present a winding-up petition to enforce his claim against the company.

Grosvenor Woods, Q.C. and *Cecil Chapman* for respondent.—[Lindley, L.J.—Why did not the respondent present a winding-up petition?] Because of the inevitable delay which would occur, and also because there are debenture-holders who would no doubt have rendered such a course ineffectual. Equitable execution is not merely execution, but it is equitable relief granted because mere execution at law cannot be obtained. It is a substitute for legal execution where that cannot be had:

Re Shephard; *Atkins* v. *Shephard*, 62 L. T. Rep. 337; 43 Ch. Div. 131.

The property of the company being mortgaged, the interest of the debtors was only equitable, and therefore the judgment creditor was compelled to have recourse to the remedy afforded by equitable execution. *Holmes* v. *Millage* (*ubi sup.*) is a different case from this. The earnings of the theatre —viz., the receipts taken at the doors—are in the nature of earnings of land, and this is a case in which a writ of *elegit* could have issued if the property had not been mortgaged. Therefore the order was, we submit, rightly made. If, however, the court should be of opinion that the respondent was not entitled to the order as made by Kekewich, J., then we ask the court to give him such a proper order as will afford him effectual recovery of his debt.

Ingpen in reply.—[The Lord Chancellor.—In Kerr on Receivers (3rd edit. p. 45) *Rhodes* v. *Lord Mostyn* (17 Jur. 1007) is cited, and it is said, "If there are prior or outstanding mortgages, but the mortgagees are not in possession, or refuse to take possession, the court will appoint a receiver of the mortgaged premises at the suit of judgment creditors, without prejudice, however, to the right of mortgagees to take possession if they think fit." That seems to exactly apply to this case. The observations in *Ex parte Evans*; *Re Watkins* (41 L. T. Rep. 565, 566; 13 Ch. Div. 252, 257) are also much in point, the matter there being treated in precisely the same way.] There may have been rents to receive in *Rhodes* v. *Mostyn*

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(*ubi sup.*). A receiver, without being a manager, cannot carry on the company's business, and the effect would be to bring it to a standstill.

Grosvenor Woods, Q.C. referred to *Salt* v. *Cooper* (43 L. T. Rep. 682; 16 Ch. Div. 544) and *Re Pope* (55 L. T. Rep. 369; 17 Q. B. Div. 743) as further showing that the order made by Kekewich, J. ought to be modified.

The Lord Chancellor—In this case the respondent, the execution creditor, having recovered judgment against the appellants, the company, for 2000*l.*, and not being able to obtain satisfaction of the judgment by means of execution, applied to Kekewich, J. for an order for a receiver. He obtained an order for the appointment of a receiver by way of equitable execution, the view taken by the learned judge being that, as the company was carrying on business, the execution creditor was entitled to have a receiver appointed to take the money paid by the public at the doors of the theatre, and in that way to obtain satisfaction of his judgment. I do not think, with deference to the learned judge, that that was a right order to make. An execution creditor can only come to a court of equity to enforce his judgment against property which is not capable of being reached at law. He is entitled to come to a court of equity to enforce his judgment when the debtor has some equitable interest which is not capable of being reached by execution at law, but which can be reached in equity. But it was argued by Mr. Grosvenor Woods for the respondent, that money paid at the doors by persons who entered the theatre for witnessing the spectacle therein was really "rent" of the land owned by the company, and that therefore the order was a proper one, the case being on that ground distinguishable from *Holmes* v. *Millage* (68 L. T. Rep. 205; (1893) 1 Q. B. 551), and *Harris* v. *Beauchamp* (70 L. T. Rep. 636; (1894) 1 Q. B. 801). I do not think that that distinction will hold good. Money paid for entrance to a theatre is not properly described as rent or profits of the premises. No doubt premises are required for carrying on the business of a spectacle giver, but only just as they are required for carrying on any other business. I do not think that the distinction relied upon between the present case and those cases can be supported. I think, however, that the execution creditor has rightly come to this court for relief. If the theatre had not been mortgaged, the plaintiff could have taken it under an *elegit* at law. But the remedy by *elegit* is excluded by reason of the mortgage, the debtors having thus only an equitable interest in the theatre, having parted with their legal estate. But they have retained their equitable estate, and the case seems to me within the words of Lindley, L.J. in *Holmes* v. *Millage* (*ubi sup.*), where his Lordship said (1893) 1 Q. B. at p. 555): "The only cases of this kind in which courts of equity ever interfered were cases in which the judgment debtor had an equitable interest in property which could have been reached at law, if he had had the legal interest in it, instead of an equitable interest only." That applies to the present case. There can be no doubt that, if the interest of the judgment debtors had not been equitable, the judgment creditor could have taken it under an *elegit*. And in my opinion, as the debtor's interest is equitable, the creditor is entitled to that equitable remedy which is a substitute for an *elegit* at law. It is not necessary to refer to more than one case, namely, *Ex parte Evans*; *Re Watkins* (41 L. T. Rep. 565, at p. 566; 13 Ch. Div. 252, at p. 257), because the principle laid down in the previous cases is stated by James, L.J. thus: "Beyond all question it was held, in *Hatton* v. *Haywood* (30 L. T. Rep. 279; L. Rep. 9 Ch. App. 229) and *Anglo-Italian Bank* v. *Davies* (39 L. T. Rep. 244; 9 Ch. Div. 275), that an order appointing a receiver amounted to equitable execution. A judgment creditor, not being able to obtain relief at law under the old system, because his debtor had nothing but an equitable interest in the land, came into a court of equity to obtain that relief which he could not obtain at law, and the moment he established the difficulty in his way at law, and the court made the order giving the right to the possession of land to the receiver appointed on his behalf, that order giving the right to possession to the creditor through the receiver was as much a delivery in execution of land in which the debtor had only an equitable interest, as was the sheriff's return to the writ of *elegit* at law, that he had extended the land, a delivery in execution of land in which the debtor had a legal interest." That seems to me to point clearly to what is the proper remedy of the creditor in the present case. The judgment debtors having only an equitable interest, the creditor ought to have precisely the same remedy in equity as he would have had at law if the debtor's interest had been legal. The order therefore should be for the appointment of a receiver of the rents and profits of the company's land, and the company must deliver possession to him, but without prejudice to the rights of prior incumbrancers. I think that the appellants were justified in coming to this court, and therefore there will be no costs of the appeal. The order as to costs in the court below will not be interfered with.

Lindley, L.J.—In substance the order appealed from is, in my opinion, right, and is in conformity with the principle which has governed the court of equity for years. But in form it is open to objection. The facts of the case are simple. [His Lordship stated them, and continued:] Supposing there had been no mortgage, the respondent's legal right would have been to take the theatre under a writ of *elegit*, and to make what he could of it. That would have been his right at law if the property of the company had not been mortgaged. But the company have only an equitable interest in the theatre, and long before the Judicature Acts the Court of Chancery was in the habit of appointing in such a case a receiver of the debtor's equitable interest. In *Rhodes* v. *Lord Mostyn* (17 Jur. 1007), which was decided in 1853, and in which that point was discussed, an order such as the Lord Chancellor has here indicated was made. Why should that not be the order made in the present case? I cannot conceive any reason. There seems to me no ground upon which the authorities of *Holmes* v. *Millage* (*ubi sup.*) and *Harris* v. *Beauchamp* (*ubi sup.*) are distinguishable from the present case. The order must be made, as mentioned by Lord Herschell. I suppose that practically the order will be worked out by fixing an occupation rent of the theatre. I agree also as to the costs.

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DAVEY, L.J.—I agree that the order made by Kekewich, J. is wrong in form. I also think that in substance it is wrong, because under it the receiver would have power to take the earnings of the theatre. He intended that the receiver should sit in the pay box and take the money paid by the persons who entered the theatre. I do not think that that is right. I do not think that the receiver appointed on the application of the judgment creditor is entitled to carry on the business of the company, or to take the profits derived from it, although he may be entitled to prevent the company or anyone else from carrying on business on the company's premises. That we ought to make an order such as has been indicated by the Lord Chancellor is, I think, perfectly plain. Ever since the case of *Neate* v. *Duke of Marlborough* (3 My. & Cr. 407) it has been held that, where there is a legal impediment to the remedy by *elegit* at law and a judgment creditor is not able to obtain relief at law because his debtor has only an equitable interest, he is entitled to come to this court and have the same benefit in equity which he would have had at law if the debtor's estate had been legal. Equity gives the judgment creditor precisely the same relief as he would have got at law. That seems to me clearly established, not only by *Neate* v. *Duke of Marlborough* (3 My. & Cr. 407), but also by *Hatton* v. *Haywood* (30 L. T. Rep. 279; L. Rep. 9, Ch. App. 229), *Anglo-Italian Bank* v. *Davies* (39 L. T. Rep. 244; 9 Ch. Div. 275), and *Re Pope* (55 L. T. Rep. 369; 17 Q. B. Div. 743). The vice of the order appealed from is, that it gives the receiver power to take the profits of the company's business and apparently wherever it is carried on. I think we ought to make an order in the terms which the Lord Chancellor has mentioned, limited to rents and profits derived from the company's land. And, as it appears that the whole of the land is in the possession of the company, I think that, to avoid any question, it would be right to mould our order in such a way as to direct the company to deliver up possession to the receiver without prejudice to the rights of prior incumbrancers. I agree as to the costs.

Order varied.

Solicitor for the appellants, *M. S. Rubinstein.*

Solicitors for the respondent, *Lee* and *Pembertons.*

Monday, July 30.

(Before LINDLEY, LOPES, and DAVEY, L.JJ.)

HOOD-BARRS v. CATHCART. (a)

APPEAL FROM THE CHANCERY DIVISION.

Practice—Married woman—Defendant in action—Costs of unsuccessful appeal—Sequestration—Property subject to restraint upon anticipation—Married Women's Property Act 1893 (56 & 57 *Vict. c.* 63), *s.* 2.

An order for the payment of costs of an unsuccessful appeal by a married woman cannot be enforced by the issue of a writ of sequestration under sect. 2 *of the Married Women's Property Act* 1893, *as that section only applies to some action commenced by the married woman or proceedings initiated by her, such as a petition or originating summons, and does not extend to appeals.*

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

THE plaintiff, who was a solicitor, commenced this action in the Queen's Bench Division to recover from the defendant, a married woman, a sum of money which he had paid on her account. He obtained judgment for the amount and costs, and a writ of sequestration was issued against the defendant to enforce payment of the costs. The defendant applied that the writ should be stayed, and her application was on the 19th Oct. 1893 dismissed by the vacation judge with costs. The defendant appealed from that decision to a divisional court, and her appeal was dismissed with costs on the 14th Dec., 1893. From that decision she appealed to the Court of Appeal, and that appeal was dismissed with costs on the 12th Feb. 1894.

The action was afterwards transferred to the Chancery Division, and attached to the court of North, J. By an order made in chambers on the 2nd July 1894, North, J. gave leave to the plaintiff to issue a writ of sequestration against the separate estate of the defendant for the costs of the appeals of the 14th Dec. 1893, and the 12th Feb. 1894; and it was ordered that the costs of that application should be taxed and paid by the defendant out of her separate estate not restrained from anticipation. The defendant gave notice of motion to discharge that order, and the plaintiff gave a cross notice of motion to vary the order by inserting the words "notwithstanding any restraint upon anticipation." On the 13th July 1894, North, J., on the hearing of the defendant's motion, discharged the order of the 2nd July, considering that he was bound by the order of the Court of Appeal given on the 25th June 1894, in an action of *Hulbert and Crowe* v. *Cathcart.*

From that decision the plaintiff now appealed.

Hopkinson, Q.C. (with him *Johnstone Edwards*) for the appellant.—The specific costs in respect of which it is now desired to issue a writ of sequestration are the costs of two unsuccessful appeals by Mrs. Cathcart. The order made by North, J., in chambers, only gave leave to sequestrate property not subject to a restraint upon anticipation. Mrs. Cathcart moved to discharge that order, and succeeded, and the appellant's notice of motion to vary it of course fell through. I now ask the court to restore the order giving leave to issue a writ of sequestration, and to add to it a direction that it shall extend to property belonging to Mrs. Cathcart which is subject to a restraint upon anticipation. North, J. was of opinion that the order of the Court of Appeal of the 25th June 1894, in the case of *Hulbert and Crowe* v. *Cathcart* (70 L. T. Rep. 558; on appeal not reported) governed this case, and decided accordingly. [LINDLEY, L.J.—As I understand that decision, you cannot sequestrate property which has accrued due if protected by a restraint upon anticipation.] There is an affidavit in this case very different from the affidavit made in *Hulbert and Crowe* v. *Cathcart.* The question in the judgment there did not arise in respect of property which Mrs. Cathcart is restrained from anticipating. Order XLIII., rr. 6 and 7, deals with this matter. The Married Women's Property Act 1893, s. 2, enacts that, in any action or proceeding now or hereafter instituted by a woman, or by a next friend on her behalf, the court before which such action or proceeding is pending shall have jurisdiction, by judgment or order from time to time, to order payment of the costs of the

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opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver, and the sale of the property, or otherwise as may be just. That section was considered in this court in *Re Lumley; Hood-Barrs* v. *Cathcart* (*ante* p. 7). But in that case the orders were made before the Act came into operation, and therefore the court held that the Act did not assist in the matter. I submit that the section is quite wide enough to cover any application made to the court by a married woman, and therefore includes appeals by her. The court ought not to place too narrow a construction on what the Legislature have done. I ask the court, therefore, to give leave to issue the writ of sequestration.

Mrs. Cathcart appeared in person, but did not address the court.

LINDLEY, L.J.—The substantial question, to my mind, in this case is the one last raised—namely, whether sect. 2 of the Married Women's Property Act 1893 can be applied. Mr. Hopkinson says that it can. He says that the orders by which the appeals by Mrs. Cathcart were dismissed were both made after the Act came into force, and that the appeals which were dismissed were proceedings instituted by Mrs. Cathcart within the meaning of sect. 2 of the Act. The question is very important. The section enacts as follows: [His Lordship read the section and continued:] The question is, What is the true meaning which must be put upon the words "any proceedings now or hereafter instituted by a woman or by a next friend on her behalf?" Mr. Hopkinson says that those words will include appeals or applications of any other kind by a person who sues, or against whom proceedings have been taken. It appears to me that the legislation does not hit such a case as that. I do not think that the language bears that construction. The word "instituted" is important, and I cannot help thinking that it refers to some proceeding in which a married woman is the actor in the sense of starting it, such as an originating summons or petition in proceedings which are authorised to be so commenced. I do not think that the expression includes motions or other applications by defendants. It may be that frivolous appeals are within the mischief of the Act, but they are not within the language. I do not think that the language is large enough to include such proceedings as this. I do not think that they are proceedings "instituted" within the language of lawyers or the ordinary meaning of the word, and, that being so, the case is not distinguishable from the cases before the court on the former occasions. I think that North, J. was right in saying that there is no property which can be got at by means of a writ of sequestration. I think, therefore, that the appeal must be dismissed, and dismissed with costs.

LOPES, L.J.—The costs in this case which are sought to be recovered are the costs of two appeals which have been dismissed with costs, and the question is an important one as to the construction of sect. 2 of the Act of 1893. The question raised is, Does that section include appeals? That is the matter to be dealt with here. In my opinion it does not. The word "instituted" conveys to my mind the idea of proceedings which are the commencement of proceedings, such as originating summonses or summonses which are the initiation of the matters to be dealt with, of which kind there are many. That is to say, proceedings in which the married woman is the prime mover—the actor. That appears to me to be the meaning of the section. I think North, J. was right in saying that there was no property which could be sequestrated, and that the appeal fails.

DAVEY, L.J.—I am of the same opinion, and were it not that this is the first occasion on which the construction of this section has come before us, I should have contented myself by merely saying that I agreed with the judgments which have been delivered. Mr. Hopkinson's contention is, that the word "proceeding" in the section means any motion or any step taken by a married woman in any action, though it may be one in which she is defendant and not plaintiff. That appears to me not borne out by the language. An appeal is really in the nature of a defence by a person who has already had an order made against him. I think that the words "action or proceeding" must mean an action or proceeding in the nature of an action; that is to say, a proceeding by which some process is instituted, and "instituted" would be an inapt word to use for a purpose such as that suggested by Mr. Hopkinson. I never heard, and I feel confident that no practitioner ever heard, of an appeal being "instituted," or of a motion or a summons in an action being "instituted," whereas the word "institute" is an appropriate or apt word for describing the commencement of an action. In Chancery we used formerly to talk of the "institution" of a suit. The words "from time to time" in the section point out what is meant. That is, whenever a married woman begins litigation as plaintiff, then in any step or in any action, in any proceeding in the nature of an action so started, in which she is ordered to pay costs, the court may in such action or proceeding order the costs to be paid out of her separate estate, notwithstanding that there may be a restraint on anticipation. On the other point I have nothing to add. As regards the costs of this appeal, they can be set off against the costs of Mrs. Cathcart's unsuccessful appeals.

LINDLEY, L.J.—I may add that we have all considered this section with our colleagues, not with regard to this particular appeal, but generally, and we are all agreed as to the construction which must be put upon it.

Appeal dismissed.

Wednesday, July 25.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

THE BASSETT HOUND. (*a*)

Collision—Overtaking vessel—Flare-up light—Regulations for Preventing Collisions at Sea, art. 11.

A fishing smack on her way to her fishing ground in the North Sea, on a clear night, sighted the light of an overtaking vessel on her port quarter. The smack exhibited one flare-up light, but the vessel, nevertheless, continued her course, and a collision occurred.

Held, that the smack was to blame within art. 11

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

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of the Regulations for Preventing Collisions at Sea, for not showing flare-up lights at proper intervals as long as there was any danger.

The Essequibo (58 *L. T. Rep.* 596; 6 Asp. *Mar. Law Cas.* 276; 13 *P. Div.* 51) *followed.*

APPEAL from a decision of Barnes, J.

This was a collision action *in rem*, brought by Thomas Henry Greer, owner of the smack *Sobriety*, her master and crew, against the owners of the steam trawler *Bassett Hound*.

The collision occurred in the North Sea, about 120 miles E.N.E. of the Spurn.

On 7th April 1894 the *Sobriety*, a wooden sailing smack of 75 tons register, belonging to the port of Grimsby, was in the North Sea, about 120 miles E.N.E. of Spurn Point, on her way to the fishing grounds, with her gear and a crew of five hands. The weather was fine and clear, with a light E.N.E. breeze and a smooth sea, and the tide was flood, setting to the eastward with a force of about two knots. The *Sobriety* was laid on the starboard tack, heading about N.N.E., with her mainsail, mizzen, and second jib set, with her head to windward, at a speed of about one knot. About 2.15 a.m. the white light of the *Bassett Hound* was sighted about five miles away, and bearing off the port mizzen rigging of the *Sobriety* about W.S.W. Some time afterwards the green light of the *Bassett Hound* came in sight, and almost directly afterwards the red light, but only for a moment, and was then shut in, and the green light alone was to be seen. This light was watched, and when it approached to within about a quarter of a mile a red flare was burnt on the lee quarter, and the *Sobriety* kept her course. The *Bassett Hound* continued to approach without altering her course, and with the bluff of her starboard bow struck the *Sobriety* on the port side, about abreast of the main rigging, doing her so much damage that she sank in ten minutes, and four of the crew were drowned. The *Bassett Hound*, an iron steam trawler of 57 tons register, with engines of forty-five horse power nominal, and a crew of nine hands, was also on her way to the fishing grounds, and was making about eight knots on an E. by N. course magnetic. Her story was that the sails of the *Sobriety* were suddenly seen about two to three points on her starboard bow, and quite close, and that no lights whatever were visible. Her helm was ordered to be starboarded, but too late to avoid collision. The defendants charged the plaintiffs (*inter alia*) with breach of art. 11 of the Regulations for Preventing Collisions at Sea, which is as follows:

> A ship which is being overtaken by another shall show from her stern to such last-mentioned ship a white light or a flare-up light.

The action was tried before Barnes, J. and Trinity Masters on the 7th and 8th June 1894. Barnes, J., in giving judgment, said that the whole question turned upon—(1) Whether or not there was a proper look-out on the *Bassett Hound*; and (2) whether or not the *Sobriety* showed the light or lights required by rule 11 sufficiently or at all. As to (1), he decided that those on board the *Bassett Hound* kept a proper look-out, and could not have seen the flare on the *Sobriety* because of the distance; and, as to (2), that the smack did not comply with art. 11, because there was ample time to have shown more than one flare, and that the one flare was an insufficient warning. He therefore found that the smack *Sobriety* was alone to blame.

The plaintiffs appealed.

Sir *W. Phillimore* and *G. G. Phillimore* for the appellants.

Aspinall, Q.C. and *Butler Aspinall* for the respondents.

ESHER, M.R.—I am not prepared to differ from the decision of the learned judge in this case. It seems to me that the law of the matter stands thus, that the burden of proof in the first place lies upon the smack. It is she who complains that she has been run down, and she has been run down at sea at night. At night it is the duty of any vessel moving on the sea to show lights. Why? It is their duty to show lights to enable other vessels which are moving on the sea to see them, so as to know where they are, and to act accordingly. If they show no lights they do not give to the other vessel that assistance to which that vessel is entitled. That is the reason of the rule. The reason why they are made to carry lights is in order that they may give assistance to other vessels to enable them to act according to other rules. If a vessel has a green light on one side and a red light on the other, then that enables the other vessel to see what are the other rules, as, for instance, passing port side to port side, which she is called upon to obey. Therefore the burden of proof that the vessel is carrying lights is the very first thing that she is bound to prove when she brings an action. If she does not carry proper lights it is almost, and I think it is quite, inevitable to say that she must be in the wrong. She can only escape by saying, "It is true I was in the wrong, but my wrong act did not at all conduce to the collision," which is a very difficult thing to say. What is the duty of every other vessel? Every vessel is bound to keep a proper look-out, and the duty of giving affirmative evidence upon the point is upon the vessel herself. For that reason the burden of proof is laid upon each vessel, if there is any fair reason to challenge the matter. The burden lies upon each vessel to show that she has kept a proper look-out. The first evidence of that must always be evidence from on board the vessel herself. If that ship gives evidence that they were keeping a proper look-out, that evidence may be shown to be false by the circumstances. If two steamers are meeting nearly end on, and each of them is shown to be showing her proper lights—if they are meeting nearly end on, and come within a distance of half a mile of each other, and one of them says she was keeping a good look-out but never saw the other, although if she had lights she must have seen them all three within a mile or half a mile of her, what is the result? Although the people of the steamer have sworn that they were keeping a good look-out, you do not believe them. Circumstances show that they could not have been. But it is clear that though there is one way of testing their evidence, it is a wholly illogical and unreasonable way of dealing with the thing to say that they are to be found not to have kept a good look-out in every case in which they have not seen the lights. If they did not see them, it is not true and logical reasoning to say that that shows conclusively that they were not keeping a good look-out. That must depend upon circumstances. In

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this case, therefore, it lies upon the *Sobriety* to show that she gave proper assistance to the steamer with regard to her own lights. Rule 11, if you took it literally, according to its own words, would be satisfied by the smack showing a flash light at the most extreme distance within which a flash light could be seen. Nay, more, if you take the words of the rule, it would be satisfied if it was shown at a distance at which the other could not see it. But it is not merely a legal rule; it is a business rule, to be acted upon by people who are not lawyers, and a rule to be acted upon to bring about the result which it was intended to bring about. For that reason it has been held, and particularly in the case of *The Essequibo* (*ubi sup.*)—it has been held by the late Lord Hannen that you must not read it so as to say that she has satisfied the rule if she has shown a flash light. He says that upon the fair reading of that rule, to be applied in practice, it must be that she ought to continue to show a light from time to time. You cannot say how far distant each of those flares must be, but from time to time you must show flash lights to the vessel which is approaching. The reason consists in the difference between a flash light—or, if that is not the proper term for these particular lights, a light which is only an intermittent light—and a continuous light. A red light shown all the time must be seen by people coming near to it on the port side. It must be seen. It is in sight a very long time, continuously, or up to the time you come close to one another. But these intermittent lights are at intervals of time, and whether they are seen at all must depend upon whether you have your eyes upon them at the time they are being shown. It is not in every case and in every condition that you can say that the other vessel ought to have seen that light. Nor is it true to say that in every position of the vessels you need not take any notice of the light because it was not shown more than once. Vessels may be in such a position as regards it that if it is shown once it ought to be seen that once. If the vessels were near to each other, within a quarter of a mile we may say, and one of these lights was shown, and the one that has to show the flash light was ahead of the other, as a matter of truth and practice you would say it is impossible, but that if you had kept a proper look-out you must have seen it, and if you saw it once you have no right to disregard it because you do not see it again. Then, it must be observed, that it after all depends upon the position of the two vessels both as to bearing and distance. Has this case, therefore, been brought within that rule which ought to have brought Barnes, J. to the conclusion that they ought to have seen that light, and that it is obvious and clear that if they did not see it there must have been a want of proper look-out? I cannot bring myself to that, and for the reason which I have suggested during the argument. If the vessel is at a very great distance, and the one that ought to show a flash light is at a very great distance and shows it in some part of the horizon, which, although ahead of the ship, may be at any part of that horizon, can it be true to say that, even though it could be seen, it ought to have been seen, and so clearly to have been seen that it must be negligence not to have seen it? It does not seem to be really true, and for that reason I could not accept that proposition so laid down. Here it lay upon the smack to show that she did show that flash light in such a position and at such a time that the others ought to have seen it, and seen it to this extent, that you must say that they did not keep a good look-out if they did not see it. [His Lordship dealt with the evidence, and continued:] I adopt, as absolutely good nautical law, the interpretation put upon the rule by Lord Hannen in *The Essequibo* (*ubi sup.*). Then it is said that, although that finding cannot be overruled, nevertheless the learned judge ought to have found that, although the smack was in the wrong, yet that before the collision those on board the steamer ought to have seen her, and that if they had seen her they would have been able to avoid the collision, although she was wrong in regard to her lights. That, again, depends upon the evidence as to the distances. That is upon the assumption that she did not give them proper information by her lights, but it is said that it was such a night that they ought to have seen her hull or her sails in time to enable them to avoid her. It is very difficult to say within what distance you could have seen such a vessel on such a night. It is put by the witness whose evidence the learned judge cannot rely upon, from the mode in which he gave his evidence—it is put by him at 100 yards. The learned judge cannot rely upon that man, and therefore he cannot say it was 100 yards. The others said thirty yards. I should say myself that very likely the learned judge could not safely act upon the supposition that it was thirty yards off. From that evidence on the one side and the evidence on the other, he cannot say clearly that she ought to have seen this small vessel. We do not know what sort of sails she had. We cannot come to the conclusion that she ought to have seen her. Upon the assumption that she did not give them any lights at all, we cannot say that they ought to have seen her hull in time to have been able to avoid her. There, again, the burden of proof, which charged that as negligence on the part of the steamer, lay upon the smack, and if she did not give the learned judge evidence upon which he could rely as to the distance at which they say the steamer ought to have seen her on that night, then they failed in their burden. I think, therefore, that on both the points which have been taken we cannot differ from the judgment of the learned judge, and that this appeal must be dismissed.

Kay, L.J.—It seems clear that this smack was in fault. According to art. 11 a ship which is being overtaken by another is to show at her stern to such last-mentioned ship a white light, or flare-up light; and in the case of *The Essequibo* (*ubi sup.*) Lord Hannen held that the ship which is being overtaken does not fulfil the duty cast upon her by this art. 11 by showing a flare-up light once only, but has to continue to show flare-up lights as long as there is any danger. I think it is quite clear that the *Sobriety* showed a flare-up light once only, and therefore did not fulfil the duty, according to the interpretation put upon that art. 11, devolving upon her. Then is she alone to blame? The learned judge found that she was alone to blame, and the difficulty I feel is to differ from the judge who has come to that conclusion, and who has had the advantage, that we cannot have here, of hearing the witnesses, and seeing how much of their evidence is to be

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believed and how much rejected. It is quite plain, according to the decision in *The Essequibo*, that the *Sobriety* was to blame for not repeating the flare. Therefore the *Sobriety* was in the wrong. It is not so clear, although upon the evidence I should have thought it was, to say the least, doubtful, that a proper look-out was not kept on board the *Bassett Hound*. The learned judge has come to the conclusion that a proper look-out was kept. That being so, I confess I am not able to dissent from the learned judge, and therefore I think the appeal has failed.

SMITH, L.J. concurred.

Appeal dismissed.

Solicitors: *Rollit* and *Sons*, for *Rollit* and *Sons*, Hull; *Deacon*, *Gibson* and *Medcalfe*, for *Grange* and *Wintringham*, Grimsby.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

March 21 *and April* 18.

(Before WILLIAMS, J., sitting as an additional Judge of the Chancery Division.)

Re A COMPANY. (*a*)

Company—Winding-up—Petition not presented in good faith—Jurisdiction of court to prevent abuse of its own process—Restraining advertisement of petition.

The Court has an inherent jurisdiction to stay proceedings when they amount to an abuse of its own process.

Where, therefore, a petition had been presented for the winding-up of a company which the court was satisfied had not been presented in good faith, the Court on the application of the company granted an injunction restraining the petitioner from advertising the petition, and from taking any further proceedings thereon.

MOTION.

This was a motion by a limited company for an injunction to restrain a petitioner who had presented a petition for winding-up the company from advertising the petition, and from taking any further proceedings thereon.

The petition was presented on the 20th March 1894, and by it the petitioner alleged that the company had no money in hand to meet the expenses of promotion and the expenses of certain experiments, and that there appeared to be "an absence of *bonâ fide* intention on the part of those responsible for the management of the company to carry on business in a proper manner, and there are matters to be investigated in connection with the promotion of the company;" and that, under those and other circumstances alleged in the petition, it was just and equitable that the company should be wound-up. The petitioner then alleged as follows:

Your petitioner holds 800 shares in the capital of the company, which said shares are fully paid, and although your petitioner was not the original allottee of such shares, he was entitled *de jure* to have had the same originally allotted to him, and claims to be considered as an original allottee.

On the day following the presentation of the petition the company applied *ex parte* in the matter of the petition for an interim injunction to restrain the petitioner from advertising the petition. From the evidence it appeared that the petitioner had acquired his shares by transfer on the 14th Feb. 1894.

Buckley, Q.C. and *Bethune Baker* for the motion.—The petitioner is precluded from presenting a winding-up petition, as he is neither an original allottee of the shares, nor have they been held by him and registered in his name for six months prior to the presentation of the petition: (Companies Act 1867, sect. 40.) As, therefore, the petitioner cannot hope to succeed upon the present petition, and the effect of advertising it will cause great damage to the company, he ought to be restrained, under sect. 85 of the Companies Act 1862, from so doing, and from taking any further proceedings thereon.

WILLIAMS, J.—That section appears to me to apply only to restraining proceedings other than those taken with a view to obtaining a winding-up order. The court has, however, an inherent jurisdiction to stay proceedings when they amount to an abuse of its process. That is a well-recognised principle. You may take an interim order extending over the next petition day, which will be the first petition day in next sittings, restraining the advertisement of the petition, with liberty to the petitioner to apply—and if necessary to the vacation judge—to discharge the order. It has been suggested to me that the applicants should give an undertaking as to damages, and I think that the usual undertaking should be given. The applicants must also give notice to the petitioner of the order which has been made.

April 18.—Short notice of the present motion was subsequently served upon the petitioner, and the motion now came on for hearing.

Buckley, Q.C. and *Bethune Baker* for motion.

Farwell, Q.C. and *R. J. Parker* for the petitioner.—The shares in question were allotted by the company to the wrong person. The company cannot therefore avail themselves of sect. 40 of the Companies Act 1867. [WILLIAMS, J.—That section contains an express provision as to the qualification of a contributory to present a winding-up petition, and it cannot be modified by saying that the petitioner ought to be put in a position in which he is not. The provisions of the section have not been complied with in the present case, and I have not been shown any reason why the company ought not to be allowed to set up the defence which they do.] The mere fact that the petition may be demurrable is not a sufficient ground for restraining the advertisement of the petition. Such a prohibition would be a strong measure, and should only be resorted to when the court is satisfied that the petition is not presented in good faith, but for some ulterior purpose.

WILLIAMS, J.—In my opinion, if I am satisfied that a petition is not presented in good faith, and for the legitimate purpose of obtaining a winding-up order, but for some other purpose, as, for example, for putting pressure on the company, I ought to stop it if its continuance is likely to cause damage to the company. I think those reasons apply in the present case, and that the injunction ought to be granted. I make the order asked for

(*a*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

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restraining the advertisement of the petition, and all further proceedings upon it.

Solicitors: *Dix* and *Warlow*, for *G. L. Welford*, Manchester; *J. R. Hall*, for *W. Vernon Ogden*, Manchester.

QUEEN'S BENCH DIVISION.

Tuesday, April 10.

(Before Wright and Bruce, JJ.)

Bassett v. Tong. (a)

County Court — Practice — Remitting action to County Court—Claim for unliquidated damages indorsed on writ—County Courts Act 1888 (51 & 52 *Vict. c.* 43), *s.* 65—*Judicature Act* 1873, *s.* 67.

Held, by the Court, that they were bound by the decision in Knight *v.* Abbott, Page, and Co. (10 *Q. B. Div.* 11; 52 *L. J.* 131, *Q. B.*). *Nothing but a claim for liquidated damages can be remitted to the County Court.*

Knight *v.* Abbott, Page, and Co. (*ubi sup.*) *followed.*

This was an appeal by the defendant against an order made by the district registrar sitting at Grimsby, directing the action to be tried in the Grimsby County Court pursuant to sect. 65 of the County Courts Act of 1888 (51 & 52 Vict. c. 43).

The appeal came before Wright, J., at chambers, who was of opinion that in the face of the decision in the case of *Knight* v. *Abbott, Page, and Co.* (10 Q. B. Div. 11; 52 L. J. 131, Q.B.) he ought to adjourn the summons to the Divisional Court for argument.

Acland for the plaintiff (the respondent).—The decision of the court in the case of *Knight* v. *Abbott, Page, and Co.* (10 Q. B. Div. 11; 52 L. J. 131, Q. B.) is wrong as regards the ruling therein laid down with respect to the practice under sect. 26 of the County Courts Act 1856 (19 & 20 Vict. c. 108), even as that statute stood then. At the time when that decision was given there were two statutes dealing with the remittal of actions to the County Court, viz., the County Courts Act of 1856 (19 & 20 Vict. c. 108), s. 26, and the County Courts Act 1867 (30 & 31 Vict. c. 142), s. 7. The latter statute deals with cases in which the claim indorsed on the writ does not exceed 50*l.*, or has been reduced to a sum not exceeding 50*l.* Sect. 26 of the County Courts Act 1856 (19 & 20 Vict. c. 108) provided that, where the claim did not exceed 50*l.* the case might be remitted from the High Court to be tried in the County Court; and sect. 7 of the County Courts Act 1867 (30 & 31 Vict. c. 142) provides that, where the claim indorsed on the writ does not exceed that amount, the case could be remitted to the County Court altogether and not for trial only. Sect. 67 of the Judicature Act 1873 extended the provisions of sect. 7 of the Act of 1867 to all actions commenced in the High Court in which the relief sought can be given in the County Court. This cannot be taken to be limited to liquidated claims. [Wright, J.—That seems to me to be an important argument.] By the County Courts Act 1888 (51 & 52 Vict. c. 43), s. 65, the amount was increased to not exceeding 100*l.* The words "where in any action of contract" in this section are not limited to actions in which only liquidated damages are claimed, but extend to unliquidated damages also. In sect. 62 similar words are found, viz., "if in any action of contract." These words must be construed in their widest sense. This court is not bound by the decision in *Knight* v. *Abbott* (*ubi sup.*). With regard to the words "indorsed on," it is submitted that they do not mean specially indorsed, for when that sense is intended to be conveyed the word "specially" is made use of: (see Order XIII., r. 3.) They mean merely "written on the back." This is their ordinary and natural meaning, as is clearly shown in Order IV., rr. 1 and 2, which deals with indorsement of address, and again in Order VII., r. 1, and still again in Order IX., r. 15. [Wright, J.—Neither of us see how you can get over sect. 7 of the Act of 1867.]

Etherington Smith for the appellant (the defendant).—This is not a case of an indorsement on the writ. [Wright, J.—Your best point is that this is not the kind of action in which there could be any indorsement.] The Judicature Acts made a distinction between indorsements that are mere writings on the writ, and which do not take the place of a statement of claim, and technical or special indorsements which do. This, which purposes to be a statement of claim on the writ, is irregular. An apparent special indorsement cannot be made by putting a specific sum which is for liquidated damages on the writ. The forms of writs of summons which are given in Appendix A. and C. of the Rules of the Supreme Court 1883 must be adhered to. [Bruce, J. refers to the case of *Rockett* v. *Chippingdale and another*, in the Court of Appeal, 64 L. T. Rep. 641; (1891) 2 Q. B. 293.] The order of the district registrar was made without jurisdiction, and in the face of the decision in the case of *Knight* v. *Abbott* cannot be allowed to stand. This court is still bound by that case.

Acland in reply.

Wright, J.—There is considerable doubt about this matter, and if it were not that we considered that we ought not to interfere with the practice that exists, we should take time to consider our judgment. The history of the remittal of actions of contract to the County Courts, where the claim is for liquidated damages, is as follows: The County Courts Act 1856 restricted the procedure to cases where the claim did not exceed 50*l.*, and in the case of *Knight* v. *Abbott, Page, and Co.* (10 Q. B. Div. 11; 52 L. J. 131, Q. B.), Field and Stephen, JJ., decided that the only meaning that could be given to sect. 26 of that Act was that it was not merely a permissive but a restrictive enactment, that deprived parties of the right to have a case tried in the County Court, where the indorsement on the writ did not answer the description which is given in that section; and that, therefore, there is no power thereunder to order an action for unliquidated damages to be tried in a County Court, even where the writ is indorsed with a claim for a specified sum. In the argument in this case no mention was made of the Judicature Act 1873. Then came the Act of 1867, by sect. 7 of which it was provided that, in any action of contract commenced in the Superior Court, where the claim did not exceed 50*l.*, the judge should, unless there were good cause to the contrary, order the cause to be tried in the County Court, whereas in

(a) Reported by Henry Leigh, Esq., Barrister-at-Law.

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the former Act the judge had a discretionary power given to him as regards such cases, the words there used being "may in his discretion order the cause to be tried in a County Court." I do not think there can be any doubt as to the meaning of these two sections, that nothing but a liquidated demand could be sent to the County Court. Then came the Judicature Act of 1873 (36 & 37 Vict. c. 66), sect. 67 of which gave a general power to transfer all actions whatever in which relief could be given in the county court; the words of the enactment being: "The provisions contained in the . . . seventh, eighth, and tenth sections of the County Courts Act 1867, shall apply to all actions commenced or pending in the said High Court of Justice in which any relief is sought which can be given in a County Court." This section, to my mind, was altogether intended to remove, and does remove, all limitations on the words "where in any action the claim indorsed on the writ." I do not think full effect can be given to sect. 67 unless we hold that while it left the limit of 50*l.* preventing the County Court from trying actions beyond that amount, it removed the restrictions formerly imposed by the words "claim indorsed on the writ," where there was a claim indorsed on the writ for a certain amount. That section was not referred to in *Knight* v. *Abbott* (*ubi sup.*), which decides nothing at all in regard to it. Then we come to the County Courts Act of 1888 (51 & 52 Vict. c. 43), sect 65 of which gives express power to transfer to the County Courts all actions of contract for claims for liquidated damages not exceeding 100*l.* This section thus increases the amount that can be indorsed on the writ, but re-enacts the words of sect. 7 of the County Courts Act of 1867. If I am right, sect. 67 of the Judicature Act 1873 had struck out of the Act of 1867 all reference to liquidated demands, and the County Courts Act 1888 repeals the Act of 1867, re-enacts it *totidem verbis*, and applies to it sect. 67 of the Judicature Act. By some subtlety we might hold, notwithstanding the use of the phrase "claim indorsed on the writ," where the claim does not exceed the sum fixed by the County Courts Act of 1888, that the insertion of these words was overriden by sub-sect. 3 of sect. 188 of the Act of 1888, applying that Act in the same way as the Act of 1873 applied the Act of 1867. I have made inquiries as to what has been the custom and practice as regards cases of this sort, and I find that the practice is in accordance with the case of *Knight* v. *Abbott* (*ubi sup.*), and this is also adopted in the text-books. I am of opinion that we are bound by the above-mentioned case, and that it is not for us to interfere with its ruling. I think we should adhere to the existing practice, and I should feel reluctant to interfere with it. There is, no doubt, a good deal to be said why an action for unliquidated damages should be sent down to the County Court just as much as one for liquidated damages, but we must leave it to the Court of Appeal to set us right if necessary. The effect will be that the order of the district registrar will be reversed, and the case will be tried in the High Court unless the parties consent to its removal. On the other construction it would hardly be possible for a judge to refuse to admit an action, although there would be nothing to guide him. He would not know what was the real amount claimed, and the plaintiff would not tell him how much he claims. It may be that some fresh enactment or some new rule is desirable.

Bruce, J.—I am of the same opinion. The words "claim indorsed on the writ" are introduced into the earlier County Court Acts, and they have received judicial interpretation in the case of *Knight* v. *Abbott* (*ubi sup.*), which was decided so long ago as 1882, and has never been questioned. It is said that the Judicature Act of 1873, sect. 67, struck out the words "claim indorsed on the writ." Assuming this to be so, yet when we come to the County Courts Act of 1888 we find the words "claim indorsed on the writ" again. I think we are right in assuming that it was intended that these words should have the same meaning as they were understood to have in the earlier Acts, and so take away the power of the judge to refer to the County Court actions in which the claim was not a claim indorsed on the writ. This appeal must therefore be allowed.

Appeal allowed.

Solicitors: for the appellant, *Hicks* and *Son*, for *H. E.* and *R. Mason*, Great Grimsby; for the respondent, *Clarksons, Greenwell*, and *Co.*, for *John Barker*, Great Grimsby.

Tuesday, May 22.

(Before Cave and Wright, JJ.)

Reg. v. The Judge of the Pontypool County Court and Tompkins. (a)

Practice — County Court — Default summons — Affidavit in support of—Assignee of debt— County Courts Act 1888 (51 *&* 52 *Vict. c.* 43), *s.* 86—*County Court Rules, Form* 14 *B* (*a*).

In an action in a County Court, to recover a sum of money for goods sold and delivered, the plaintiffs took out a default summons under sect. 86 *of the County Courts Act* 1888, *and at the hearing it appeared that the plaintiffs claimed as assignees of the debt. An affidavit of the defendant's indebtedness was sworn by one of the plaintiffs according to Form* 14 *B. The learned judge thereupon struck out the case, holding that sect.* 86 *of the above-mentioned Act did not apply to a case where the debt had been assigned, and that the affidavit was insufficient. Leave was given to the plaintiffs to issue an ordinary summons. This they did not do, but they obtained a rule* nisi *for a* mandamus *to hear and determine, &c.*

Held, that the County Court judge had not declined jurisdiction.

Per Cave, J.: That the form of affidavit prescribed by the County Court Rules (*Form* 14 *B*), *in accordance with sect.* 86 *of the County Courts Act* 1888, *was not applicable to the assignee of a debt. The plaintiff must depose to facts that are within his own knowledge. There is good reason why this summary procedure should not be extended to cases of assignment, but confined to cases in which the facts are within the knowledge of the person deposing to them.*

In this case a rule *nisi* was obtained for a *mandamus*, calling upon the County Court judge for Monmouthshire, sitting at Pontypool, to show

(a) Reported by H. Leigh, Esq., Barrister-at-Law.

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cause why he should not proceed to hear and determine the matter of a certain action in the County Court of Pontypool, between Taylor and Houghton, plaintiffs, and F. Tompkins, defendant, to recover the sum of 6*l.* 16*s.* 4*d.*

The following are the facts as they appeared in the affidavits:—On the 14th March 1894 a default summons, in which Taylor and Houghton were plaintiffs, and Frederick Tompkins was defendant, came on for hearing before the learned County Court judge at Pontypool.

The plaintiff's claim was for 6*l.* 16*s.* 4*d.*, due and owing from Tompkins to plaintiff's firm as assignees of the book-debts of one G. W.; such debts having been purchased by the said firm from the official receiver in bankruptcy.

The default summons was taken out under sect. 86 of the County Courts Act 1888, and was issued upon the following affidavit:

I, W. F. Taylor, commission agent, maketh oath and saith as follows: That F. Tompkins, of New Inn, Pontypool, in the county of Monmouth, is justly and truly indebted to me, or to Taylor and Houghton, as asignees of the book-debts of George Wilton, of Newport, in the sum of 6*l.* 16*s.* 4*d.* for the price of goods sold.

The registrar called the attention of the learned judge to the form of this affidavit, whereupon the judge struck out the case and gave the plaintiffs leave to issue an ordinary summons instead of a default summons.

The learned judge asked Taylor how he could swear from facts within his own knowledge that the alleged debt was contracted for the price of goods sold and delivered by Wilton to the defendant, and his answer was that the defendant had admitted it to him. The judge, however, was satisfied from the evidence of the defendant that he had not made any such admission, and in his affidavit the judge gave his reasons for striking out the case, that it appeared to him that sect. 86 of the County Courts Act 1888, as shown by the form of the affidavit (Form 14 Ba) applied only to cases where this affidavit can be made either by the original vendor or creditor, or some person in his employment, and not to a case where the debt has been assigned; also that the affidavit was insufficient because it did not state facts which would, in the event of the defendant not appearing, justify an order being made upon the summons; and further, because the affidavit did not allege that the book-debts of the said Wilton had been assigned to plaintiffs by deed, or that any notice of assignment had been given to the defendant.

By the County Courts Act 1888 (51 & 52 Vict. c. 43), sect. 86, it is provided as follows:

Subject to any rules and orders under this Act, in any action in a court for a debt or a liquidated money demand, the plaintiff may, at his option, cause to be issued a summons in the ordinary form, or (upon filing an affidavit to the effect set forth in the prescribed form) a default summons in the prescribed form or to the prescribed effect. . . .

For the prescribed form *vide* the Annual County Courts Practice 1894, Appendix H, Form 14 Ba, "Affidavits of debt," at p. 727.

Sutton showed cause against the rule.—The form of the affidavit upon which the default summons was issued was not in accordance with the form prescribed in Form 14 Ba: (*vide* Appendix H, Forms, p. 727, Annual County Court Practice.) Whenever it is made to appear to the County Court judge that the affidavit has been wrongly made, he is justified in saying he cannot go on this form, and may give leave to the plaintiff to proceed on an ordinary summons.

Davies supported the rule, and contended that the plaintiffs were entitled to sue under sect. 86 of the County Courts Act 1888, and to proceed either by an ordinary summons or by a default summons, and that the judge ought to have heard the case. The learned judge, in declining to hear the case on the default summons, had declined jurisdiction, and the rule should therefore be made absolute.

Cave, J.—This is an application to make absolute a rule calling on the County Court judge to hear and determine this matter. When the case came before him the learned judge inquired how it came about that the affidavit was made by the assignee of the debt and not by the assignor or anyone in his service, according to the form of the affidavit given in the Act. The answer to that inquiry appears to have been that the affidavit had been made by the assignor because the defendant had admitted to him that the goods had been sold and delivered to him, and the learned County Court judge appears to have put questions thereupon to the defendant, and to have arrived at the conclusion that no such admission was made. He also seems to have arrived at the conclusion that the affidavit was not in accordance with the Act, and he thereupon gave judgment. He offered first to hear the case upon a summons in the usual form, and the plaintiffs declining that offer the judge proceeded to dismiss the summons, and to give costs to the defendant. Now it is said that in so doing he has declined jurisdiction. I am not at all satisfied that he has so declined jurisdiction. It is quite true that, in the case as it at present stands, there is no appeal, but if the amount had been of an appealable size, would not the proper remedy in such a case have been an appeal, upon the ground that the judge had wrongly decided? I am by no means sure that it would not have been so; and if that is so, then it is not a refusal to hear this summons but a deciding it wrongly, which is matter of appeal, and consequently does not leave to the plaintiff the option of coming here and saying that there has been a refusal to entertain the case altogether. I am, however, rather more inclined to the other branch of the answer, namely, that this case is not within the intention of the Act. The Act requires that there should be an affidavit in the prescribed form, and that form is one which is not applicable to the assignee of a debt. There are steps required beyond the ordinary proof of a debt where there has been an assignment. There must be not only the assignment, but there must be notice of assignment given to the debtor—all that in addition to the ordinary proof of the existence of the debt which would have to be given in an ordinary case where there has been no assignment. Now the affidavit given in the form makes no provision for any proof of these additional circumstances, but does provide for a proof that the goods were sold and delivered, or whatever the other cause of action may be, and requires that that shall be proved by the plaintiff, who, obviously, in the form, is contemplated as being the person who sold and delivered the goods, and it enables anyone else—any person in his

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service, for instance—where he does not personally attend to the business, or any person who, from any other reason, happens to have a personal knowledge of the matter, to make an affidavit, which the plaintiff in such a case would be unable to make himself, and in such a case the person making the affidavit has to go on and say that he knows the matters to which he deposes of his own knowledge, to wit, "that the facts herein deposed to are within my own knowledge." Now what is meant by that? I cannot possibly think that it is meant that he has been told that the facts are true, even when he is told that by the defendant. Nor is the mere fact of indebtedness the thing that he is swearing to. That a man is indebted is simply a conclusion of law from the fact that goods have been sold and delivered to him by the plaintiff. It is the fact that goods have been sold and delivered which the man should speak to of his own knowledge. If the assignee is to be allowed to say that the delivery of the goods is within his own knowledge because the defendant told him that he had had the goods, why are you to stop short at that? Why may not he say, it is equally within his own knowledge because the plaintiff, the original assignor, told him that the goods were sold and delivered to the defendant? There seems to me to be a very good test of whether this will do, and that is, supposing the facts as they really exist had been set out, would that have done? I think it would not have done if the plaintiff had sworn, "I say that the defendant was truly indebted to Wilton before the assignment, and now to my firm, and I know that, because the defendant told me so," the words "the facts therein deposed to are within my own knowledge" being struck out. It seems to me that that would not be according to the Act; and I cannot think it was ever intended that the person making the affidavit was to judge for himself whether the facts were true from statements made to him by other persons. Where are we to draw the line? He says, "that the facts are within his own knowledge;" I think it ought to be confined to cases where the facts are to the knowledge of the person deposing to them, and when a plaintiff makes that statement, he, as much as the other man, deposes to it as being within his own knowledge, although he does not in express terms say so. I think there is also very good reason for not extending this summary procedure to cases of assignment. There may be no defence so far as the assignor is concerned, but there may be a question as to whether the assignment is in proper form; whether it includes this debt; whether notice has been given to the debtor; all of which the debtor himself may be in no position, except with regard to the notice, to dispute or traverse, and it certainly would be a very grave miscarriage of justice if the result were that, after judgment obtained in a summary manner by the assignee, the assignor were to come forward and bring his action and allege that the assignment was bad, or that it was made upon a condition which had not been fulfilled, or that it had been afterwards, and before the suing for the debt, done away with by a subsequent agreement. All these things seem to me to point out considerable difficulties in the way of allowing an assignee of a debt to use this short method by default summons, and to make it all the more necessary that we should see that the form is strictly complied with, as it is obviously intended to be, because the form is actually embodied in the very section which gives power to issue the default summons. For these reasons it seems to me that this rule should be discharged.

Wright, J.—I am of the same opinion; but I prefer to base my judgment upon the gro nd that I do not think it appears here that the learned judge has really declined jurisdiction. He may or may not have made a mistake. I do not say one way or the other, but I do not think we ought to take upon ourselves to say that he has refused to entertain the case. He was quite willing to try the action in a judicial form.

Rule discharged with costs.

Sollcitor, showing cause against the rule, *The Treasury Solicitor.*

Solicitors in support of the rule, *George S. Warmington* and *Co.*, for *Evans*, Newport.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Wednesday, June 20.

(Before Bruce, J.)

The Saltburn. (a)

Salvage — Apportionment — Deductions — Interlineations and alterations in agreement—Merchant Shipping Act 1854 (17 *&* 18 *Vict. c.* 104), *s.* 182—*Merchant Shipping Act Amendment Act* 1862 (25 *&* 26 *Vict. c.* 63), *s.* 18—*Merchant Shipping* (*Fishing Boats*) *Act* 1883 (46 *&* 47 *Vict. c.* 41), *s.* 182.

An agreement by which a seaman stipulates that he shall be entitled to his proportion of a sum awarded for salvage services, calculated not upon the amount awarded but upon so much of that amount as remains after certain deductions have been made, is inoperative by virtue of sect. 182 *of the Merchant Shipping Act,* 1854.

Semble, *clauses respecting deductions that are to be made inserted in such an agreement, without the consent of all the parties interested, are interlineations and alterations within the meaning of sect.* 22 *of the Merchant Shipping* (*Fishing Boats*) *Act* 1883, *and are therefore void.*

Motion for apportionment of salvage.

This was an application on behalf of Charles Ede and Stephen Green, the chief and second engineers of the steam trawler *North Sea*, to apportion the sum of 900*l.*, awarded by Barnes, J., on 30th May 1893, to the owners, master, and crew of that vessel for salvage services rendered to the steamship *Saltburn* in conjunction with the steam trawler *Witham.*

The *North Sea*, who belonged to the port of Hull, and was of 57 tons net register, with triple expansion engines of forty-five horse power nominal, and a crew of nine hands, was on a fishing voyage at the time the services were rendered. Her value was 5000*l.*, and she had full stores of coals, provisions, ice, and fishing gear to last fifteen days. The *Witham*, who was also engaged in trawling, was of 83 tons net register, with triple expansion engines of forty-five horse power nominal. Her value was 4000*l.* The *Saltburn* was a steamship

(a) Reported by Basil Crump, Esq., Barrister-at-Law.

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of 837 tons net register, and was on a voyage from Aarhuus to Bo'ness in ballast.

On the 17th March 1893 the *Witham* fell in with the *Saltburn* about 180 miles to the N.E. of Spurn Point. The latter had sprung a leak and was in a sinking condition, short of provisions and coal, with the fires put out by water and her crew exhausted with pumping. The *Witham* towed her for two days, when they came up with the *North Sea*, with whose assistance the vessel was towed to the Humber. On 20th March, with the assistance of a tug, she was placed on the mud, and eventually pumped out and docked. Her value was agreed at 7750*l.*

On the 30th May 1893, in consolidated actions brought by the owners of the two trawlers against the owners of the *Saltburn*, Barnes, J., assisted by Trinity Masters, awarded to the *Witham* the sum of 1350*l.*, and to the *North Sea* the sum of 900*l.* This latter sum the court was now moved to apportion so far as regarded only Charles Ede and Stephen Green, to whom the owners of the *North Sea* had, in making the apportionment, given the sums of 27*l.* 1*s.* 3*d.* and 15*l.* 0*s.* 8½*d.* respectively. The facts respecting the agreement entered into by these two appear in the judgment.

Sect. 182 of the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104) provides that

No seaman shall by any agreement forfeit his lien upon the ship, or be deprived of any remedy for the recovery of his wages to which he would otherwise have been entitled; and every stipulation in any agreement inconsistent with any provision of this Act, and every stipulation by which any seaman consents to abandon his right to wages in the case of the loss of the ship, or to abandon any right which he may have or obtain in the nature of salvage, shall be wholly inoperative.

By sect. 18 of the Merchant Shipping Act Amendment Act 1862 (25 & 26 Vict. c. 63)

It is hereby declared that the 182nd section of the principal Act does not apply to the case of any stipulation made by the seamen belonging to any ship, which, according to the terms of the agreement, is to be employed on salvage service, with respect to the remuneration to be paid to them for salvage services to be rendered by such ship to any other ship or ships.

Sect. 13 of the Merchant Shipping (Fishing Boats) Act 1883 (46 & 47 Vict. c. 41) provides that

The skipper of every fishing boat shall enter into an agreement with every seaman (not being a boy under such an agreement as is by this Act required) whom he carries to sea from any port in the United Kingdom as one of his crew; and every such agreement shall be in a form sanctioned by the Board of Trade, and shall be dated on the date of the first signature thereof, and shall be signed by the skipper before any seaman signs the same, and shall contain the following particulars as terms thereof, that is to say: 1. The nature, and as far as practicable, the duration of the intended voyage or engagement. 2. The number and description of the crew. 3. The time at which each seaman is to be on board or to begin work. 4. The capacity in which each seaman is to serve. 5. The remuneration which each seaman is to receive, whether in wages or by a share in the catch, or in both ways, and the time from which each seaman's remuneration is to commence. 6. A scale of the provisions which are to be furnished to each seaman. 7. Any regulations as to conduct on board, and as to fines, short allowance of provisions, or other lawful punishments for misconduct which have been sanctioned by the Board of Trade as regulations proper to be adopted, and which the parties agree to adopt. And every such agreement shall be so framed as to admit of stipulations, to be adopted at the will of the skipper and seaman in each case, as to advance and allotment of wages, and may contain any other stipulations which are not contrary to law.

Gerard Ince supported the motion on behalf of the chief and second engineers of the *North Sea*.

Butler Aspinall represented the owners of the *North Sea*.

The arguments sufficiently appear in the judgment. In addition to the cases there cited the following were referred to:

The Wigtownshire, 36 L. J. Adm. 11;
The City of Chester, 51 L. T. Rep. 485; 5 Asp. Mar. Law Cas. 311; 9 P. Div. 182.

BRUCE, J.—This is an application made on behalf of two of the members of the crew of the steam trawler *North Sea* to apportion to each of them an equitable share of the sum of 900*l.*, which has been awarded to the owners, master, and crew of their vessel for salvage services rendered to the *Saltburn*. The *North Sea* was at the time the services were rendered engaged on a fishing expedition in the North Sea. The crew, including the two men on behalf of whom the motion has been made, signed a running agreement for the fishing expedition, which was in a printed form issued by the Board of Trade, and expressed to be so issued in pursuance of the Merchant Shipping (Fishing Boats) Act of 1883. The printed agreement contains a clause which states that every member of the crew shall be regarded as entitled to participate in any sums of money arising from salvage in the proportion set forth opposite to their names. The copy of the agreement produced in court contained, in a column headed "share of salvage," the proportions of salvage which each member of the crew was to be entitled to receive. The two applicants, who filled respectively the posts of first and second engineer, according to this scale would be entitled to 4½ and 2½ per cent. of the salvage awarded. But there was evidence produced on behalf of the applicants to prove that the column stating the proportion of salvage to which each member of the crew should be entitled was not filled in at the time when it was signed, and it was admitted by counsel for the owners that there was not sufficient proof to rebut that evidence. I cannot, therefore, regard the agreement as affording a binding rule for regulating the proportions of salvage to which the applicants are entitled. But the main dispute in the case has arisen upon clauses in the agreement respecting the deductions to be made from the salvage award before apportioning amongst the crew their share. At the end of the printed clause of the agreement the following words are added: "After first making the deductions hereinafter mentioned." There follows a little lower down a clause added to the printed form: "The deductions to be so made from any salvage moneys shall be loss of fishing, damage to vessel and gear, injury to crew." In the present case, the *North Sea* sustained damage in rendering the salvage services, and of course lost time which would otherwise have been spent in fishing. It is quite clear from the judgment of Barnes, J., that in awarding 900*l.* to the *North Sea* he took into consideration that the vessel had received damage, and had she not been engaged in salvage services might have been profitably employed in fishing.

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But although the learned judge took these matters into consideration in fixing the sum of 900*l.*, he did not attempt to ascertain with exactness the amount of damage and loss incurred, and he made no special order respecting the payment of loss or damage to the owners, and I must therefore come to the conclusion that, although in consideration of the damage and loss a larger sum has been awarded than would otherwise have been, yet the whole of the 900*l.* must be regarded as salvage reward, and should be apportioned amongst the owners, master, and crew without any other deduction than costs in the salvage suit. The question also then arises, Can the agreement in any way affect the right of the crew to the shares they would otherwise be entitled to? I think it cannot. An agreement to abandon a right in the nature of salvage is inoperative by virtue of sect. 182 of the Merchant Shipping Act of 1854, and the present case does not fall within the exception provided for in sect. 18 of the Merchant Shipping Act 1862. An agreement by which a seaman stipulates that he shall be entitled to his proportion of the sum awarded as salvage, calculated not upon the amount awarded, but upon so much of that amount as remains after certain deductions have been made, is, I think, an agreement within the meaning of the clause. By such an agreement a seaman gives up his right to a share in a part of the amount awarded, and to which, but for the agreement, he would be entitled. Such a stipulation seems to me to be not only within the words of the section, but calculated to give rise to the very mischief which the section was intended to provide against. Sir James Hannen, in the case of *The De Bay* (49 L. T. Rep. 414; 5 Asp. Mar. Law Cas. 156; 8 App. Cas., at p. 563), says: "It is frequently difficult and expensive, and sometimes impossible, to ascertain with exactness the amount of such loss," referring to the damage and loss sustained by a salving vessel. If, then, the amount of such damage and loss is to be deducted from the amount of the salvage award, how is that amount to be ascertained? If the owners are themselves to be at liberty to assess the amount of the damage, as apparently the owners in this case claimed to have the right to do, there can be no security that the assessment would be fair and impartial. If, on the other hand, the damage is to be assessed by the registrar of this court, or by a referee to be agreed on by the parties, much expense and delay would be incurred in many cases of apportionment. I think the plain meaning of the statute and the interests of the seafaring community require that I should hold a clause providing that deductions should be made from the salvage remuneration to be inoperative. Apart from the reasons I have already stated, I should be prepared to hold that the clauses inserted in the agreement respecting deductions that are to be made are interlineations and alterations within the meaning of sect. 22 of the Merchant Shipping (Fishing Boats) Act 1883, and as it has not been proved to my satisfaction that these interlineations and alterations were made with the consent of all the persons interested, such interlineations and alterations in my opinion on that ground are void. I have felt considerable difficulty in apportioning the amount. I think I cannot gain much assistance from the agreement; therefore I must endeavour as well as I can to apportion to the applicants the shares equitably due to them of the salvage money awarded. I have to deal with the sum of 900*l.* The services were rendered by a steam fishing boat, and undoubtedly, as I have already said, Barnes, J. took into consideration the damage sustained by the vessel, and the possible loss of profits from fishing. Therefore I think it is a case where the owners are entitled to a considerable proportion of the salvage award. I should first of all say, that from the 900*l.* I think there should be deducted the sum of 84*l.* 2s., which is the sum the owners claim for extra costs. That, I think, they are entitled to deduct from the amount awarded, according to the decision of Barnes, J. in *The Wilhelm Tell* (1892) P. 337). They are entitled to deduct those costs because they were expended in obtaining the salvage award. That leaves 815*l.* I think the owners are entitled to a considerable share, and I think I should not be awarding too much to them if—I mention the award because I must decide it—I give them three-quarters of the sum of 815*l.* That would leave a sum of about 204*l.* to be apportioned among the crew. Of that sum the master is entitled to a considerable proportion. The master in this case was not like the other members of the crew, because he had a share in the earnings of the vessel, and therefore in the event of the salvage services being unsuccessful, and he incurred the loss which might have been incurred in attempting to render salvage services, while other members of the crew would have received their wages he would have received no money at all. Therefore I think he is entitled to special consideration in this case, and I do not think I should be awarding him more than he is entitled to by saying he should receive one-third. That leaves a sum of about 136*l.* to be divided amongst the members of the crew according to their rating. I have to consider what sum the two applicants are entitled to, according to their rating. There is a little difficulty in fixing this sum, because the mate was not paid by wages but by a share in the vessel, and therefore I have been obliged, with the assistance of the registrar, to ascertain what his wages would have been if he were entered as entitled to wages. Giving the best consideration to the matter, I think, according to his rating, the first engineer is entitled to 27*l.*, and the second engineer to 20*l.* Therefore I apportion that amount to them. According to his rating, I think the share of the first engineer would be a little less than 27*l.*, but as the sum of 27*l.* has been offered him by the owners, I do not award him less. To the second engineer the owners offered a less sum than 20*l.*, but as the increase in the apportionment has been so slight upon the amount offered by the owners, I do not think I can allow costs. It will be judgment for the sums I have mentioned, without costs.

Solicitor for the chief and second engineers of the *North Sea*, *W. H. Cowl*, for *E.* and *W. H Cowl*, Great Yarmouth.

Solicitors for the owners of the *North Sea*, *Pritchard* and *Sons*, for *A. M. Jackson* and *Co.*, Hull.

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June 18 *and* 25.

(Before BRUCE, J.)

THE GEORG. (*a*)

Salvage — Appraisement — Mistake — Varying decree.

Where the defendants in a salvage action have allowed the court to proceed to award salvage upon the appraisement, they cannot call upon the court to vary the decree merely because, since the decree, it has been found, for some reason unexplained, that the property has been sold at much less than the appraised value.

Semble: *The court cannot entertain any suggestion that the salvage award should be reduced in proportion to the difference between the appraised value, and the value realised upon the sale, because the amount of salvage award does not bear any fixed proportion to the value of the property salved.*

MOTION to vary salvage award.

The facts which gave rise to this application were as follows:

On the 1st Jan. 1894, the steamship *Georg*, of 1194 tons register, whilst on a voyage from Bremen to New York, with a general cargo, came into collision with the *Oberon*, a screw steamship of 1763 tons net register, belonging to the port of London, about seven miles east of the North Sand Head lightship in the straits of Dover. The *Georg* lost her jibboom, and received serious damage to her starboard bow and anchor, and she engaged the paddle-wheel steam tug *Granville*, of Dover, to tow her to Dover, where she was brought up off Dover Castle by her port bower anchor.

On the 2nd Jan. the wind increased to a hurricane from the E. to E.N.E., with heavy snow squalls and a terrific sea, and at about 10.30 p.m. those on board the *Granville*, which was anchored on the west side of the Admiralty Pier, observed signals of distress, and found that the *Georg* had dragged her anchor, and was in imminent danger of striking the pier. The tug went to her assistance, and with great difficulty passed a hawser on board and drew her clear of the pier, but could not altogether prevent her from dragging, owing to the force of the wind and sea. The tug *Challenge* now came up, and also succeeded in passing her tow rope aboard, and the two tugs held the *Georg* off till daybreak. At about 9.30 a.m. the *Georg* slipped her anchors, and the tugs towed her to the Solent in terrific weather, and with the assistance of a pilot she was safely moored to the Government buoys at Southampton about noon on the 4th Jan. The appraised value of the *Georg* was 1250*l.*, and of her cargo 5004*l.*, total 6254*l.* The Dover Harbour Board, owners of the *Granville*, and Messrs. Dick and Page and others, owners of the tug *Challenge*, brought an action for the services rendered, and on the 3rd Feb. Barnes, J. awarded 1500*l.* to be divided equally between the two tugs. The *Oberon* also brought an action for damage against the *Georg*, and on 30th Jan. the latter vessel was found alone to blame. In addition to the award of 1500*l.* to the two tugs, the pilot was subsequently awarded 130*l.*, and judgment was also given in the County Court against the *Georg* for 100*l.* for other salvage services. The total salvage award obtained against the *Georg* was thus 1730*l.* The defendants being unable to give bail for that amount, the ship and her cargo were sold, and realised a net sum of 1624*l.* 11*s.* 10*d.* The whole of the proceeds were thus absorbed by the salvage awards, and there was nothing left to satisfy the claim of the *Oberon*. On 18th June the defendants applied to the court to vary the decree, on the ground that a mistake had been made by the marshal in the appraisement.

Aspinall, Q.C. and Dr. *Stubbs* in support of the motion on behalf of the owners of the *Georg*. The court has power, if a mistake has been made in the values, to make the necessary alterations in the salvage award:

The James Armstrong, 33 L. T. Rep. 390 3 Asp. Mar. Law Cas. 46; 4 Adm. & Eccles. 380.
The Markland, 24 L. T. Rep. 596; 1 Asp. Mar. Law Cas. 44; 3 Adm. & Eccles. 340.

Butler Aspinall supported the application on behalf of the owners of the *Oberon*.

Dr. *Raikes*, Q.C. for the owners, master, and crew of the tugs.—It is submitted that such an alteration as is here asked for has never been made by this court. In the *Cargo ex Venus* (L. Rep. 1 Adm. & Eccles. 50), to which your Lordship referred, Dr. Lushington said: "It would, in my opinion, unless under extraordinary circumstances, be imprudent on the part of the court to allow an appraisement, made under its authority, to be departed from. In the first place an appraisement made by the authority of this court is made with great care and perfect impartiality, and is always considered to be a fixed sum, unless it is objected to on particularly strong grounds at the moment it is brought in. But an appraisement might be attempted to be barred in two ways—by one it might be attempted to be said the appraisement is too high, and by the other it is too low, and great delay and expense would be incurred if the court encouraged proceedings of this kind." The question the court has to decide is the value of the cargo at the time the salvage services were rendered. [BRUCE, J: Is the appraisement to be calculated upon what it would fetch at a sale, or what it is worth?] It is submitted it would be the actual value the thing possessed:

The Monarch, 1 W. Rob. 21.

There the court limits itself as to the conditions under which it will vary the decree. The error must be brought to the attention of the court with the utmost possible diligence. It has never been the practice for one judge to vary the decision of another when fairly tried out. [BRUCE, J.: No doubt, but Barnes, J. is not available at the present time (the learned judge was away on sick leave]. It could have been brought before his Lordship before he left the country.]

The Nymphen (not reported).

The John Bastian (5 Christ. Rob. 303) is another case bearing on the point.

Aspinall, Q.C. in reply.—It must first be found out by whom the property is sold. Here the sale was by the officer of the court. In *The Nymphen* the whole question of the values was gone into before the President. A subsequent application was made to induce him to vary the award, and he very properly refused, as it had been so fully argued before him. As to arriving at the value of the cargo, see Kennedy's Law of Civil Salvage, p. 190. The case of *The George Dean* (Swabey, 290) is there referred to. The price the cargo

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would fetch at the port to which it is carried is the test of its value. "The nearest and most convenient market" is the expression in Kennedy. Dr. Lushington, in *The Cargo ex Venus* (*ubi sup.*), says the circumstances must be extraordinary to induce the court to depart from an appraisement, and it is submitted that here there was an extraordinary state of things, and all possible expedition has been employed.

Judgment was reserved, and delivered on the 25th June as follows:

BRUCE, J.—This is an action of salvage in which Barnes, J. on 3rd Feb. awarded to the plaintiffs 1500*l.*, and taxed costs. I am now asked to vary this decree on the ground that it was made upon a mistaken appraisement of the values of the property by the marshal. There are authorities which establish the power of the court to rehear causes, and in its discretion to vary its decrees where it has proceeded upon a mistake. (*The Monarch, ubi sup.; The Franconia*, 39 L. T. Rep. 57; 4 Asp. Mar. Law Cas. 1; 3 P. Div. 340; and *The James Armstrong, ubi sup.*). But this power ought to be exercised rarely and with great caution, for otherwise much inconvenience and uncertainty would ensue. In the present case the value of the ship was appraised by the marshal at 1250*l.*, and the value of the cargo at 5004*l.* After the judgment was delivered, viz., on 17th May, the ship was sold by the marshal for 713*l.* 10*s.*, and in March, April, and June the cargo was sold by the marshal in several parcels for 1649*l.* 1*s.* 8*d.*, making a total gross value of 2362*l.* 11*s.* 8*d.* The ship and cargo having been for a long time under arrest—a portion of the cargo having been five months under arrest—the marshal's fees and disbursements were heavy, and amounted altogether to a sum of 737*l.* 19*s.* 10*d.*, thus reducing the net proceeds in court to a sum of 1624*l.* 11*s.* 10*d.* I should observe that of this sum of 737*l.* 19*s.* 10*d.* upwards of 167*l.* seems to be made up of dock charges and tonnage dues in respect of the ship, and upwards of 169*l.* is for warehouse rent in respect of the cargo. Beyond the discrepancy between the figures of the appraisement and the proceeds of the sale there is nothing before me to point to any mistake in the appraisement. The defendants allowed the court to proceed to judgment on the appraisement, without taking any exception to the appraisement, and without making any application to have the value of the property ascertained by sale. They filed affidavits of value in which the value of the ship was stated to be 1000*l.*, and the value of the cargo 4167*l.* 6*s.*, thus making a total value of 5167*l.* 6*s.*, which although less than the appraisement by the marshal, is yet very much greater than the amount which was realised by the sale. Beyond the statement made in the affidavit filed in support of the present motion that the affidavit of value was made upon the basis of the invoice value of the cargo, there is no suggestion that any mistake was made by the plaintiffs in estimating the value of the cargo, and there is nothing to indicate that the appraisement made by the marshal did not fairly represent the value of the cargo at the time and place when it was brought into safety. The cargo consisted chiefly of bags which had been shipped on board the defendant's vessel at Bremen for a port in the United States. The bags were of the kind commonly used for the stowage of grain, and no doubt if the vessel had arrived safely in the United States, or if the sale of the bags could have been effected at a port where grain is an article of export, they would have realised a comparatively high value; and if, in estimating the value of the bags to the defendants, the marshal took into consideration the opportunity the defendants had of disposing of the bags at a profit at the port of destination, and the cost to be incurred in carrying them to the port of destination, upon the principle indicated by Dr. Lushington, in the case of *The George Dean* (*ubi sup.*), I cannot say that he made any mistake in the appraisement. But it is enough that there is no evidence to show that there was any mistake or error in the appraisement. It is said that if the sale had taken place before the award of salvage, Barnes, J. would have taken the value realised by the sale as the value on which to base his award. But where the defendants have allowed the court to proceed to award salvage upon the appraisement I think they cannot call upon the court to vary the decree merely because since the decree it has been found, for some reason which is not explained, that the property has been sold at much less than the appraised value. In the case of *The Cargo ex Venus* (*ubi sup.*), Dr. Lushington held the appraisement to be conclusive, notwithstanding that the sum actually realised by the sale was less than the appraised value. If, after proceedings had been regularly taken, and judgment pronounced in the ordinary course, it would be open for parties, on facts happening after the judgment, to reopen the whole case, the greatest confusion and uncertainty would prevail. In a salvage suit, unless there had been an agreement as to the value, no judgment could ever be considered as final. In the present case, if I were to disregard the judgment founded on the appraisement, what judgment could I pronounce without a re-hearing of the case, and a re-hearing of the case would involve so much cost and inconvenience that it is practically out of the question. It has been suggested that the salvage award might be reduced in proportion to the difference between the appraised value and the value realised on the sale. But as the amount of salvage award does not bear any fixed proportion to the value of the property salved, such a method of proceeding could not lead to any satisfactory result. It is said there was a suit by other salvors against the same ship and cargo, heard by the President, after the judgment of Barnes, J., who made a salvage award based upon values less than the appraised value. No doubt the President acted upon the evidence of the value of the property then brought before him, but the circumstance that the evidence before the President in that case was not the same as the evidence before Barnes, J. in the other, seems to me to afford no reason why the award of Barnes, J. should be varied. I cannot see any sufficient reason why I should vary the decree. The defendants ask not only that the judgment should be varied, but they ask for an order that the plaintiffs should pay the costs of the first appraisement of the ship and cargo. But, as I have already said, I can find no fault with the appraisement. The circumstance that the property sold for a comparatively small sum is not, I think, proof that the defendants were correct in stating the value of the ship and cargo to be less than the values at which they

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were appraised by the marshal. I must therefore reject the motion, with costs.

Solicitors: for the *Georg, Stokes, Saunders*, and *Stokes*; for the *Oberon, Thomas Cooper* and *Co.*; for the tug *Granville, Clarkson, Greenwells*, and *Co.*, for *Stillwell* and *Harby*, Dover; for the tug, *Challenge, Lowless* and *Co.*

June 18 *and* 25.

(Before BRUCE, J.)

THE MONA. (*a*)

Practice—Tender—Order XXII., rr. 1 *and* 5—*Order LXXII., r.* 2.

A tender, according to the old Admiralty practice, is nothing more than an offer, and it was not intended by Order XXII. to alter this practice, or to assimilate it to the technical rules regulating tender at common law.

In the absence of any express rule regulating in other respects the practice of tender in court in an Admiralty action, it may reasonably be concluded that, in accordance with the provisions of Order LXXII., r. 2, *the old procedure and practice of tender in Admiralty actions should remain in force, except in so far as the rules affect the manner in which the money is to be lodged in court.*

SUMMONS (adjourned into court) for payment of tender.

This was a matter arising out of an action for damage by collision brought by Messrs. Phillips and Graves and others, owners of the dumb barge *Stockholm* and cargo, against the owners of the steamship *Mona*.

On the 8th Jan. 1894 the parties agreed to settle the action on the basis that the defendants should be responsible for 67½ per cent. of the damages, and they filed an agreement in court to that effect. They were, however, unable to agree as to the amount of the damages, and the question was accordingly referred to the registrar and merchants to report thereon.

On the 5th April the defendants filed a notice of tender of the sum of 700*l.* and taxed costs up to that date, and on the 7th May they filed a notice of tender of an additional sum of 50*l.*, with taxed costs up to the time of this further tender, thus making a sum of 750*l.* tendered in satisfaction of the plaintiffs' claim.

On the 24th May the reference was held, and the registrar found that the sum of 713*l.* 16s. was due to the plaintiffs in respect of their claim. He was further of opinion that as a more than sufficient tender of 750*l.* was duly offered to the plaintiffs, they must be condemned in costs subsequent thereto.

The plaintiffs now took out a summons to have the whole amount of 750*l.* paid out to them, and the matter was adjourned into court for argument upon the question of law.

F. Laing appeared for the plaintiffs.

Butler Aspinall for the defendants.

On the 25th June BRUCE, J. delivered the following judgment:

BRUCE, J.—(The learned judge shortly stated the facts and continued:) The plaintiffs contend that the tender in court amounts to an admission by the defendants that the amount tendered is due. The defendants contend that the tender was nothing more than an offer, and that when the offer was not accepted they were at liberty to establish, if they could, that a smaller sum was due. They ask that the balance remaining, after satisfying the amount found to be due, should be paid to them. The argument of the plaintiffs' counsel was based mainly upon Order XXII. of the Rules of the Supreme Court. The main question for consideration is, whether rules 1 and 5 of that order govern the practice of tender by act in court in the Admiralty Division in cases where the liability has been admitted prior to the tender, and the only question pending is as to the amount of the damages to be fixed by the registrar. Rule 1 in Order XXII. provides that a defendant, in actions of debt or damages, may before or at the time of delivering his defence, or at any later time by leave of the court or judge, pay into court a sum of money by way of satisfaction, which shall be taken to admit the claim or cause of action; or he may, with a defence denying liability, pay money into court which shall be subject to the provisions of rule 6. It seems to me to be doubtful whether this rule applies to salvage actions, which do not, I think, come under the category of actions brought to recover a debt or damages, and if it does not apply to one large class of actions in the Admiralty Division, it may be open to contend that it was not intended to apply to other actions in the Admiralty Division. But it is sufficient for the present purpose to observe that the provisions of this rule seem, when read in connection with rule 2, to be applicable to actions where the claim or cause of action in respect of which the money is paid in is admitted or denied by the defence. It does not seem to contemplate a payment into court in an Admiralty action after the question of liability has been determined by agreement between the parties, and the question of the amount of damages has been referred. The same may be said of rule 5, which provides for the case when payment into court is made, with a defence setting up a tender of the sum paid. That, I think, clearly applies to a tender before action as understood in the common law courts. The defence of tender at common law was highly technical, and did not apply to an action for unliquidated damages. If the debt or duty was of such a nature as to be discharged by a tender and refusal, the plea of tender was a plea in bar, but in other cases it was necessary in pleading tender to plead *uncore prist*—that is, to allege that the defendant was still ready and willing to pay, and so the plea amounted to an admission that the amount tendered was due, and the plaintiff was entitled to the amount tendered, though he should be nonsuited, or a verdict should be found against him: (see Bacon's Abridgment, "Tender.") The long-established practice in the Admiralty Court was altogether different from the rules which regulate tender at common law, and I do not think that it can be gathered from any reasonable construction of the provisions of Order XXII. that it was intended to abrogate the old practice which prevailed in Admiralty actions. According to the old practice in Admiralty, a tender was nothing more than an offer. If the offer was accepted there was an end of the action, and if it was not accepted, the fact that a tender

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had been made was a circumstance to be taken into consideration by the court in the exercise of its discretion in awarding costs. It seems, according to the old practice, that tenders were often made informally out of court, but disputes arising in many cases as to whether alleged tenders had really been made or not, the court, in order to prevent this inconvenience, required the tender to be made by act in court, and the money tendered to be brought into court, so that no doubt could arise as to the fact of tender or the amount of the tender: (see per Lord Stowell, *The Vrouw Margaretha* (4 Rob. 106.) And where a tender was made by act in court it was usual for the court to name a day on or before which the plaintiffs should declare whether they accepted or rejected the tender. In *The General Palmer* (2 Hagg. 180), Sir Christopher Robinson said that in future cases he should hold neither the court nor the owners bound in any manner by a tender not accepted in due time, and the learned reporter, in the marginal note to the case, interprets the words of the judge to mean that a tender not accepted in due time may be reduced by the court. In *The Johannes* (6 N. C. 296) a tender of fifteen guineas had been made by the defendants to the plaintiffs in a salvage suit. Sir John Nicholl pronounced against the claim, and directed the amount tendered in court to be paid out, not to the plaintiffs, but to the defendants, to go *pro tanto* in payment of their costs. I cannot find any case in which it has been held that a tender made in an Admiralty action, not accepted by the plaintiffs, has been held to operate as a binding admission to the amount due. In Coote's Admiralty Practice, at page 37 of the edition of 1860, it is stated: "If the tender be rejected the suit is prosecuted to a judicial determination. The money remains idle in the hands of the registrar until the end of the suit, when, after certain formalities, it is delivered over to the defendant who has paid it in, or to the plaintiff to whom it is awarded." I cannot think that it was intended by Order XXII. to alter the old practice in Admiralty actions respecting tender, or to assimilate it to the technical rules regulating tender at common law. With regard to the proceedings after admission of liability in the Admiralty Registry, I may observe that, although Order LVI. lays down rules to regulate the procedure in such cases, there are not among such rules any relating to a tender in a reference, and that, I think, affords some ground for holding that tenders in such references were intended to be left to be regulated by the old practice. Order XXII. no doubt provides the manner in which the money tendered is to be lodged in court, but rule 20 enacts an express provision with respect to the payment of money out of court in an Admiralty action; and in the absence of any express rule regulating in other respects the practice of tender in court in an Admiralty action, I think it is reasonable to conclude that it was intended, in accordance with the provisions of Order LXXII., r. 2, that the old procedure and practice of tender in Admiralty actions should remain in force, except in so far as the rules affect the manner in which the money is to be lodged in court. But the matter seems to be concluded by authority. I do not rely upon the case of *The Dunbeth*, which was referred to in the argument, because the order made by Barnes, J. in that case was made by consent. But the case of *The R. W. Boyd* seems to be on all fours with the present case. It was a case of damage. There was an admission of liability by the defendants, and afterwards notice of tender by the defendants of 125*l.* The registrar, on the reference, found that less than 120*l.* was due. The plaintiffs moved that the amount of the tender should be paid out to them. That motion was argued before Butt, J. and rejected by him, and it was ordered that the 125*l.* should be paid out to the plaintiffs' solicitors, only on the terms of their undertaking to pay the balance to the solicitors of the defendants. That was a decision in June 1886, and is, I think, a decision binding upon me in this case. I must therefore reject the application of the plaintiffs, with costs.

F. Laing pointed out that in any event the plaintiffs would have had to apply for an order for the payment out of the sum found by the registrar to be due to them. He contended, therefore, that the plaintiffs were entitled to their costs.

Butler Aspinall submitted that the real matter at issue was the attempt by the plaintiffs to get the whole amount paid into court by the defendants. On that ground he contended the plaintiffs were not entitled to costs. He also applied for confirmation of the registrar's report.

BRUCE, J. allowed the plaintiffs the costs of the summons, and also made an order confirming the report of the registrar.

Solicitors for the plaintiffs, *J. A.* and *H. E. Farnfield.*

Solicitor for the defendants, *Charles E. Harvey.*

July 2 and 3.

(Before BRUCE, J.)

THE THETA. (a)

Personal injury—Action in rem—*Admiralty Court Jurisdiction Act* (24 *Vict. c.* 10), *s.* 7—*Meaning of word "damage."*

The chief engineer of a steamship, while crossing the deck of another vessel moored between the quay and his own vessel, fell down a hatchway, which was covered with tarpaulin, and was injured.

Held, that the ship could not be said to be the active instrument of the damage done, and that therefore it was done on board the ship, and not by the ship, within the meaning of sect. 7 *of the Admiralty Court Jurisdiction Act.*

Semble, *the word "damage" is as applicable to damage done to person as to damage done to property.*

MOTION to set aside writ and dismiss action.

This was an action *in rem* brought by William Yule, chief engineer of the steamship *Faithful*, of the port of Liverpool, against the owners of the ship or vessel *Theta*, to recover damages for injuries sustained through falling down the hold of the *Theta*.

The *Theta*, a Norwegian barque, was on the 5th June 1894 lying moored to the quay in the Regent's Canal Dock. Work on her having been finished for the day, her hatches, which

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had been opened, were covered up with tarpaulins in the usual way, and she was left for the night with no one in charge except the dock officials.

About 9 p.m., according to the plaintiff's written statement, he being desirous of getting on board his vessel, the *Faithful*, which was lying outside the *Theta*, and moored alongside her, got on board the *Theta*, and in stepping from the gangway on to the hatch, which he supposed was safe, he stepped on to the tarpaulin covering, and fell down the hold, sustaining certain injuries.

The Admiralty Court Jurisdiction Act, s. 7, is as follows:

> The High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship.

Parker Lowe in support of the motion.—It is submitted that there is no jurisdiction in the Admiralty Court to try an action *in rem* under these circumstances, whether there be negligence proved or not, as it was not an active commission of an injury on the part of the ship within the meaning of the Act:

> *The Sylph*, 17 L. T. Rep. 519; L. Rep. 2 Adm. 24;
> *The Beta*, 12 L. T. Rep. 1; L. Rep. 2 P. C. 447.

The word "damage" does not cover damage done to a person, even when done in a collision. In *Smith* v. *Brown*. (24 L. T. Rep. 808; 1 Asp. Mar. Law Cas. 56; L. Rep. 6 Q. B. 729), Cockburn, C.J. says (p. 732 L. Rep.): "The question is whether loss of life or personal injury occasioned by the collision of two vessels comes under the term 'damage' as used in this section" (Adm. Court Act, s. 7). "Now the words used are, undoubtedly, very extensive, but it is to be observed that neither in common parlance nor in legal phraseology is the word 'damage' used as applicable to injuries done to the person, but solely as applicable to mischief done to property. . . . We speak, indeed, of damages as compensation for injury done to the person; but the term 'damage' is not employed interchangeably with the word 'injury' with reference to mischief wrongfully occasioned to the person." And again, at p. 735 (L. Rep.): "It is true that in the case of *The Uhla* (L. Rep. 2 Adm. & Ecc. 29, n.), Dr. Lushington held that, where a ship had driven against a breakwater, and had done damage to it, a suit in the Admiralty Court would lie; but there the damage had actually been done to the breakwater by the ship itself, and the case, therefore, came within the very words of the Act, nor was there the difficulty we have pointed out in the application of the term 'damage' to personal injury":

> *Simpson* v. *Blues*, 26 L. T. Rep. 697; 1 Asp. Mar. Law Cas. 326; L. Rep. 7 C. P. 290.

Lord Blackburn says in *The Vera Cruz* (51 L. T. Rep. 104; 5 Asp. Mar. Law Cas. 386; 10 App. Cas. at p. 72): "If the question now raised had been that which the Court of Queen's Bench, of which I was then a member, treated as raised in *Smith* v. *Brown* (*ubi sup.*) . . . whether personal damage to a man who lived was within that 7th section of the enactment, I should have had, as I then had, some doubt about the matter, and it would have carried me so far that, if that had been the question now raised, I certainly should have wished to hear the case argued out to the end before giving an opinion upon it one way or the other. But the question raised here being exclusively whether the liability of a shipowner as a person, under Lord Campbell's Act, to make good damages for the negligence of his servant, who happens to be the master of the ship, comes within the words 'damage done by any ship,' I decidedly say that I do not think it does." [BRUCE, J. referred to *The Zeta*, 33 L. T. Rep. 477; 3 Asp. Mar. Law Cas. 73; L. Rep. 4 Adm. 22.]

Sir *Walter Phillimore* for the plaintiffs.—Among the cases which have been cited, *The Sylph* will, I think, be found to be co-ordinate, *The Beta* superior. In the Court of Appeal, in the case of *The Vera Cruz* No. 2 (9 P. Div. 96), Brett, M.R. says: "The section indeed seems to me to intend by the words, 'jurisdiction' over any claim in the nature of an action on the case for damage done by any ship, or, in other words, over a case in which a ship was the active cause, the damage being physically caused by the ship. I do not say that damage need be confined to damage to property, it may be damage to person, as if a man were injured by the bowsprit of a ship. But the section does not apply to a case where physical injury is not done by a ship." And then he travels into Lord Campbell's Act, and further on he says: "The real cause of action is, in fact, pecuniary loss caused to these persons; it is not a cause of action for anything done by a ship, which is only one ingredient in the right of action." Then Bowen, L.J. says, "'Done by a ship' means done by those in charge of a ship, with the ship as the noxious instrument." Lord Selborne, in the House of Lords, draws exactly the same distinction. The line is drawn between injuries causing death on the one hand, and those not causing death on the other. If a ship coming into harbour, knocks down a man with her bowsprit, that is clearly within *The Sylph* (*ubi sup.*) and *The Zeta* (*ubi sup.*). There is no distinction between an act done in the course of navigation, and in the course of loading. There is a certain amount of analogy in *The Clara Killam* (23 L. T. Rep. 27; L. Rep. 3 Adm. 161). With regard to the question of jurisdiction, the defendants are Norwegian, and the object of this procedure is to secure to the plaintiff the fruits of a judgment for an injury done to him in his own country.

Parker Lowe in reply.—Lord Selborne says, in *The Vera Cruz* (10 App. Cas., at p. 67): "It is to my mind . . . a personal action given for a personal injury inflicted by a person who would have been liable to an action for damages manifestly in the common law courts, if death had not ensued." [BRUCE, J. referred to *The George and Richard*, 24 L. T. Rep. 717; 1 Asp. Mar. Law Cas. 50; L. Rep. 3 Adm. 466.]

The Max Morris, 30 Davies's Reports, 1.

Here the ship was merely an unsafe gangway.

Judgment was reserved and delivered on the following day as follows:

BRUCE, J.—In this case the defendants move to set aside the writ and to dismiss the action with costs, on the ground that this court has no jurisdiction. The question before me turns on the words in the Admiralty Court Act, "damage done by the ship." I see no reason to doubt that the word damage is as applicable to damage done to person as to damage done to property. It seems to me to be doing great violence to the ordinary meaning of the word "damage" to limit it to

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damage to property. I see that in the classics the word damage is used as applicable to mischief done to person. There is one passage from the authorised version of the New Testament, where in the 27th chapter of the Acts, Saint Paul says, "I perceive that this voyage will be with hurt and much damage, not only of the lading and ship, but also of our lives." Not only does the word "damage" in the ordinary classics apply to mischief to person, but I think on the authorities that its meaning comes to much the same in our courts. Of course it is true that it is said in the case of *The Zeta* (*ubi sup.*), that "it is impossible to reconcile all the opinions which have proceeded from the bench from time to time." I am guided by the more recent opinion which has been expressed by judges of high authority in the Court of Appeal and the House of Lords. I find in the recent case of *The Vera Cruz* (*ubi sup.*), the Master of the Rolls says, "I do not say that damage need be confined to damage to property; it may be damage to person." In the House of Lords, in the case of *The Zeta*, Lord Herschell, after mentioning cases which have been decided, says: "It is not necessary to trouble your Lordships with all the cases. It is enough to say that the proposition that the Act of 1861 applies to damage done by a ship to persons and things other than ships has been well established by many authorities, the correctness of which I see no reason to question." Therefore I have come to the conclusion that it is now decided by authority that the word "damage" by Act of Parliament has the ordinary meaning of the word—damage to property and damage to persons. But another question arises, viz., whether in the present case the damage was done by the ship. I cannot think that the present case falls within the provisions of the Act of Parliament. Damage done by the ship is, I think, applicable only to those cases where, in the words of the Master of the Rolls in *The Vera Cruz*, "a ship was the active cause of damage," and, in the words of Bowen, L.J., "the damage done by a ship means damage done by those in charge of a ship with the ship as the noxious instrument." In this case those in charge of the ship so placed a tarpaulin over the hatches as to make a trap into which the plaintiff fell in passing to his own ship. The ship cannot be said to be the active instrument of the damage done. The damage was done on board the ship, and not, I think, in the meaning of the Act, by the ship. Therefore I must allow the motion, with costs, and dismiss the action with costs.

Solicitors: *Robert Greening*; *Pritchard* and *Sons*.

July 17 *and* 30.

(Before the PRESIDENT (Sir F. Jeune.)

THE AUSTIN FRIARS. (*a*)

Charter-party—Arrived ship—"Ready to load"—Delay through sanitary regulations—Option of charterers to cancel—Damages for loss of charter.

A charter-party provided that the freighters were to have the option of cancelling the charter if the vessel failed to arrive at the port of loading and be ready to load on or before midnight on a certain date; also that detention by quarantine should not count as lay days.

The vessel arrived within the stipulated time, but was prohibited from communicating with the shore until the doctor had visited her and pronounced her free from infection. This was not done until the following day, and the charterers then stated that the vessel was too late and cancelled the charter.

The Assistant Registrar held, that the vessel was not too late and that the charterers were not justified in cancelling the charter; also that the visit of the doctor, although it prevented the charterers from putting cargo on board, did not constitute any unreadiness on the part of the ship to load.

On motion to vary the report:

Held (confirming the report), that the charterers were liable to the shipowners, and that the damages must include damages for the loss of the charter.

MOTION to vary a report of the assistant registrar.

This was an action arising out of a collision which occurred in the Bosphorus about 3 p.m. on the 27th Sept. 1893, between the steamship *Albula* and the steamship *Austin Friars*.

Messrs. Matthew Cay and others, owners of the *Albula*, brought an action for damages against the owners of the *Austin Friars*. The court found that the *Albula* was alone to blame for the collision, and the usual reference to the registrar and merchants was made to report as to the amount of damages sustained by the owners of the *Austin Friars*.

At the time of the collision the *Austin Friars* was proceeding up the Bosphorus in water ballast on her way to Sulina and Galatz for the purpose of loading at the latter port a cargo of wheat under a charter-party dated 25th Sept. 1893, and made between the owners of the *Austin Friars* and Messrs. J. Dreyfus and Co. of London.

The charter-party was the 1890 Danube charter-party, and the material clauses were as follows:

7. Eleven running days, Sundays, &c., excepted, are to be allowed the said freighters (if the steamer be not sooner despatched) for loading and unloading, and ten days on demurrage over and above the said lay days, at 4*d*. per ton on the steamer's gross registered tonnage per running day. Lay days at port of loading are not to count before the 26th Sept. next (new style), unless both steamers and cargo be ready earlier. The freighters have the option of cancelling this charter if the steamer does not arrive at port of loading, and be ready to load on or before midnight of 10th Oct. next (new style).

11. Except as herein provided, detention by frost or ice from Ibrail down to Sulina, also detention by quarantine, shall not count as lay days.

The registrar found, as a fact, that the *Austin Friars* put back to Constantinople in consequence of the collision, and was there temporarily repaired. She sailed thence on the 7th Oct. and arrived off Sulina on the 9th, and on the following morning at 9.30 the clearance papers for Galatz were taken from the ship by a person from the firm who were agents both for the charterers and the shipowners.

On the 10th Oct., at 11 p.m., the *Austin Friars* arrived at Galatz, but no one could leave the ship or come on board until the doctor had visited her and pronounced her free from infection. On the following morning the doctor came on board, and

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

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the master then landed and gave notice to the charterers that he was ready to load; but the charterers stated that the vessel was too late, and they cancelled the charter in accordance with clause 7.

The *Austin Friars* was consequently placed on the berth, and after some delay obtained another cargo with which she proceeded to Antwerp, and after discharging there was taken to Shields, where she was permanently repaired.

The owners of the *Austin Friars* therefore claimed, as part of their damages arising out of the collision, (*a*) demurrage at Constantinople, (*b*) demurrage at Shields, and the loss of the time occupied in proceeding thither from Antwerp, and (*c*) demurrage at Galatz, and damages for the loss of the charter of the 25th Sept., such damages being the difference between the freight lost and the freight earned.

As regards (*a*) and (*b*) the registrar stated that a reasonable allowance had been given, and as regards (*c*) he was of opinion that the charterers were not justified in exercising the option of cancelling the charter, and he consequently allowed the defendants, as against the owners of the *Albula*, nothing in respect of this amount. He expressed the opinion that from a business point of view the *Austin Friars* was not too late, loading was not done at Galatz by night, and for all practical purposes she was as much in time as if she had arrived several hours earlier. Further, it was clear that, as the charterers had already loaded part of the cargo destined for the *Austin Friars* in another vessel before she arrived, it was necessary for them to make out that she had not complied with the terms of the charter. But, in his opinion, she had arrived and was ready to load before midnight on the 10th Oct., and was, as regards holds, equipment, &c., in a position to take on board cargo. The visit of the doctor was a matter which prevented the charterers from placing the cargo on board, and not a matter which constituted any unreadiness on the part of the ship to load.

Dealing with the cases on the point the learned registrar thought that the case of *Smith* v. *Dart* (52 L. T. Rep. 218; 5 Asp. Mar. Law Cas. 360; 14 Q. B. Div. 105) seemed to show that, when the charterers intend to make the option of cancelling dependent not only on the arrival, and so to say physical fitness of the ship, but also on her having submitted to local regulations, words for that purpose are introduced into the charter-party. For in that case the words were "free of pratique and ready to load," and the vessel was not free of pratique by the agreed date. The intention of this clause is to place an obligation on the shipowner to use his best endeavours to bring his vessel to the port of loading by a fixed date and in a proper condition. These things he has within his own control. It does not intend him to be exposed to the loss of his charter from the acts of persons over whom he has not control. If this were so, a shipowner might have his vessel at a loading port several days before the appointed time, and yet through the negligence of some municipal officer he might lose his freight. This, he thought, was not the intention of the parties to this charter, and therefore that part of the claim could not be sustained.

J. E. Bankes, for the defendants, in objection to the report.—It is submitted in the first place that the ship as a fact was not ready to load on or before midnight on the 10th, because she was in quarantine, although it is a kind of qualified quarantine, because it only lasted till the doctor came on board. It was just as if it were the last day of a period of quarantine. It was therefore impossible, as a fact, to load the vessel because nobody could go on or off. Secondly, inasmuch as by reason of the quarantine she was unable to load, the risk falls on the charterer and not on the shipowner. In *Smith* v. *Dart* (*ubi sup.*) Smith, J. said: "The shipowner does not contract to get there by a certain day, but says, 'If I do not get there you may cancel.' It is an absolute engagement, that if he does not get there the charterers may cancel." The same point taken by the registrar was taken in the case of *Oliver* v. *Fielden* (4 Ex. 135). The only case which seems to be exactly in point is *White* v. *Steamship Winchester Company* (13 Scotch Sess. Cas. 4th Series, 524). There the Turkish authorities wrongly placed the ship in quarantine. A vessel in quarantine is like a vessel without a crew, she is like a log on the water and is perfectly useless for purposes of loading:

Groves, Maclean, and Co. v. *Volkart*, 1 C. & E. 309.

Thirdly, with regard to the class of cases dealing with revolutions and other kinds of *vis major*, there is then some disqualification in the ship, and the courts have there held a joint disqualification which implies faults on both sides. [The PRESIDENT referred to *Hudson* v. *Ede*, 18 L. T. Rep. 764; 3 Mar. Law Cas. 114; L. Rep. 3 Q. B. 412.]

Cunningham v. *Dunn*, 38 L. T. Rep. 631; 3 Asp. Mar. Law Cas. 595; 3 C. P. Div. 433.

Butler Aspinall, for the plaintiffs, *contrà*.—This vessel was never in quarantine at all. [The PRESIDENT.—She was in an intermediate condition, a kind of medical purgatory.] The ship was ready to load, but the effect of the local rule was to prevent the cargo being put on board. The intention of the parties to the contract must be looked to, and here there is an express provision that the risk of quarantine shall fall upon the ship. Where the words "free of pratique" are absent it must be concluded that the parties did not intend to insert them. The cases which have been cited, particularly the Scotch case, deal with the rights of the parties after the ship has arrived, and not with the question as to whether the charter-party is to be enforced between the parties. In *Smith* v. *Dart* (*ubi sup.*) it was held that the excepted perils did not apply to the cancellation clause at all. [The PRESIDENT.—It really all comes back to what is the meaning of the words "ready to load."] There is surely a distinction between "ready to load," and "ready to load free of pratique:"

Hick v. *Tweedy*, 63 L. T. Rep. 765; 6 Asp. Mar. Law Cas. 599;

Tharsis Sulphur and Copper Company v. *Morel*, (1891) 2 Q. B. 648.

Finally, it is submitted that, if the vessel is to get demurrage for the delay, she ought not to get damages in respect of this contract:

The Argentino, 61 L. T. Rep. 706; 6 Asp. Mar. Law Cas. 433; 14 App. Cas. 519.

Lord Herschell there held that the vessel should not have both.

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Bankes in reply.—The ship could not be loaded in the condition she was in, and there is no practical difference between that and the condition of quarantine. As to the absence of the words "free of pratique," if Lord Shand is right (*White* v. *Steamship Winchester Company* (*ubi sup.*) it is not necessary to put them in, because "ready to load" means "ready to load in fact." [The PRESIDENT.—The question really is: Is a vessel ready to load when the quarantine regulations of the port prevent anyone from going on board?]

Judgment was reserved, and delivered on July 30.

The PRESIDENT.—The only question raised is, whether the claim for damages for the loss of the charter-party is well founded, and that turns on the point whether the steamer was ready to load before midnight on the 10th Oct., within the meaning of the 7th clause of the charter-party. It was not contested that but for the delay caused by the collision the ship would beyond question have been ready to load in due time; nor was any argument as to remoteness of the damages pressed. The learned registrar has reported that, in his judgment, the vessel had arrived, and was ready to load. "She was," he says, "as regards hold, equipment, &c., in a position to take on board cargo. The visit of the doctor was a matter which prevented the charterers from placing cargo on board, not a matter which constituted any unreadiness of the ship to load." And again: "The intention of the clause is to place an obligation on the shipowner to use his best endeavours to bring his vessel to the port of loading by a fixed date and in a proper condition. These things he has within his own control. It does not intend him to be exposed to the loss of his charter from the acts of parties over which he has no control." The latter of these arguments—namely, that the shipowner is not liable to have his charter cancelled for the acts of parties over whom he has not control—appears to me to be answered by reference to the words of the charter-party, and which is covered by authority. The provision is an absolute one for the benefit of the charterers. If the ship is not in fact ready to load by the specified time, they are to be entitled to cancel the charter-party. This was decided in *Smith* v. *Dart and Son* (*ubi sup.*). In that case the charter-party contained the words "should the steamer not have arrived at first loading port free of pratique and ready to load on the 15th Dec. next charterers have the option of cancelling or confirming this charter-party." The vessel was prevented from being ready to load as provided by dangers of the seas, and it was argued that the excepted dangers clause applied to the claim giving the option to cancel. It was, however, held that it did not apply, and that the stipulation in question was an absolute engagement that the ship should be ready to load by a given time. *A fortiori*, if the forms of *vis major* enumerated in the excepted perils clause do not, on that ground, apply to control this stipulation, neither they nor any other forms of *vis major* can on any ground be imported to effect this object. The other point is, that the vessel was herself ready to load, but that the charterers were prevented by pratique regulations from loading her; in other words, that there was no incapacity attaching to the ship herself. It was argued that the action of the authorities constituted an impediment to the ship loading independent of her own ability to load. There does not appear to be any English authority decided with reference to a state of things similar to that presented in the present case. The case of *Cunningham* v. *Dunn and another* (*ubi sup.*) is, I think, an authority to show that the act of a superior power, in that case, as in this, a Government authority, which prohibited the loading of a vessel, is an impediment incumbent not only on the charterers, but also on the shipowners. There is, however, a decision in the Scotch Court of Session which is nearer to the present case. In the case of *John and James White* v. *The Steamship Winchester Company* (*ubi sup.*) it was held that where access to a ship was prevented by quarantine regulations, the lay days did not commence to run, and the shipowners could not charge the loss arising from such circumstance against the charterer, but must bear the loss themselves. The ground of this decision was that by reason of the quarantine regulations the ship was disqualified, and so not available, for taking in the cargo of the charterer. "The vessel," Lord Shand said, "would be an arrived ship in name only, but not in reality, so far as regarded the charterer, whose duty and obligation—the loading or unloading—should begin on arrival. The charterer might be quite ready to unload, or ready with a cargo waiting to load the vessel, but the disqualification of the ship would prevent this, and, indeed, would lead to the ship being sent away from the place of loading or discharge. She would thus never be at the disposal of the charterer so as to enable him to fulfil his obligation." I think that these words express the view which I ought to adopt; and I agree with Lord Shand that a quarantine regulation constitutes a disqualification of the ship to load. It was argued before me that the present is not a case of quarantine, nor in strictness is it. But there seems to me no distinction for this purpose between a medical officer in authority ordering a ship into quarantine, and his prohibiting access to her until he can examine into her condition. In both cases a superior authority, in pursuance of sanitary regulations, disqualifies a ship from taking cargo on board. It was also argued that some charter-parties (for example, that in *Smith* v. *Dart*) add "free of pratique" to the words "ready to load." This, of course, shows that those who framed the charter-party doubted if it were sufficiently clear that readiness to load included the absence of sanitary disqualifications; but I do not think that the practice of adding these words has been so usual or so authoritative as to show such a doubt is well founded. I think, therefore, that the damages in this case must include damages by reason of the loss of the charter-party.

Solicitors: *Botterell* and *Roche*; *Thomas Cooper* and *Co.*

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Judicial Committee of the Privy Council.

April 9, 11, *and June* 9.

(Present: The Right Hon. the LORD CHANCELLOR (Herschell), Lords HOBHOUSE, MACNAGHTEN, and MORRIS, and Sir R. COUCH.)

MUNICIPAL COUNCIL OF SYDNEY AND OTHERS *v.* ATTORNEY-GENERAL OF NEW SOUTH WALES, AND MILROY. (*a*)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Crown lands—Dedication by Crown—Permanent common—Common of pasturage—Inclosure—Public Parks Act of New South Wales 1854 (18 *Vict. No.* 33)—*Crown Lands Alienation Act* 1861 (25 *Vict. No.* 1), *s.* 5.

By sect. 5 *of the Crown Lands Alienation Act of New South Wales,* 1861, *it is enacted that Crown lands in the colony may be reserved or dedicated for various specified purposes, including "pasturage common, or for public health, recreation, convenience, or enjoyment." A tract of Crown land was duly dedicated under the Act as "permanent common," and the Municipal Council of Sydney were appointed trustees of the land so dedicated, under the Public Parks Act,* 1854. *The Municipal Council let a small portion of the land on lease to the other appellants, who inclosed it, and used it for agricultural shows, races, and cricket and football matches, and made a charge for admittance.*

Held, that the dedication of the land did not create a common of pasturage, and that the use by the appellants was not inconsistent with the dedication, which must be taken to have been for the public enjoyment, and that such use should not be restrained at the suit of the Attorney-General suing on behalf either of the Crown or of the public.

Judgment of the court below reversed.

THIS was an appeal from a decree of the Supreme Court of New South Wales in Equity.

The facts are fully set out in the judgment of their Lordships.

Crackanthorpe, Q.C. and *T. R. Warrington* appeared for the appellants.

The *Solicitor-General* (Sir J. Rigby, Q.C.), *Lynn*, and *Adams* for the respondents.

At the conclusion of the arguments their Lordships took time to consider their judgment.

June 9. — Their Lordships' judgment was delivered by

Lord HOBHOUSE:—The main question in this appeal turns on the effect of a dedication of Crown land in Sydney, made by the Crown in 1866, under the powers given by the Act of 1861 (25 Vict. No. 1) for regulating the alienation of Crown lands. By the decree appealed from, certain arrangements made or permitted by the municipal council of Sydney for allowing agricultural shows and races to be held by the other appellants on a portion of the dedicated land are declared to be void, and injunctions have been granted to prohibit them. The Attorney-General of New South Wales, who appears as a respondent, seeks to maintain the decree on the ground that the land was dedicated as a pasturage common, and can not lawfully be used for other objects. The Crown Lands Alienation Act defines Crown lands to mean "all lands vested in her Majesty which have not been dedicated to any public purpose, or have not been granted or lawfully contracted to be granted in fee simple." And by sect. 5 it enacts that "the Governor, with the advice aforesaid" (the advice of the Executive Council), "may by notice in the *Gazette* reserve or dedicate in such manner as may seem best for the public interest any Crown lands for"—then follow a number of specified purposes, ending with "or for any pasturage common, or for public health, recreation, convenience, or enjoyment, or for the interment of the dead, or for any other public purpose." A notice was published in the Government *Gazette*, under date 5th Oct. 1866, as follows:—"Department of Lands, Sydney, 5th Oct. 1866. His Excellency the Governor, with the advice of the Executive Council, has been pleased to dedicate the Crown lands hereunder described to the several public purposes mentioned in connection therewith, abstracts of such intended dedications having been duly laid before Parliament in accordance with the 5th section of the Crown Lands Alienation Act of 1861.—J. BOWIE WILSON." Then follows the schedule relating to many parcels of land, and among them the parcel now in dispute. Its place is mentioned as Sydney, its extent as 490 acres, and its purpose as "permanent common." The Public Parks Act 1854 (18 Vict. No. 33), recites that it "is expedient that bodies of trustees with perpetual succession should be created for the purpose of holding, managing, and protecting lands granted for or dedicated to purposes of public recreation, health, convenience, or enjoyment." It enacts that the Governor may, without any grant by the Crown, appoint trustees of lands so dedicated, and that they shall be a body corporate. And by sect. 5: "The trustees appointed by virtue of this Act shall have the powers of absolute owners (except for the purposes of alienation in respect of the land granted to or placed in trust under them), and it shall be lawful for them to make such rules and regulations for the protection of the shrub trees and herbage growing upon such lands, and for regulating the use and enjoyment of such lands, and for the removal of trespassers thereon, and other parties causing annoyance or inconvenience thereon, as to them shall seem necessary or expedient." A notice was published in the Government *Gazette* under date, "Department of Lands, Sydney, 15th Aug. 1871," as follows:—"It is hereby notified for public information that his Excellency the Governor, with the advice of the Executive Council, has been pleased to approve of the appointment of the Municipal Council of Sydney as trustees of the portions of land in the city of Sydney dedicated for public recreation, the particulars of which are set out in the accompanying schedule.—J. BOWIE WILSON." The schedule contains the 490 acres in question. They are there stated to have been dedicated by notice in the *Gazette* of the 5th Oct. 1866. On the 5th Sept. 1881, the Municipal Council executed a deed whereby they purported to let to the Agricultural Society of New South Wales about twenty-five acres of land, situate at Moore Park, Sydney, at a yearly rent of 10*l.* The lease is to endure from the 1st July then last during the will of the lessors only, or until notice

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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given as therein mentioned. The lessors may determine the tenancy after fourteen days' notice in writing. The lessees are to hold the demised land for the purpose only of shows or exhibitions, and they undertake to keep the land drained and cleaned under the directions of the lessors' engineer, and to comply with the lessors' regulations as to access by the public. The demised twenty-five acres are part of the dedicated land, which appears to be called "Moore Park." According to the evidence they are a low-lying portion of the ground, very wet and swampy when taken by the Agricultural Society, who have drained them and made them fit for use. It appears that they are fenced round in some way, and that the inclosure can be entered at some points by turnstiles or by a carriage-way, at both of which payment is made for entrance, and from another direction by gates which can be passed without payment. Within the inclosure the society hold their agricultural shows, and, by arrangement with them, the Driving Club hold pony races. It was stated that the expense was borne half by the society and half by the Government. The condition of things was stated by Mr. Webster, the secretary of the society, whose evidence does not appear to be contradicted. He says: "It" (the land) "was very rough and trees growing on it, and considerably below the level Moore Park had been made up to. It was all a swamp. At the first show, in 1882, the centre of the ground was three feet under water. The society has filled it in and well drained it. It is now fairly dry. Stables and pens erected. Pavilions and offices. All the requirements for a first class agricultural show. The cost has been 32,000*l.* since 1881. That included the Government subsidy of 1*l.* for 1*l.* The Government gave 5000*l.* when the land was first taken up, on condition that 1*l.* for 1*l.* was obtained. The 5000*l.* was given to start it. Ponies compete for prizes given at our show, just as we have jumping competitions. It is not true that people are totally excluded without payment. There are turnstiles where people pay for going in. There is also a gate on the Moore Park or Randwick-road side and one on the rifle range without any turnstile. Through these gates the public can go without payment. They are always open. The turnstiles register everybody who goes through, and so we can see what cash the turnstile man takes —so much for adults and so much for children. There were over 50,000 people at the last show. Forty-six thousand paid. Subscribers and exhibitors, soldiers and sailors do not pay. Wednesday is the Driving Park day. Saturday, cricket in summer and football in winter. The admission is 1*s.*; ordinary matches, 6*d.* The members' gate and other gates are always open. When no football, cricket, or trotting matches are on the grounds are open. Very few of the public go in; one or two." The same witness showed that other parts of the 490 acres had been appropriated in similar ways for cricket and football and for zoological gardens, the practice apparently beginning soon after the appointment of the municipal council as trustees. Speaking in 1892, the witness said: "This has been going on for seventeen or eighteen years." No question is raised in the suit as to such other parts, but the nature of the dedication must affect all alike. In October 1891 an information on the relation of the respondent, Milroy, joined with a claim by him, was filed against the three appellants. It states that by the notice of the 15th Aug. 1871 the governor duly dedicated the lands to the purpose of public recreation. It complains that members of the public, including the plaintiff, who desire to enter the demised twenty-five acres for the purpose of public recreation are prevented from doing so. It prays a declaration that the twenty-five acres are held by the municipal council upon trust for the purpose of public recreation only, the avoidance of the lease, and injunctions to restrain the exclusion of the public and the exaction of payment. The Chief Judge in equity, who heard the cause, held that the rights of the public and of the parties turned upon the construction of the dedication of 1866. On that point his opinion was stated as follows: "The 5th section of the Crown Lands Alienation Act, under which this dedication is expressed to be made, authorises the dedication of Crown lands as a 'pasturage common.' And such, it is clear, this common must be. In England there are various kinds of common—such as a common of fishing in rivers or lakes; a common of turbary, conferring the right of cutting turf; a common of estovers, conferring a right to lop timber; and a common of right to dig for coal, minerals, and the like; but the most usual form of common is that of pasturage, and, unless it be otherwise expressed, a dedication of grass land as a common can only mean a common of pasturage. It was contended that the words in this dedication 'permanent common' meant only a place of public recreation. I am clear they have no such meaning." As for the difficulty that no commoners were specified, he met it by holding that the rights of a common are necessarily limited to those who lived in proximity to the common. As regards the frame of the suit, he held that the Crown was in the position of the lord of an English manor; that it had an equal right of pasturage with the commoners, and could sue for itself and the commoners who claimed under it. The plaintiff's claim he thought to be a mere sham, and he dismissed it with costs. He did not discuss the difference between commoners and the public, or the circumstance that his view was as adverse to the view of the dedication which was taken by the information as to that which was taken by the defendants. The decree declares that the twenty-five acres formed part of the common dedicated by the notice of 5th Oct 1866, and that the lease of Sept. 1881, is void. It directs the lease to be cancelled, and it restrains the lessees and the Driving Club from excluding any member of the public from the twenty-five acres or any part thereof at all reasonable times, and from making any charge to any member of the public for entrance thereto. It is to be remarked that the decree does not declare the twenty-five acres to be subject to common of pasturage. It declares it to be part of the common established in 1866, which nobody had disputed. By reference to the learned judge's reasons their Lordships find that he interpreted the *Gazette* of 1866 to mean common of pasturage. But then the decree goes on to protect the public only, not the commoners nor the lord. Now, if the common is for pasture, and belongs to those who are in proximity, it is difficult to see why the public should have a decree made on their behalf invalidating the transactions

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in question. The decree seems to rest partly on the ground that there was common of pasturage to be protected and partly on the ground that the Attorney-General sued on behalf of the public, and not on behalf of the lord or any of the commoners. The ground first is inconsistent with the case presented by the information, and the second is inconsistent with the view taken by the learned judge. Passing from those objections, and adopting for the moment the supposition that the land was dedicated to pasturage, in what position has the Crown placed itself? The view submitted by the Solicitor-General for the respondents was that the dedication of 1866 was an incomplete act capable of being made complete afterwards; that it was valid and indefeasible so far as it devoted the land to common of pasturage; and that, though subsequent declarations might show who were the commoners and what were their rights, the Crown could not make any disposition inconsistent with the dedication. Even if that view be right, how does it support the case made by the information? The Crown remains the legal owner of the land, and has not designated any other person to possess any interest in it. Until such designation it is surely open in the meantime to the Crown to use the land in any way not inconsistent with its ultimate use for pasturage. What the Crown has done is to treat the land as a recreation ground, to appoint trustees for it on that footing, and to encourage and assist with money the acts now complained of. So long as there is nobody interested in the pasturage except the Crown itself, what legal objection is there to that course? The municipal council are only doing what the Crown intended them to do; and their Lordships cannot see what right the Attorney-General for New South Wales has to sue on behalf of the public or of the Crown to restrain them. Their Lordships feel that the issues dealt with are not the principal ones, and they prefer to rest their judgment on the broad ground that the dedication of 1866 did not create a common of pasturage. If it was intended to create such a right, why should not the Crown have used the statutory expression for it? Its advisers preferred to use a term not to be found in the statute, and yet susceptible of a popular and intelligible meaning. The word "common," it is true, had a technical meaning in England and in New South Wales, though what kind of enjoyment it may indicate, and for what persons, cannot be understood without something more. Standing alone it is an ambiguous term which requires explanation and may be explained by circumstances. But further it is very often used, though inexactly, and in popular parlance, to denote land devoted to the enjoyment of the public or of large numbers of people. And the question is whether it has not been so used in this instance. It appears to their Lordships that there are several considerations, some more and some less cogent, all bearing the same way. The departure from the words of the statute, though consistent with the ultimate use of the land for pasturage, suggests that the Crown had not then any intention of irrevocably fastening upon the land any of those precise modes of enjoyment which the statute mentioned. The omission to name commoners or in any way to define the nature of the common is more consistent with the intention of leaving the enjoyment a variable thing and open to all comers than of giving it to a defined class which, even if a large one, must be limited. The contiguity of the land to a populous city suggests that other modes of enjoyment are more suitable than pasturage. Five years after the dedication the Crown, by an equally formal document, treated it as one made for public recreation, and proceeded to appoint trustees accordingly. Since the appointment of trustees, at least for seventeen or eighteen years, the use of the land for different purposes of enjoyment has been constant. It is not a long user, but it has never been disturbed by any claim for pasturage. How strong is the general understanding that the land was actually dedicated to public recreation is shown by the information itself, which prays a judicial declaration to that effect, and founds its complaint on the defendants' interference with the public enjoyment. Their Lordships find no trace of any contrary view before the delivery of the judgment in this case. For these reasons they hold that the view taken by the advisers of the Crown and by the authorities and the people of Sydney was also the true legal view, and that the dedication of 1866 in permanent common meant that the land was to go for ever for the common or public enjoyment, so as to bring it within the operation of the Public Parks Act. If that be so, the appointment of trustees in 1871 was valid, and the only question that remains is whether the municipal corporation has dealt with the land in a way which is authorised by the powers conferred on them by the Parks Act. On that point no complaint has been made at their Lordships' bar, and it does not appear that there is any dissatisfaction among the people of Sydney, who might show it, if felt, very effectually in their municipal elections. There is a very general liking for animal shows and races, and a general willingness that portions of public ground should be taken for such things and money paid for good positions to enjoy them, inasmuch as without those payments the enterprises could not be maintained, and the enjoyment derived by the public from the land dedicated to their recreation would be less and not greater. By the evidence of Webster it appears that the inhabitants of Sydney are not behind the rest of the world in their readiness to see sights and to pay for them. Their Lordships think it is impossible to say that the lands are not being used and enjoyed with due regard for the rights and interests of the public. The result is that, in their Lordships' judgment, the court below ought to have dismissed the whole suit with costs. They will now humbly advise Her Majesty to discharge the decree appealed from, except so far as it dismissed the claim with costs, and to dismiss the information with costs. The respondents must pay the costs of this appeal.

Solicitors for the appellants, *Young, Jones, and Co.*

Solicitor for the respondents, *R. Bridger.*

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Supreme Court of Judicature.

COURT OF APPEAL.

Monday, June 25.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

HOLLAND *v.* LESLIE. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Writ for service out of the jurisdiction—Amendment of claim—Rules of the Supreme Court, Order XI.; Order XXVIII.

The indorsement on a writ for service out of the jurisdiction issued under Order XI. can be amended under Order XXVIII.

THIS was an appeal from a judgment of the Queen's Bench Division (Cave and Collins, JJ.) dismissing an appeal from an order of Lawrance, J. at chambers allowing the plaintiff to amend the indorsement on his writ.

The action was by the holder of a bill of exchange against the acceptor, a foreigner resident abroad, and having obtained leave for the issue of the writ for service out of the jurisdiction under Order XI., the plaintiff duly served notice thereof on the defendant.

The writ was indorsed with a claim on a bill for 45*l.* dated the 1st Dec. 1892, and payable four months after date.

The defendant appeared by a London solicitor, and delivered a defence pleading payment.

The plaintiff then took out a summons under Order XXVIII., asking for leave to amend the indorsement on the writ by substituting a claim for 42*l.* upon a bill dated the 1st Feb. 1893, payable three months after date, in the place of the bill set out in the indorsement.

No affidavit was filed by the plaintiff in support of his summons, but on his producing both the bills and stating that a mistake had been made between them, the bill for 45*l.* having been paid, Lawrance, J. at chambers made an order allowing him, upon terms as to costs, to amend the indorsement on the writ by substituting the bill for 42*l.* for the bill for 45*l.*

By Order XXVIII. it is provided:

Rule 1. The court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

The defendant appealed from the order of Lawrance, J.

May 31.—*Watt* on behalf of the defendant.—The judge in chambers had no power to allow this amendment of the writ. The application for this amendment of the writ was equivalent to the issuing and serving of a new writ, and whenever an application is made for the issuing of a writ for service out of the jurisdiction an affidavit is required; therefore, if the judge had power to allow the amendment at all, it certainly required to be allowed only upon fresh affidavits being made by the plaintiff:

Diamond v. *Sutton*, 13 L. T. Rep. 800; L. Rep. 1 Ex. 130;
Roberts v. *Worsley*, 2 Cox Cases in Chancery, 389;
The Cassiopeia, 40 L. T. Rep. 869; 48 L. J. 39, Prob.; 4 P. Div. 188;
Re Hartley; *Nuttall* v. *Whittaker*, 64 L. T. Rep. 786; (1891) 2 Ch. 121.

Lewis Thomas for the plaintiff, the respondent.—When once the order to serve a writ out of the jurisdiction has been granted, the defendant is before the court subject to any amendment under Order XXVIII. All that is required to serve a writ out of the jurisdiction is leave to serve, and this has been obtained; all that the plaintiffs have to show is that they have a good cause of action, and this they have done. When the plaintiffs are before the court they are before it for all purposes, and so is the defendant; he had appeared, and he also was before the court for all purposes, and the amendment which has been made ought therefore to be allowed.

CAVE, J.—In this case two points are raised on behalf of the appellant, the defendant in the action. The first is, whether the judge in chambers had the power to allow the amendment of the writ at all; and, secondly, whether the amendment was properly made on a statement of fact, and not on an affidavit. I am of opinion that the first contention raised on behalf of the appellant—viz., that the writ was improperly served—is not well founded; nothing has been referred to which shows that Order XXVIII. does not apply to writs issued for service out of the jurisdiction. I am of opinion that none of the cases which have been referred to say that you cannot amend without the writ being reserved upon the defendant. The defendant is before the court, and all that is necessary is that the judge shall be satisfied that, where one cause of action is substituted for another, all conditions which apply to the original cause of action are equally applicable to the second cause of action. As to the second point raised, viz., that the judge has no power to amend the statement of claim without having before him a fresh affidavit of the facts, it is beyond doubt that the judge cannot make an order without a fresh affidavit, if the party objecting says that the facts are not properly verified. I am not satisfied that this point was raised before the judge in chambers. The notice of appeal is silent upon the point, and it does not state upon what grounds the amendment made was objected to. I am certain that no judge would be satisfied upon the mere statement of a solicitor or his clerk or counsel before him in chambers. I am not satisfied that this point raised was taken, and therefore must assume that it was not taken. This appeal therefore fails, and must be dismissed.

COLLINS, J.—I am of the same opinion.

The defendant appealed. *Appeal dismissed.*

June 25.—*Watt* for the defendant.—Order XXVIII. does not apply to a writ for service out of the jurisdiction, and the court had no power to allow an amendment. All the rules as to writs for service out of the jurisdiction are contained in Order XI., which is a complete code on this subject. The plaintiff

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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ought to have proceeded as if he wished to issue a new writ, and have begun the action *de novo*. The amendment allowed practically substitutes a new cause of action; it is not merely an amendment of the plaintiff's original cause of action. The defendant is brought here to answer one cause of action, and then the action is completely altered so as to include another cause. If this amendment is allowed, a plaintiff will be able to substitute in a writ for service out of the jurisdiction a cause of action which perhaps would not have been considered sufficient to entitle him to leave for issuing such a writ:

The Cassiopeia, 40 L. T. Rep. 869; 4 P. Div. 188.

Ralph Bankes, for the plaintiff, was not called upon.

Lord ESHER, M.R.—In this case the plaintiff had a cause of action against the defendant upon his acceptance of a bill of exchange; but, in filling up the indorsement on his writ, he, by a blunder, put in another bill which had been paid instead of the one which he now wishes to sue upon. It was a blunder made in filling up a writ by a man who had at the time a good cause of action. The writ was issued for service out of the jurisdiction, and, after the defendant had appeared and delivered his defence, the plaintiff obtained leave at chambers to amend the writ. Now, it is argued by the defendant that the amendment ought not to be allowed, that Order XXVIII. of the Rules of the Supreme Court which regulates amendments does not apply to an amendment of this writ, because it is a writ of service out of the jurisdiction. It is said that, if we allow this amendment, a plaintiff will be enabled to issue a writ for service out of the jurisdiction, and then amend it so as to bring in a cause of action which, if put into the writ originally, would prevent his being able to issue it at all for service out of the jurisdiction. That case does not arise in the present application, and it is unnecessary to say anything more upon it. The case of *The Cassiopeia* (*ubi sup.*) which was cited was an action *in rem*, and has nothing to do with the class of action we have now to deal with. The appeal must be dismissed.

KAY, L.J.—I agree. The defendant has appeared to this writ, and given an address for service in London. The application by the plaintiff to amend was one which would have been perfectly proper if the action had been brought in the ordinary way against a defendant resident within the jurisdiction. There is no order or rule providing that when a writ has been amended it shall be "served" again; it need only be "delivered;" and that can easily be done in the present case, because the defendant has appeared and given an English address. If the amendment were one in respect of which no order for leave to issue a writ for service out of the jurisdiction would originally have been given, that would be good ground now for asking for a discharge of the order giving leave to amend; but that is not at all the case here. I think the appeal should be dismissed.

SMITH, L.J.—I agree. *Appeal dismissed.*

Solicitor for the plaintiff, *W. H. Herbert*.

Solicitors for the defendant, *Webster* and *Webster*.

Friday, June 29.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

THE BLYTH HARBOUR COMMISSIONERS (apps.) v. THE CHURCHWARDENS AND OVERSEERS OF THE POOR OF NEWSHAM AND SOUTH BLYTH AND THE ASSESSMENT COMMITTEE OF THE TYNEMOUTH UNION (resps.). (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Poor rate—Rateable value—Quays—Harbour dues—Dues payable, irrespective of the use of the land to be rated.

The appellants were incorporated by the Blyth Harbour and Dock Act 1882, *and were authorised under the Act to levy certain "harbour dues" for every vessel entering or clearing, or remaining within the harbour, and certain "goods dues," in respect of all goods shipped or unshipped, received or delivered within the harbour. The soil of the harbour was not vested in the appellants but they owned a piece of land adjoining, part of which was excavated so as to be covered with deep water, and part of which was used for the erection of quays. These quays were built under Parliamentary authority. The result of building them was to increase greatly the number of ships using the harbour. The respondents, in rating the appellants in respect of the quays, took into account, as enhancing the rateable value, the harbour and goods dues received by the appellants. Upon a special case being stated:*

Held (affirming the decision of the Queen's Bench Division), that, as the dues were payable under the Act by all ships entering the harbour, irrespective of any use of the quays, they could not be taken into account in estimating the rateable value of the quays.

THIS was an appeal from a judgment of the Queen's Bench Division (Charles and Bruce, JJ.) upon a special case concerning the validity of a rate for the relief of the poor of the township of Newsham and South Blyth, in the county of Northumberland, stated pursuant to the provisions of 12 & 13 Vict. c. 45 by consent of the parties, and by order of Lawrance, J.

By a rate made on the 10th April 1893 the appellants, the Blyth Harbour Commissioners, were rated to the relief of the poor of the township of Newsham and South Blyth, in the Tynemouth Union, in respect of property of which they are alleged to be the owners and occupiers, and which in the rate was described as "Land and the tolls and dues arising therefrom or belonging thereto, and the buildings, fixed plant and machinery connected therewith." The gross estimated rental of the property so rated was alleged to be 10,358*l.* and the rateable value thereof was alleged to be 9358*l.* Against the rate so made the appellants appealed to the quarter sessions. The appellants were constituted and incorporated by the Blyth Harbour Act 1882, which transferred to the appellants the harbour undertaking of the Blyth Harbour and Dock Company (hereafter referred to as the company).

The Blyth Harbour and Dock Act 1854 incorporated the company for the purpose of improving the harbour of Blyth, and authorised the company to demand and receive certain rates

(a) Reported by F. O. ROBINSON, and E. MANLEY SMITH, Esqrs., Barristers-at-Law.

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(sect. 29) for vessels entering within the defined limits from the sea, (sect. 35) for vessels entering any dock or basin authorised by the Act, and (sect. 39) for goods shipped or unshipped within any such dock or basin or upon or from any wharf, quay, staith, &c., of the company. The Act provided (sect. 46) that the company should be enabled to purchase the rights and interests of all persons in certain tolls, rates, dues, and charges then leviable in respect of the use of mooring anchors, mooring posts and hauling posts, and for lights and otherwise in respect of the harbour.

Before and at the time of the passing of the Act of 1854 Sir M. W. Ridley was seised of the manor and township of Newsham and South Blyth and of Cambois, and of that part of the harbour of Blyth which was in these townships, and of the ground and soil of that part up to high-water mark, and of the tolls, &c., leviable in respect of the harbour as parcel of the hereditaments in these townships. The soil of the river Blyth where the river passed through Cowpen, and before it entered the aforesaid townships, was vested in persons other than Sir M. W. Ridley, but no vessel could enter the river Blyth at all from the sea without passing through one or other of the townships. Sir M. W. Ridley possessed the right of levying the tolls, &c., in respect of all ships entering the river and harbours, whether they did or did not afterwards enter that part of the river of the soil of which he was not seised.

In pursuance of the powers contained in the Act of 1854, the company, on the 14th Jan., 1857, purchased from Sir M. W. Ridley his rights and interests in the tolls.

On the 3rd April 1858 Sir M. W. Ridley conveyed to the company a piece of ground in the township of Newsham and South Blyth, which was used by the company and the appellants up to 1887 in connection with the harbour, and since that date has been dealt with as mentioned below.

By the Blyth Harbour and Dock Act 1858 the powers of the company were enlarged, and the company were authorised to demand and receive certain rates (sect. 57) for vessels entering the harbour from the sea, including or in lieu of the tolls purchased from Sir M. W. Ridley, and (sect. 67) for goods shipped or unshipped within any dock or basin, or from any wharf, quay, or staith belonging to the company.

By a deed, dated 11th Aug. 1858, Sir M. W. Ridley conveyed to the company a piece of ground in the township of Newsham and South Blyth, then used as a quay, which continued to be so used by the company until 1884, since when it has been dealt with as mentioned below.

By sects. 99 and 100 of the Blythe Harbour Act 1882, sects. 57 and 67 were repealed, and the appellants were authorised to receive harbour dues for every vessel clearing or departing outwards from the harbour or remaining within the harbour, and goods dues for all goods shipped or unshipped within the harbour.

Subject to the rights possessed by the appellants by virtue of the Acts of Parliament and the above-mentioned conveyances, the soil of that part of the harbour within Newsham and South Blyth was the freehold of Sir M. W. Ridley, and the part within Cowpen was the freehold of the other persons.

A part of the land comprised in the conveyance of the 3rd April 1858 was dredged away by the appellants, and was now covered by water, and used to provide berths for vessels shipping coals from elevated coal shipping staiths and sidings, which had been erected by the North-Eastern Railway Company, partly on the land comprised in this conveyance and partly upon the adjoining land. The appellants contributed to the cost of the staiths, and had provided on them mooring posts for mooring vessels, but the staiths were solely occupied by the railway company, and the railway company was rated for the occupation of them, and also for the land, buildings, and sidings connected therewith, but the harbour and goods dues were not taken into account in any way as enhancing the value of such occupation by the railway company. Similar staiths, occupied and used in the same way, had been erected on the land comprised in the conveyance of the 11th Aug. 1858. A quay had been erected under the staiths by the appellants, by arrangement with the railway company, in substitution for the previously existing quay, and was maintained by the appellants. The appellants, and their predecessors the company habitually dredged and deepened such portions of the harbour as they thought fit, and exercised the powers conferred upon them with respect to the management of the harbour, but they were not the owners of or in possession of the harbour except so far as appeared from the said Acts of Parliament and conveyances, and the facts stated in this case. The result of these improvements in the harbour, including the facilities provided on the said pieces of land, was to greatly increase the trade of the harbour, and as a consequence the appellants received for harbour and goods dues larger sums than they otherwise would have done. At least one-third of the vessels entering the harbour were berthed or moored on or alongside the above mentioned pieces of land, and at least one-third of the goods shipped or unshipped within the harbour were shipped or unshipped from or on the same pieces of land, but harbour dues and goods dues would have been payable if such vessels had been berthed or moored elsewhere in the harbour, and if such goods were shipped or unshipped by means of facilities provided elsewhere in the harbour.

The question for the opinion of the court was, whether the harbour dues and goods dues, or either of them, or any and what part of them, ought to be taken into account as enhancing the rateable value of the land and hereditaments comprised in the conveyances of the 3rd April 1858 and the 11th Aug. 1858.

Lawson Walton, Q.C., *T. Willes Chitty*, and *Newbolt*, for the appellants.

Sir *R. Webster*, Q.C., *Balfour Browne*, Q.C., and *Scott Fox* for the respondents. *Cur. adv. vult.*

May 11.—The judgment of the Court (Charles and Bruce, JJ.) was delivered by

CHARLES, J.—The principal question raised in this case is whether certain dues called "harbour" and "goods" dues, which are received by the appellants under and by virtue of sects. 99 and 100 of the Blyth Harbour Act 1882, for vessels using the harbour, and goods shipped or unshipped, received or delivered there, are to be taken into account in enhancing the rateable value of the appellants' premises. There is also

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a subsidiary question with reference to their liability to be rated in respect of a small sum received by them under the powers conferred on them by the Act of Parliament for ballast. The appellants were incorporated by the Act of 1882, and in them was vested, by sect. 59, the undertaking of a company called the Blyth Harbour and Dock Company, which had been authorised under the Blyth Harbour and Dock Acts of 1854, 1858, 1860, to improve the harbour and levy tolls, rates, and dues on vessels entering the harbour, as well as on goods shipped or unshipped there. The Act of 1854, sect. 46, empowered the dock company to buy the interests of all persons then entitled to receive tolls or dues in respect of the use of mooring anchors, mooring posts, and hauling posts and lights, and, by sect. 47, provided that such tolls were to cease so soon as the company had, by execution of the improvement works, placed itself in a condition to demand the rates prescribed. In pursuance of the power thus conferred, the company, in Jan. 1857, bought from Sir M. W. Ridley the tolls and rates leviable and receivable by him for the use of mooring posts, buoys, &c., in Blyth harbour. He was, before and at the time the Act of 1854 passed, seised of the manor and township of Newsham and South Blyth, and of the manor and township of Cambois, and of that part of Blyth harbour which is within these townships, and of the ground and soil of that part up to high-water mark and, "as parcel of these hereditaments," of the tolls and dues so purchased. No vessel could enter the river Blyth from the sea without passing over some portion of the harbour owned by Sir M. W. Ridley, and his right to levy dues extended towards vessels entering the river and harbour, whether they did or did not afterwards enter a part of the river where the soil belonged to other persons. By sect. 57 of the Act of 1858 the company were authorised to demand and receive a rate for all vessels entering the harbour from the sea, and it was declared that that rate should include, or be in lieu of, the rates bought of Sir M. W. Ridley. The purchase from him, it should be noted, did not convey the soil of the harbour. By sect. 67 the company were authorised to take rates for goods shipped or unshipped, received or delivered, within any dock or basin or upon or from any wharf, quay, staith, spout, drop, or pier of the company, with a proviso that as to ballast the rates might be demanded in respect of ballast received or delivered by the company at any place within the harbour limits as defined by the Act. These two sections were repealed by sects. 99 and 100 of the Act of 1882, which now empower the commissioners to demand specified rates:—"(1) For every vessel entering the harbour and for every vessel clearing or departing outwards and for every vessel remaining within the harbour, and (2) in respect of all goods (*i.e.*, wares, merchandise, and articles of every description) shipped or unshipped, received or delivered, within the harbour." In April 1858 the company bought a piece of land from Sir M. W. Ridley, in the township of Newsham and South Blyth, adjoining the harbour, and it was used, first by the company and then by the appellants, until the year 1887, in connection with the harbour and undertaking. A part of this ground is occupied by the appellants as a ballast quay, and in front of the other part the appellants have deepened the harbour so as to provide accommodation for vessels loading coal from elevated staiths placed partly on the appellants' land and partly on land belonging to Sir M. W. Ridley, and exclusively used by the North-Eastern Railway Company. In Aug. 1858 another piece of land was bought by the company and used by them and their successors, the appellants, until 1884 as a quay. A part of it, or a substituted quay, is still so used by the appellants, but the residue is now replaced by a quay made and maintained by the North-Eastern Railway Company. Above the quays there are also elevated coal staiths occupied and used by the North-Eastern Railway Company. The appellants have habitually dredged and deepened such portions of the harbour as they have thought fit, and have fixed such mooring posts and buoys as they have deemed necessary, but they are not the owners of, or in possession of, the soil of the harbour. The quays, however, belong to and are occupied by them to the extent above indicated. The result of the harbour improvements, including the facilities provided on the pieces of land bought in 1858, has been greatly to increase the trade and augment the appellants' dues. At least one-third of the vessels entering the harbour are berthed or moored alongside these pieces of land and at least one-third of the goods are shipped or unshipped on or from the same pieces of land, but harbour dues and goods dues would be payable if such vessels were berthed or moored elsewhere in the harbour, and if such goods were shipped or unshipped by means of facilities provided elsewhere in the harbour. The respondents do not seek to charge the appellants so far as regards harbour and goods rates generally; but they contend that they are entitled to take into account, as enhancing the value of the appellants' rateable hereditaments within the townships, harbour dues received for vessels berthing along the dredged-out piece of land or along the adjoining quays, and goods dues received in respect of goods shipped into or unshipped from those vessels. Now, the test of rateability is the nature of the dues. If they are dues in gross the land is not rateable in respect of them; if they are connected with the occupation of the land it is otherwise. We have, then, to inquire for what they are paid. Are they paid for the use of the quays and mooring-posts, or apart from and independent of such use? It seems clear from the statements in the case that they are paid under a separate obligation and irrespective of the use of the quays altogether. The case, therefore, appears to be very similar to *Lewis* v. *Overseers of Swansea* (5 E. & B. 508). It was there proved that on the western shore of Swansea harbour within the borough were quays and wharfs (1) occupied by and the property of the corporation; (2) occupied by the lessees of the corporation; (3) the property of the Duke of Beaufort. The only mode of landing goods in or shipping them from the borough was by using one or other of these three classes of quays and wharfs. For all goods so landed or shipped the corporation received town dues and quayage dues, sometimes called "town dues and quayage," sometimes "quayage" only. It was held that these dues were not paid in respect of the use of land, but were incorporeal and in gross, and that neither the corporation nor their lessees were

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rateable in respect of any part of the dues. The appellant was lessee of the corporation of the dues, and did not himself occupy any quay; but the case was argued upon the assumption that the corporation, as well as their lessee, were appealing. In giving judgment Lord Campbell, C.J. says: "If the payment is made for the use of the quay, then the value of the toll would properly be taken into account in rating the quay; but if the payment be irrespective of the use of the soil, then the value of the toll could not be so taken into account. Is then this a payment for the use of the soil? *Primâ facie* it would appear to be so, for it is called quayage. But we find that a party not in occupation of the soil may have these dues. It seems to me that payment is not made for the use of the soil. It is paid for all goods landed on the western side of the harbour. Now, whenever we can ascertain how the case is as to one part of the harbour, we can from that judge of the nature of the payment generally. But we do find in the case of the land of the Duke of Beaufort that the dues are as much payable to the corporation for goods landed there as they were for goods landed on the soil of the corporation. That being so, the toll cannot be corporeal, the payment cannot be for the use of the soil. It is therefore incorporeal and not the subject of rate." And Wightman, J. adds: "The toll is taken without any distinction as to the occupation of the land which is used for the carriage of goods, and it is a mere accident that the corporation are occupiers of a portion of the land. If they had not a foot of land the toll would be equally payable to them." Having regard to the finding in the present case that the dues are payable, whether the quays are used or not, the observations in that case appear exactly applicable to the Blyth Harbour Commissioners, who would receive the dues just as they do at present, even if they did not occupy any of the quays. Another example of the necessity of a connection between the receipt of dues and the occupation of land is to be found in the case of *Commissioners of Shoreham Harbour* v. *Overseers of Lancing* (22 L. T. Rep. 434; L. Rep. 5 Q. B. 489). There, under a local and personal Act, commissioners were appointed for the improvement of Shorebam Harbour. The property in all quays erected under the Act was vested in the commissioners, who were empowered to make new piers and to deepen the channel of the harbour. After the piers had been constructed dues were to be paid by every one exporting or importing goods within the limits of the harbour. The commissioners built piers and deepened the channel, and received dues on all merchandise brought into the harbour. It was held that they were not occupiers of the soil of the channel so as to be rateable, and that, although they were occupiers of the piers and of the soil on which the piers were built, this occupation was not sufficiently connected with earning the dues to make them rateable in respect of the piers. The dues did not enhance the value of those piers, although it was conceded that if the piers fell into decay the harbour entrance would probably be choked up and the dues lost. Again, the same principle was applied in *Reg.* v. *Berwick Assessment Committee* (54 L. T. Rep. 159). There, harbour commissioners had statutory power to impose tonnage dues on all ships using the harbour, and shore dues on all goods shipped from or landed on the quays. The soil of the harbour was not vested in the commissioners, but that of the quays was, and they were accordingly properly rated in respect of those dues. But these were charged only for goods actually laden or unladen on the quays, and the benefit conferred by this use was the meritorious cause of the dues. In this state of things new powers were granted by a later Act for the construction of a wet dock and other works, and fresh dues were substituted for those formerly authorised as follows: (1) A new shore duty with an addition, on completion of the wet dock or goods loaded or discharged in the dock or on goods exported or imported in vessels of a registered tonnage of 100 tons or upwards: (2) new and in some respects increased tonnage and harbour dues on all ships entering the harbour from the time of the passing of the Act; and (3) additional tonnage dues payable on completion of the wet dock on vessels entering the wet dock. It was held in assessing the commissions for the wet dock, first, that the general tonnage and harbour duty paid by all vessels must be excluded from consideration, not having been earned in any way by the dock or given for the expenses of making it. But, further, it was held that it was wrong to bring into account the whole tonnage dues paid by ships which actually did use the wet dock. The additional 2*d.*, and that only, was regarded as earned by the dock, and as to the residue the court was of opinion that it was not earned by the dock at all because it would have been paid whether the vessels entered the dock or not. The wet dock was not in any way the meritorious cause of anything beyond the added sum. This reasoning appears entirely applicable to the present case, and to lead to the conclusion that the harbour and goods dues cannot be treated as elements in the rateable value of the appellant's premises. It was, however, suggested that the case of *Reg.* v. *Kingston-upon-Hull Dock Company* (7 Q. B. 2) was an authority for the respondent. In that case it appeared that the defendant company were entitled to be paid a certain due on all vessels which entered the harbour of Hull, whether they used the docks or not; and it is true that the court held that there was a distinction between dues received from ships which did use the docks and dues received from ships which did not, and that the defendants were liable in respect of the former and not of the latter. But, as Cave, J. points out in *Reg.* v. *Berwick Assessment Committee* (*ubi sup.*), the docks in the Hull case were the sole meritorious cause of the company's right to dues. Now, in the present case, the quays are not the sole meritorious cause of the Blyth Commissioners' right. On the contrary, just as in the Berwick case, there are other works in the harbour beneficial to ships, so that the dues which all vessels and goods pay, whether the quays are used or not, must be considered as earned by the harbour works and not by the quay. It was further contended by the respondents that the commissioners are in precisely the same position as was Sir M. W. Ridley before the sale of these dues, and he would have been rateable in respect of them inasmuch as he appears to have received them *ratione soli*, and doubtless his position does appear to be similar to that of the Bishop of Durham (the lessor of the Earl of Durham) in the case of *Earl of Durham* v. *Overseers of*

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Bishopwearmouth (2 E. & E. 230), and to that of the lords of the manor of Trematon in the case of *Sutton Harbour Improvement Company* v. *Guardians of Plymouth* (63 L. T. Rep. 772). But it is plain, I think, that whatever may have been the true nature of the dues in the hands of Sir M. W. Ridley, and whether he received them as owner of the soil of the harbour or as owner of a franchise, the appellants do not receive them *ratione soli*, and the statutes I have referred to must be looked at to find in what character they are received, and from these statutes it appears to be clear that the receipt of the harbour and goods dues is no longer, if it ever was, connected with the occupation of the soil of the harbour. These two cases, therefore, do not seem to be authorities on which reliance can be placed by the respondents. It is not necessary to say more as to the subsidiary claim to rate-money received for ballast than that it appears to be governed by precisely the same considerations as the harbour and goods dues. In the result, therefore, my judgment is for the apellants, with costs.

The respondents (the Churchwardens and Overseers) appealed.

Sir *Richard Webster*, Q.C. and *Scott-Fox* for the respondents.

Lawson Walton, Q.C., *T. Willes Chitty*, and *Newbolt*, for the appellants, were not called upon.

Lord ESHER, M.R.—This case seems to me to be quite clear on principle, and, if authority be needed, I think it is governed by the rules laid down in *Lewis* v. *The Churchwardens of Swansea* (5 E. & B. 508). The Blyth Harbour Commissioners are not owners of the soil of the harbour, but under an Act of Parliament they have certain rights in imposing dues or tolls, which have to be paid by ships in consideration of their entering the harbour. All ships that come into the harbour have to pay these dues. The commissioners contend that, as they are not owners of the soil of the harbour, and the dues are imposed only under an Act of Parliament, they cannot be rated in respect of these dues. As the only persons who can be rated are the occupiers of the land, the commissioners cannot be rated in respect of the harbour, nor in respect of dues which are paid to them merely for the use of the harbour. Now, that being the position of affairs, the commissioners purchased some land near the harbour, upon which they built some quays. The Act of Parliament which enabled them to do that did not give them any right to demand dues in respect of the use of the quays, but only in respect of the harbour. The respondents have now assessed the commissioners for a rate in respect of these quays, alleging that they are occupiers of the quays, and that they receive dues which must be taken into account in getting at their rateable value. The question comes to this, are the dues paid in respect of the use of the quays? It has been the question in all cases cited to us, whether the payment relied on by the rating authority was a payment made in respect of the use of the land rated. That is the way in which it was put by Lord Campbell, C.J. in *Lewis* v. *The Churchwardens of Swansea* (*ubi sup.*). He says: "What is the nature of the payment? If it is a payment made for the use of the quay, then when the corporation or their lessee were in occupation of the quay the value of the toll would properly be taken into account in rating the quay; but if the payment be irrespective of the use of the soil, then the value of the toll could not be taken into account. Is, then, this a payment for the use of the soil? *Primâ facie* it would appear to be so, for it is called quayage. But we find that a party not in occupation of the soil may have these town dues, as they are also called. It seems to me that such payment is not made for the use of the soil." And in the same case Wightman, J. puts to himself the question whether the toll was payable in respect of the use of the land rated, and then answers himself thus: "If they had not a foot of land the toll would equally be payable to them." If that be so, how can the dues be said to be payable in respect of any land which the commissioners may acquire? That is the test—for it is nothing more than a test—which was applied in the *Swansea* case and in the other cases cited to us by the respondents. Then the case of *Reg.* v. *The Hull Dock Company* (7 Q. B. 2) was cited to us. That case recognises precisely the same rule and principle as that which I have mentioned, but the judges there, having power to draw inferences of fact, drew an inference from the circumstances of the case that the toll in question was paid in respect of the use of the land which was rated. Having come to that conclusion on that question, the case was plain. But whether they drew the right inference of fact, whether we should draw the same inference if the case now came before us for the first time, is wholly immaterial. The case is of no use as an authority for a finding of fact, no case can be cited for that purpose. The rule of law in the *Hull* case is exactly the same as in the *Swansea* case; the difference between the two cases is that in the *Swansea* case the court applied one test and came to a conclusion of fact in one way, and in the *Hull* case other matters were taken into consideration, with which we have nothing to do, which led the court to an opposite conclusion of fact. In the present case, Charles, J. states as a fact, which cannot be denied, that the commissioners would receive the dues, just as they do at present, if they did not occupy any of the quays, and he comes to the conclusion that if that be so, it cannot be said by any reasonable person that they are paid for the use of the quays and mooring posts. The Divisional Court have applied the right test, and they have come to the right conclusion, with which I entirely agree. I think, therefore, that, both on principle and authority, this appeal must be dismissed.

KAY, L.J.—The respondents in this case have rated the Commissioners of Blyth Harbour in respect of certain quays in the parish of Newsham which are vested in the commissioners, and in respect of which they are undoubtedly rateable. The question before us is one of quantum only, and an attempt is made to raise the rateable value of the quays by taking into account the fact that the commissioners are entitled to charge certain tolls and dues upon all ships entering the harbour. The argument is put in this way: A certain proportion—one-third, it is said, but it is immaterial for the argument— of the ships which enter the harbour come and lie at the quays, and attach themselves to the mooring-posts and discharge goods on to the quays or take goods on board at them. This use of the quays, which are the property of the commissioners, attracts, it is said, many

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more ships than would otherwise come into the harbour. It is therefore argued that it is only fair and right to attribute at least a portion of the harbour dues to the use of the quays, and to enhance the rateable value of the quays by at least the dues paid by the ships which use these quays. The question before us relates merely to the use of the quays, and not to the use of any of the land under the water, but I will just refer to one of the quays which is coloured green on the plan before me. A portion of the land in front of that quay which is under water belongs to the commissioners, so that ships lying by the quay are lying over the land which was formerly dry land, and rateable, but which has been excavated by the commissioners, so that now it forms part of the harbour. Now, originally the whole of the soil of this harbour was vested in the adjoining landowner, Sir Matthew White Ridley. He still retains the soil, excepting only the small piece coloured green which I have mentioned. While the soil was vested in him he could take, and did take, harbour dues from ships that came into the harbour, and he was rated in respect of the harbour, and the rateable value of it was enhanced by the dues he took from ships. In 1854, under an Act of Parliament passed in that year, he assigned these dues to a dock company. That Act provided by sect. 46 that the dock company should be enabled to purchase the rights and interests of all persons in certain tolls, rates, dues, and charges then leviable or receivable in respect of the use of mooring anchors, mooring posts, and hauling posts, and for lights and otherwise in respect of the harbour of Blyth, and, by sect. 47, that when and so soon as the company should be able to demand and receive rates upon vessels entering within the limits provided by the Act, the said tolls, rates, dues, and charges previously leviable and receivable as aforesaid should cease to be collected. Then by another Act of 1858 the company was authorised to demand and receive certain rates for vessels entering the harbour, which were to be in lieu of the rates formerly demandable by Sir Matthew White Ridley and purchased by the company. I need not refer further to that Act because the sections in it relating to rates were repealed by the Act of 1882, which is now in force. This Act vested in the commissioners the whole of the property of the dock company, and by sect. 99 it authorised them to demand and receive for every vessel entering the harbour, and for every vessel clearing or departing outwards, and for every vessel remaining within the harbour, and also in respect of all goods shipped or unshipped, received or delivered, within the harbour, certain specified rates. There is not a word in the Act about any rate being payable in respect of the quays. Under the Act a ship becomes liable to dues the moment of entering the harbour, before reaching the quays, and further, a ship has to pay the same dues whether the quays are used by her or not. The real question which we have to decide is, whether or not, that being the state of the case, any part of the dues can be treated as being payable in connection with the quays. Now, I have referred to the former state of affairs for this reason: Sir Matthew White Ridley was formerly rated in respect of his occupation of the soil of the harbour, and the rateable value was considerably enhanced by the dues he received in respect of the harbour. Having parted with the dues, any rate paid now by him in respect of the soil of the harbour will probably be much less than it used to be, and the rating authorities will lose part of the rate which he formerly paid. It would then be hard upon the ratepayers if they lost the rate which Sir Matthew White Ridley used to pay, and could exact no equivalent from the persons who are now in possession and enjoyment of the harbour dues. But after all we have to look at the Act of Parliament, and the question comes to this: Do the rates and dues imposed by the Act of 1882 relate in any way to these particular quays, or are they not practically tolls in gross, payable merely for the use of the harbour and not in respect of the quays? I feel bound to come to the conclusion that under this Act there is nothing to show that these tolls have any connection with these particular quays, nor can any part of them fairly be attributed to the quays. I agree that this appeal should be dismissed.

SMITH, L.J.—This special case raises really the following very short point: Is the rateable value of the quays on the south side of the harbour to be enhanced by taking into account the dues prescribed by the Act of 1882? My Lord has referred to the *Swansea* case, and the manner in which the law was there laid down, and I should like to add the statement of the law by Blackburn, J. in *The Commissioners of Shoreham Harbour* v. *The Overseers of Lancing* (22 L. T. Rep. 434; L. Rep. 5 Q. B. 489). He says this: "It is very clear in law that tolls are not *per se* the subject of a rate. It is equally clear that, when parties occupy land, they are rateable for the value of that land, and that tolls, though not rateable, may be considered as enhancing the value of the occupation of the land, whenever it appears that the occupation of the land is so connected with them that it can be said that the tolls and rates are levied on account of the occupation of the land; or, perhaps, though not levied on account of the occupation of the land, when they could not be received without an occupation of land." I take that to be the law, and I apply it to the present case. Are these rates so connected with the occupation of the land that they can be said to be levied on account of the occupation of the land? That depends upon the Act under which they are payable. They are to be paid for every vessel entering the harbour, every vessel clearing the harbour, and every vessel remaining in the harbour beyond a certain time. It seems to me impossible to say that they are payable on account of the quays. The commissioners cannot demand any dues except those authorised by the Act of 1882, and there is nothing in the Act empowering them to demand quay dues. The Act speaks only of "harbour dues," and does not allocate them in any way to the quays. I think that Charles, J. was absolutely right in saying that it cannot be said that the occupation of the quays is so connected with the payment of the dues that they can be said to be levied on account of the occupation of land. The tolls are payable by ships, perfectly irrespective of any occupation of the quay by them. It was argued on behalf of the respondents that, if these quays had not been constructed, ships would not have come in such numbers into the Blyth harbour. It was said that there was an obligation on the commissioners under the Act of Parliament to build the quays, and that

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that is the reason why the dues were given to them. But I can find nothing in the Act imposing any duty to execute these works. All the sections which relate to the quays are permissive, and it has been frequently held that merely permissive words in an Act of Parliament do not compel the carrying out of the provisions of the Act. It is not correct, therefore, to say that the commissioners being under an obligation to carry out these works, the right to demand these tolls was given as a *quid pro quo*. Whether the works were carried out or not, the dues are payable under the Act by every ship entering, clearing, or remaining in the harbour. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Crossman* and *Pritchard*, agents for *Dees* and *Thompson*, Newcastle-upon-Tyne.

Solicitors for the respondents, *Williamson, Hill, and Co.*, agents for *Augustus Whitehorn*, North Shields.

June 11 *and July* 9.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

THE ART UNION OF LONDON (apps.) *v.* THE OVERSEERS AND CHAPELWARDEN OF THE ROYAL PRECINCT OF THE SAVOY (resps.). (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Poor rate—Exemption—Society instituted for purposes of "science, literature, or the fine arts exclusively"—"Supported wholly or in part by voluntary contributions"—Art Union—Distribution of works of art to members of the society by lot—6 & 7 Vict. c. 36.

By 6 & 7 Vict. c. 36 land is exempted from being rated which belongs to a "society instituted for purposes of science, literature, or the fine arts exclusively, and occupied by it for the transaction of its business and for carrying into effect its purposes, provided that such society shall be supported wholly, or in part, by annual voluntary contributions. . . ."

The Art Union of London was incorporated as a society for the advancement of the fine arts. Under its bye-laws every subscriber of one guinea became a member of the society for the year, and thereupon became entitled to a copy of one of the annual works of art. Valuable prizes were also given annually to one or more members according to the number of annual subscribers, and a lottery was held by which it was determined which subscriber should be entitled to the work of art given as a prize. A member subscribing ten years without winning a prize in the lottery became entitled to a consolation prize.

Held, by Lord Esher, M.R., and Kay, L.J. (Smith, L.J. dissenting), that the Art Union was entitled to exemption from being rated in respect of the premises occupied by it.

THIS was an appeal from a decision of the Queen's Bench Division (Wright and Collins, JJ.) upon a special case stated, for the opinion of the court, pursuant to 12 & 13 Vict. c. 45, s. 11.

On 5th May 1893, the respondents assessed the appellants, the Art Union of London, in respect of the house, 112, Strand, to a rate for the relief of the poor of the precinct of the Savoy, and to certain other metropolitan rates.

The Art Union appealed to the Quarter Sessions of the County of London, contending that they were exempted by the provisions of 6 & 7 Vict. c. 36, from liability to be assessed or rated in respect of the rated premises.

By 6 & 7 Vict. c. 36 it is enacted in sect. 1 as follows:

> No person or persons shall be assessed or rated, or liable to be assessed or rated, or liable to pay, to any county, borough, parochial, or other local rates or cesses, in respect of any land, houses, or buildings, or parts of houses or buildings, belonging to any society instituted for purposes of science, literature, or the fine arts exclusively, either as tenant or as owner, and occupied by it for the transaction of its business, and for carrying into effect its purposes, provided that such society shall be supported wholly or in part by annual voluntary contributions, and shall not, and by its laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members, and provided also that such society shall obtain the certificate of the barrister-at-law, or lord advocate, as hereinafter mentioned.

By a Royal Charter, dated 1st Dec. 1846, the appellants, who had been existing as a society since 1837, were incorporated by the name of the Art Union of London, for the purposes of the general advancement of the fine arts, and for promoting and facilitating a greater knowledge and love of the arts of design on the part of the public generally.

Under the charter the property of the society for the time being, and the management and superintendence of its funds and affairs, are vested in a council of members, and the council is empowered to make bye-laws for the regulation of the society and the admission of members and the management of its estates, goods, and business, and otherwise, and the services of the members of the council are thereby directed to be honorary. General meetings of the members of the society for the distribution of prizes (being such prizes as are hereinafter mentioned), receiving the report of the council and ratifying the election of members thereof are also provided for, and the charter contains a declaration that all works of art selected or given as prizes in each year shall be exhibited in some convenient place in the metropolis, and that the members of the society shall have free access to the same under such regulations as shall from time to time be made.

By the society's bye-laws the object of the society is stated to be the general advancement of the fine arts and the promotion of a greater knowledge and love of the arts of design on the part of the public generally, and to give encouragement to artists beyond that afforded by the patronage of individuals, and to carry out such public encouragement of the fine arts in good faith according to the provisions of 9 & 10 Vict. c. 48, intituled "An Act for legalising Art Unions," and not to advance private or individual trading, gain, or profit. One of the said bye-laws (such bye-law having been passed and added to the bye-laws on the 30th May 1892) provides that the society shall not make any dividend, gift, division, or bonus in money unto or between any of its members. No dividend, gift, division, or

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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bonus in money unto or between any of the members of the society is in fact ever made.

Membership of the society is confined to subscribers. Subscribers of one guinea or upwards become members for the year for which the subscription is paid, and subscriptions may be paid in advance. Membership can at any time be determined by failure to continue the subscription. It is provided by the bye-laws of the society that the subscriptions for each year, after paying rent, taxes, salaries, and other necessary expenses of the year, and after providing for the reserve fund, shall be devoted to the purchase of pictures, drawing, enamels, sculpture, medals, engravings, or other works of art, and the said subscriptions, together with the reserve fund, are in fact so applied. The works of art so purchased include every year one work of art, or the copyright of one work of art (hereinafter called "the annual work of art"), engravings or copies whereof are procured by the society to be made or executed, and are distributed as hereinafter appears. Numerous other works of art are from time to time purchased by or executed under the orders of the society. All works of art acquired by the society (except such as may from time to time be presented to them) are selected and purchased by, and all contracts for the execution of works of art or of engravings or copies thereof are entered into by, the council of the society, and under the bye-laws the council are empowered to enter into contracts for obtaining works of art in advance, and the subscriptions of future years are made subject to the fulfilment of such contracts.

Every member of the society who subscribes one guinea receives in the year for which such subscription is paid one engraving or copy of the annual work of art for that year, or any of the annual works of art for any preceding year of which such engravings or copies may not have been exhausted, and also one chance of obtaining one of the prizes distributed in that year as hereinafter mentioned. Any member having paid his subscription for the current year may have any number of extra chances in the allotments or distribution of prizes at half-a-guinea each, but without being entitled to a second print. A subscription for ten years in advance entitles the subscriber to a porcelain bust or other work as a bonus, in addition to the usual advantages attached to the subscription. And any member who has subscribed ten guineas in successive years, ending with the current year, without gaining a prize of any kind in that period, is entitled to one of the society's porcelain busts or other work of art as a consolation prize.

The said prizes are awarded by lot at an annual distribution, held usually in or about the month of April. The prizes consist partly of such of the annual or other works of art purchased by the society either in the then current or any preceding year as the council may determine, and partly of works of art, to be selected by the prize-holders, from the Royal Academy, or from the exhibition of the Society of British Artists, or from the exhibitions of either of the two Societies of Painters in Water Colours, or from certain other exhibitions in the United Kingdom, as may be determined by the council for the current year. The number, character, and value of all prizes are determined by the council.

The holder of a prize to be selected by himself may choose one work of art only. Such work of art may be of greater estimated value than the prize provided, and, if so, the prize-holder pays the balance, but if a work of less value than the prize is selected, the surplus falls into the reserve fund of the society. The amount of the prize, or of the price of the work of art selected, whichever is the less, is paid by the council direct to the artist, and no payment is ever made to or permitted to come into the hands of the prize-holder. Every work of art so selected is delivered direct to the society for exhibition, and does not become the property of the prize-holder until after such exhibition.

The selection of a work of art as mentioned in the last paragraph is required to be made within a period generally of three months after the date of the distribution of prizes for the year in which the prize is awarded, and, if not so made, or if the prize-holder makes or attempts to make any arrangement with the artist or otherwise for obtaining the return of any portion of the amount paid for the prize, or other valuable consideration, or sells or attempts to sell his right of selection, or in any other way attempts to evade any of the society's laws, the amount of the prize is forfeited, and merges in the reserve fund of the society. In any of the above cases (except only the case of the selection not being made within the prescribed time), the prize-holder ceases to be a member of the society, and becomes ineligible to rejoin it. The prizes for each year (whether selected by the council or the prize-holder), and the annual work of art for such year, and some of the engravings or copies thereof, are exhibited in the same year (generally in the month of August) in the gallery of the society. The exhibition includes also other works of art from time to time in the society's possession. The exhibition remains open two or three weeks, and members and their friends have free admission thereto.

Great care is exercised by the council in the selection and purchase of works of art and in the choice of artists to execute engravings and other works of art, with the view of ensuring that the same shall be of real merit, and particularly with the view of elevating art and creating an increased demand for works of art and an improved taste on the part of the public. The society published in 1891 two editions of an album containing reproductions of a selection of the works of art from time to time executed by their orders, prefaced by a short account of the society, and containing trade advertisements paid for by the respective advertisers. The album (after taking into account the money received for the advertisements) is sold at less than cost price. The rated premises are used for the council and general meetings of the society, and include the offices in which the business of the society is transacted. They contain also a gallery for the annual exhibition aforesaid, and rooms in which are kept the society's works of art. One caretaker sleeps on the premises rent free.

On the 17th Nov. 1892 Edward William Brabrook, Esq., the barrister-at-law for the time being appointed to certify the rules of friendly societies in England, certified, pursuant to the said statute 6 & 7 Vict. c. 36, upon three copies of the charter and bye-laws of the society submitted to him in accordance with such statute, that the society was entitled to the benefit of the said Act. No alteration has been made in the

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society's bye-laws since the date at which such certificate was applied for as aforesaid. Notwithstanding that the society was established in 1837, exemption from payment of rates was not claimed until the year 1892.

The Queen's Bench Division (Wright and Collins, JJ.) held that the Art Union was not entitled to exemption under 6 & 7 Vict. c. 36.

The Art Union appealed.

June 11.—*Smyly*, Q.C. (*McCall*, Q.C. and *L. S. Bristowe* with him) for the appellants.—This society is one "instituted for the purposes of science, literature, or the fine arts exclusively," and is "supported wholly or in part by voluntary contributions," and is therefore within the exemption granted by 6 & 7 Vict. c. 36. The charter shows what the society was originally instituted for, and provides that, if it should appear to the Privy Council that the society has become perverted from its original purposes, then the charter is to be revoked. The charter never has been revoked, therefore *primâ facie* it would seem that the society exists simply to carry out the purposes for which it was started. Moreover, in 1892 the society obtained a certificate under the Act from the barrister appointed for that purpose that it was a society within the Act. The society is also supported by "voluntary contributions," an expression which was thus defined by Lord Denman, C.J.: "Upon consideration we think that annual contributions will satisfy the condition required, if they commence of the party's own choice, are so continued, and may be withdrawn at pleasure, that is, without subjecting the party to any legal liability or forfeiture beyond that of foregoing a participation in the pleasure or profit, scientific, literary or artistic, in respect of which they have been made:"

The Churchwardens of Birmingham v. *Shaw*, 10 Q. B. 868;

The Liverpool Library v. *The Mayor, &c., of Liverpool*, 2 L. T. Rep. 325; 5 H. & N. 526.

[Smith, L.J. referred to *The Russell Institution* v. *The Vestry of St. Giles* (3 E. & B. 416), *The Churchwardens of St. Anne's, Westminster* v. *The Linnæan Society* (3 E. & B. 793), and *The Marylebone Vestry* v. *The Zoological Society* (3 E. & B. 807).] The members of the society obtain no money profit by their membership; the lottery is held merely to decide which member is to have the annual work of art bought by the society. It therefore comes within the requirement in the Act that a society to be exempted shall not be able to make any dividend, gift, division, or bonus in money to its members.

Poland, Q.C. and *Ryde* (*Haldinstein* with them) for the respondents.—If the benefit gained by a subscriber is anything more than the fine art benefits which are the object for which the society was instituted, then the appellants are not within the exemption of the Act:

Reg. v. *The Institution of Civil Engineers*, 42 L. T. Rep. 145; 5 Q. B. Div. 48.

The question is, whether the society is carried on "exclusively" for the promotion of the fine arts. The real reason in this case why people subscribe to the society is to get engravings, a chance of a valuable prize in the lottery, or at least a consolation prize. For half-a-guinea anyone may buy chances in the lottery. The real and primary object of the subscribers is to get back their money's worth. To use an expression of Lord Campbell, C.J in the *Russell* case (*ubi sup.*), each contributor gets his pennyworth. In the case of a music society it was held not to be exempted from being rated in respect of a concert hall, although the society was instituted for promoting, and did promote, the fine arts; the reason being that the primary object was the gratification of the subscribers:

Reg. v. *Brandt*, 16 Q. B. 462.

The privilege of exemption from rating ought to be confined within narrow limits; and to bring itself within the exemption a society must have no purpose besides those specified in the Act, and must also, in some degree, partake of the character of a charitable institution; per Lord Macnaghten:

The Commissioners of Inland Revenue v. *Forest*, 63 L. T. Rep. 36; 15 App. Cas. 334.

"Voluntary," in the expression "voluntary contributions," means something more than "willingly given." If it does not, the proviso is useless, because all the societies of the kind mentioned in the Act are entered into by their members "voluntarily" in the sense of "willingly." The word in this Act means "without consideration," as in the expression "voluntary conveyance." Payments of money for value received, or to be received, are not voluntary contributions within the meaning of this Act. See per Smith, J.:

Re the Duty on the Estate of the New University Club, 56 L. T. Rep. 909; 18 Q. B. Div. 720.

Smyly, Q.C. replied.—The last-mentioned case turned on the rules of the club, which are entirely different from the bye-laws of this society. A "voluntary contribution" means one that is not made in pursuance of any preceding contract.

Cur. adv. vult.

July 9.—Lord Esher, M.R.—In this case the respondents have rated the appellants in respect of certain premises occupied by them, and the question is whether, having occupied the premises in the manner in which they do occupy them, the appellants are exempted from being rated, under the provisions of 6 & 7 Vict. c. 36, s. 1. If the appellant society is solely one for the advancement of the fine arts, it would seem that it is not rateable; but it is argued that from the way the society has exercised its powers it has ceased to be a society solely for the advancement of the fine arts. The first question therefore is, what is the constitution and usage of the society? It is certain that the Art Union was originally started for the advancement of arts and sciences, and a certificate has been obtained from the barrister appointed to give the certificates referred to in the Act, that that, and that only, is the object of the society. But there are authorities to the effect that, though the barrister appointed under the Act has given his certificate that the society is one of the class referred to by the Act, yet when a question arises as to the rateability of the society, the rating authority has power to reconsider the matter which the appointed barrister has decided upon, and to decide that the society is not one of the class referred to by the Act. It seems to me somewhat strange that, when a person, appointed for this purpose by an Act of Parliament, has come to a determination upon the question for his decision, a bench of magistrates

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should be able to go into the matter again on a rating appeal and reverse his decision. Nevertheless that is the law, and we have now to consider whether we agree with the decision of the barrister. In considering that question, however, the court ought, I think, to give weight to the fact that the person appointed under the Act of Parliament has already decided that the appellant society is one of the class of societies referred to by 6 & 7 Vict. c. 36. The Art Union of London was constituted for the promotion of painting and other of the fine arts. The principal way in which it carries out its object is by the selection of one of the best pictures of the year at certain exhibitions which take place annually in London. This picture is paid for by the council of the society, and they have it engraved and a sufficient number of copies printed to allow each member of the society to have one. But they do more than this. One of the subscribers to the society is selected from the others by a kind of raffle or lottery. He is then allowed to choose for himself, out of certain named exhibitions of pictures, any picture he may like, up to a certain price. When he has made his choice, the society buys the picture and pays for it and presents it to the subscriber. There are some minor details in the rules as to how the subscriber must himself pay the difference between the sum of money which the society is willing to pay for the picture and the price charged by the artist, in a case where the subscriber wishes to buy a picture the price of which is greater than that which the society has decided to pay; but that seems to me to be immaterial. The question is, does the fact of their giving this picture to a person selected by chance from the body of members alter the society from being a society for the advancement of the fine arts into a society for some other purpose? The Act requires that a society to gain exemption from rating must be one instituted for the advancement of the fine arts exclusively and supported by voluntary contributions. Now, it has not been argued that the Art Union of London is not a society for the advancement of art; but it is said that it does not come within the other words of sect. 1 which I have referred to, and several cases have been cited in support of the argument. We have to construe the words of this Act. The Act uses the phrase "voluntary contributions," and the question here really is, what is the meaning of that phrase in this Act? In the ordinary use of the English language the antithesis of "voluntary" is "involuntary." The only case in which the court has had to decide on the meaning of the phrase is the case in the Queen's Bench of *The Churchwardens of Birmingham* v. *Shaw* (*ubi sup.*), in which Lord Denman, C.J. delivered the judgment of the whole court, and it seems to me that the utmost care was taken in the explanation of the word "voluntary" in this Act. The effect of that judgment is, that "voluntary" is there used as the antithesis of "compulsory." I do not at all wish to criticise that judgment adversely, I think the question was rightly decided. As to the meaning of "contributions," it seems to me that the question has not been dealt with so carefully. A person who buys a thing does not "contribute" for it, he "pays" for it. A contribution does not mean a payment for some particular thing, but towards some common object; it cannot mean the payment for a thing purchased. Take the case of an ordinary club or reading-room. The money paid by a member is not a contribution, it is payment for an advantage which he receives. It seems to me, therefore, that, taking the phrase as a whole, such a society could not show that it is supported by voluntary contributions. Still, if it is a society for the advancement of art, even if only supported in part by voluntary contributions, it is within the Act, and exempted from being rated. In the judgment delivered by Lord Denman, C.J., which I have just referred to, he gives as a test of whether a contribution is voluntary or not the consideration whether a contributor was ever bound to commence his contribution, and whether, having paid once, he was bound to continue the payment. In the case before us no one is ever bound to become a subscriber to the Art Union, and there is no obligation on a person who has paid one subscription to go on paying afterwards. It therefore seems to me that the payments made by subscribers to the Art Union are "voluntary," and they are "contributions," and not payments for any special picture or thing; they are "contributions" subscribed to support the Art Union. But it is said that the true inference to be drawn from the facts is, that a subscription to the Art Union is really the purchase of a chance in the lottery. The statute of 9 & 10 Vict. c. 48, was referred to, but that Act seems to me to go far in showing that, in the intention of the Legislature, this distribution of prizes is not a lottery. The preamble speaks of certain voluntary associations which have been made for the purchase of paintings and works of art, to be afterwards allotted and distributed by chance or otherwise among the members, subscribers, or contributors forming part of such associations, and it goes on to deal with what is actually done by the Art Union of London. If the Legislature had thought that a distribution of pictures by the chances of a lottery altered a voluntary association for the advancement of art into a gambling association, it seem to me that it never would have passed an Act which legalises such things. In my opinion, this is not a gambling association, and the lottery is merely a means of distributing works of art. If I had to draw any inference of fact, it seems to me, speaking for myself, that it would be an untrue inference if we were to say that all the people who subscribe to the Art Union do so with the object of getting a chance of winning a prize in the lottery. I cannot draw that inference. Suppose that there was no lottery, and that the society chose one of the subscribers and gave him the picture, there would be a chance for each subscriber of winning a prize, just as much as if there were a lottery. The fact that the choice of which subscriber is to have the picture is determined by lottery does not make the selection more a chance than it would be if there were no lottery. In my opinion, this society is one for the advancement of the fine arts, and is supported, either wholly or in part, by voluntary contributions, as defined in the case of *The Churchwardens of Birmingham* v. *Shaw* (*ubi sup.*). It is, therefore, within the exemption given to such societies by 6 & 7 Vict. c. 36, and is not rateable in respect of the premises in question. I think that the judgment of the Queen's Bench Division should be reversed.

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Kay, L.J. read the following written judgment:—This appeal raises the question whether the Art Union of London ought to be exempted from being rated as an institution for promoting fine art exclusively under the provisions of 6 & 7 Vict. c. 36, s. 1. [His Lordship read the section.] The Art Union has a charter, granted on the 1st Dec. 1846, which recites that the Art Union of London was a society formed "for the general advancement of the fine arts, and for promoting and facilitating a greater knowledge and love of the arts of design on the part of the public generally," and that they had raised about 100,000*l.*, by subscriptions or contributions to be allotted by chance as prizes amongst them on condition that such money should "be expended solely and entirely in the purchase of paintings, drawings, sculpture, or other works of art," and that they had also purchased paintings and other works of art to be afterwards allotted by chance among them. The charter then proceeds to incorporate the society, and empowers anyone to grant land to them, settles their constitution, and enables them to make bye-laws. Under this charter and the bye-laws made pursuant thereto, any person who contributes annually the sum of one guinea is a member of the society for one year, and is entitled to a copy gratis of the engraving of the picture of the year, which is purchased and engraved at the expense of the union. He also has the chance of winning in the lottery a prize varying in amount from 100*l.* to lesser sums. This prize can only be used in purchasing some work of art for which the union will pay the amount won. If the work of art shall cost less, the winner does not get the rest of the money, but it is retained by the union. If it costs more the winner must pay the excess out of his own pocket. This work of art is to be exhibited in London, and the members are to have free admission. Subject to this, the winner may do what he likes with the work of art so obtained; may sell or keep it at his pleasure. However, he may not sell his right of selection. Besides these advantages a contributor has access to the gallery of the union where works of art are exhibited. But it is said that the rooms are used exclusively for the purposes of art, and that no newspapers are taken or refreshments provided for the contributors. An Art Union so constituted was freed from all pains and penalties which it might otherwise have been liable to as being concerned in illegal lotteries by the 9 & 10 Vict. c. 48, passed on the 13th Aug. 1846. This statute also retained the indemnity granted by 8 & 9 Vict. c. 57, to similar Art Unions previously established. The preamble and enacting words of this statute called them "voluntary associations," and therefore only to such should charters be granted where they distribute works of art by means of a lottery. The charter in this case was granted after the passing of this Act, viz. December of the same year to this Art Union as a voluntary association. There are two questions to be decided: 1st. Is this a society established for the purpose of the fine arts exclusively? 2nd. Is it supported wholly or in part by annual voluntary contributions? I do not think that the objects of the Union can fairly be said to be in any respect other than the promotion of the fine arts. Even the distribution of the engravings, and the inducements to the winners in the lottery to purchase pictures or other works of art, seem to me directly to encourage and foster a taste for works of fine art. But the objection has been based chiefly on the ground that the contributions of members are not voluntary. There are two significations which can be given to this word. The phrase used in the Act is, that a society to be exempt must, amongst other things, be supported in whole or in part by annual voluntary contributions. This may mean, first, that the contributions are not compulsory; or, secondly, that they are without consideration. The first meaning would seem to be satisfied if such contributions are not made under any previous binding contract, and can be withheld at the pleasure of the donor. In this case the contributions are altogether of that nature. The second meaning requires that the contributor should obtain no advantage, or, at any rate, no material and tangible return for his contribution. In this sense voluntary means the same thing as the signification given to it when we speak of a voluntary deed or voluntary bond and the like; that is, a deed or a bond executed without consideration moving to the grantor. The Act seems to throw some light upon the question whether this latter is the meaning of the word "voluntary" in the Act. The same section in which it is used provides that the society shall not give to its members "any dividend, gift, division, or bonus in money." I have no doubt that the words "in money" govern the whole of this sentence. It is impossible, and would be insensible, to read those words as applying to bonuses only. Besides "dividend" means a share of money, and "division" contemplates something like money which can be divided. Therefore the only advantage to the members which the Act prohibits is a money payment. The inference is, that any other advantage which would promote fine arts may be given. But apart from the Act the ordinary use of the phrase "voluntary contributions" is in connection with institutions such as hospitals. These are said to be supported by voluntary contributions. But in most such cases the contributor gets the advantage of recommending one or more persons to be in or out patients according to the amount of his contribution. No one ever supposed that this made his contribution less voluntary. It is voluntary because he may give or withhold it at his pleasure, notwithstanding that it may make him a governor of the hospital and entitle him to certain benefits in that or another character. Voluntary in such cases certainly is used rather in the former than in the latter of the two meanings suggested. I do not think there is in this case a gift or bonus in money. The prize money does not go into the hands of the winner. It is paid by the union for the work of art which he buys. Apart from authority I should think that the society was exempted from rating by the Act. In one of the earliest cases, *Churchwardens of Birmingham* v. *Shaw* (*ubi sup.*) in 1849, Lord Denman, C.J. says: "It is, perhaps, not easy to determine what the Legislature intended by the word 'voluntary' in this combination. In several cases which have come before us different suggestions have been made, but it has never been necessary expressly to decide the point. Upon consideration we think that annual contributions will satisfy the condition required, if they commence of the party's own choice, are so continued, and may be withdrawn at

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pleasure, that is, without subjecting the party to any legal liability or forfeiture beyond that of foregoing a participation in the pleasure or profit, scientific, literary, or artistic, in respect of which they have been made. If the contributor was free to commence his contribution, and incurs no legal obligation to continue it when he has once commenced, and upon ceasing to contribute will lose no more than the privileges of membership in respect of which he became a contributor, it seems to us that he must be considered a voluntary contributor, unless we add something to the idea of voluntariness, which in ordinary language it does not import, and that is what, in fact, is done by those who contend that it must be also gratuitous and bring no return of any kind to the contributor; against the addition of which particular qualification there is the further reason that the statute itself in the clause next to be considered provides for this expressly, and so seems to exclude the notion of its being previously implied." In *Reg.* v. *Overseers of Manchester*, in 1851 (16 Q. B. 449) the Royal Manchester Institution for the promotion of literature, science, and the arts was held exempt although its trust deed contained a provision that in case of dissolution the property should be sold and the proceeds divided among the then members. In *Reg.* v. *Gaskell*, in 1851 (16 Q. B. 472), a club called the Portico was held not to be exempt because its purposes were not exclusively science, literature, or the fine arts; so also in *Reg.* v. *Brandt* (*ubi sup.*) in 1851. In 1854 three cases came before the Court of Queen's Bench, in which the same kind of question was raised. In one of them, *The Russell Institution* v. *Vestry of St. Giles* (*ubi sup.*), in 1854, the institution was held not to be exempted from rating because it was not a society instituted "for the purposes of science, literature, or the fine arts exclusively." One of the purposes was the establishment of a reading-room. But Lord Campbell said: "There may be ground for contending that 'contribution' here does not mean a voluntary annual subscription or payment of money for value received or expected to be received by the party paying, but means a gift made from disinterested motives for the benefit of others. . . . The Legislature may have intended to throw an additional burden on the other ratepayers of the parish by exempting from rateability property before rateable only where it is occupied for the purposes of a society supported in part by charitable donations, and not by payments made with a view to the personal accommodation and advantages of the members, although the object of their pursuits may be the cultivation of science, literature, or the fine arts. According to this construction of the statute, where the society is instituted for the purposes of science, literature, or the fine arts exclusively, it would still be necessary to inquire whether the annual voluntary contributions by which the society is supported wholly or in part are or are not merely the purchase money for benefits to which the contributors thereby entitle themselves." Lord Campbell was in this passage stating the argument, it was not the ground of the decision. In *Churchwardens of St. Anne's, Westminster* v. *The Linnæan Society* (*ubi sup.*), in 1854, it was held that the society, being incorporated by charter for the cultivation of the science of natural history, was exempt from rating, notwithstanding that the fellows engaged to make annual payments, and were liable to ejection for nonpayment, and were entitled to receive copies of the published transactions gratis. Lord Campbell there said: "Then is the society maintained partly by voluntary contributions? I am clearly of opinion that it is. For, though the fellows are under an obligation to pay while they continue fellows, the payment is still voluntary, seeing that the obligation was incurred by a voluntary engagement from which the fellows are at liberty to withdraw, though I do not say that even if they had no longer the power to withdraw the payment would be the less voluntary." This seems to show that in Lord Campbell's opinion "voluntary" means "not compulsory" only. Erle, J. said: "It is suggested that the payments are not voluntary because every fellow becomes liable to the payment. But this subscription is in the nature of a gift for the purposes of science, nothing being received back for the personal profit of the party paying; and it is voluntary, inasmuch as a party by withdrawing his name will cease to pay. It is quite immaterial in this question whether a party can simply cease to pay, or must withdraw his name before doing so." Crompton, J. doubted whether the contribution was voluntary, "whether the statute is satisfied by the contributions being voluntary at the time when the contributor first undertakes to pay, or whether every payment must be voluntary." In *The Marylebone Vestry* v. *Zoological Society* (*ubi sup.*), in 1854, the society was held not exempt because their premises were not occupied exclusively for purposes of science. Part was used as a flower garden, the public were admitted, and refreshments and a band were provided. An opinion was also intimated by two of the learned judges that the contributions of members were not voluntary, because a subscriber would look to the amusement which he and his family and friends whom he was allowed to introduce would derive from their access to the gardens. Contributions, said Erle, J., are not voluntary "where the intention is to purchase a private convenience, as is the case I believe with many institutions which also embrace scientific objects." This view seems rather to confound the words voluntary and exclusively. In *Liverpool Library* v. *Mayor of Liverpool*, in 1860 (*ubi sup.*), the test whether contributions were voluntary was said to be that the society could not enforce payment, though they might forfeit the shares of members for nonpayment. The books of the library were circulated among the subscribers and strangers introduced by them according to the rules. The members' shares were saleable, and were of some value. The society was held to be exempt. Bramwell, B. pointed out that societies within the Act were not prohibited from making any gift, unless it be a gift in money, evidently meaning that any gift for the promotion of science, literature, or art would not render a payment to a society formed for those objects other than voluntary. The statute 48 & 49 Vict. c. 51, whereby a duty at the rate of 5 per cent. was imposed upon the annual value of property vested in bodies corporate or unincorporate which escape liability to probate, legacy, or succession duty, exempts by sect. 11, sub-sect. 6, "property acquired by or with funds voluntarily contributed to any body, corporate or unincor-

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porate, within a period of thirty years immediately preceding." It was held in the case of *The New University Club* (*ubi sup.*) in 1887, that this did not exempt property obtained by the subscription to an ordinary London club, such subscriptions not being money voluntarily contributed within the meaning of the Act. In that case voluntary seems to have been construed as meaning without consideration, and not including a payment for value received or to be received. Under this latter statute, 48 & 49 Vict. c. 51, sect 11, the question came before the House of Lords in *The Commissioners of Inland Revenue* v. *Forrest* (*ubi sup.*). The House held the society exempt, Lord Halsbury dissenting. Lord Halsbury treated the two Acts I have referred to as practically identical on the question of exemption, and considered that the Institution of Civil Engineers, being "a professional society founded for the advantage and in the interest of the profession of civil engineers, supplying most valuable and important means for the training and instruction of that profession, but for the interest and advantage of the members of the institution as members," was not within the exemption. Lord Watson, on the other hand, thought that the two Acts differed so much in their subject-matter and scope that decisions under the former Act were of little value in construing the latter one. The society held meetings at which papers on engineering subjects were read and discussed. These discussions were afterwards printed and copies sent to every member. In a former case (42 L. T. Rep. 145; 5 Q. B. Div. 48) the institution had been held not to be exempted under 6 & 7 Vict. c. 36, on the grounds that it was not established exclusively for the purposes of science, literature, or the fine arts. Lord Watson said that, in order to bring a society within the statute 6 & 7 Vict. c. 36, "two statutory requisites must concur. The society must be one instituted exclusively for purposes of science, literature, or the fine arts, and it must also be supported in whole or in part by annual voluntary contributions. I do not think," he continued, "the Legislature intended that fixed yearly payments which individuals agree to make in consideration of their being admitted to a society and allowed to share in its management (there being a legal obligation to make such payments as long as their membership continues) should be regarded as voluntary contributions within the meaning of the Act. But the contrary was decided after some hesitation, and to that circumstance the difficulties subsequently encountered in construing the exemption appear to me to have been mainly due." Lord Macnaghten insisted upon the difference between the two statutes, and relied on Lord Campbell's dictum which I have quoted, that to bring a society within the exemption of the earlier Act it should in some degree partake of the nature of a charitable institution, as distinguishing the provisions of the two statutes. This was not a decision upon the statute we have to consider. The remarks made by Lords Watson and Macnaghten upon this statute were merely for the purpose of contrasting the latter statute, under which they held the Institution of Civil Engineers exempt. Lord Watson's language to the effect that contributions under 6 & 7 Vict. c. 36 are not voluntary where members are under a legal obligation to make such payments while their membership continues does not include the present case, where there is no such legal obligation. It also shows that in his opinion such an obligation was essential to make the payment other than voluntary. The various dicta which I have cited are not reconcilable. There is no decided case which governs the present unless it be *The Churchwardens of Birmingham* v. *Shaw* (*ubi sup*), *The Liverpool Library* v. *The Mayor of Liverpool*, and the *Churchwardens of St. Anne* v. *The Linnæan Society* (*ubi sup.*), in all of which the societies were held to be exempt from rating, although the members did get certain positive and tangible advantages by subscribing. But none of the cases are binding on this court. For the reasons I have given I think that the society should be held to be exempt from duty.

Smith, L.J. delivered the following written judgment:—I have the misfortune to differ from my Lord and Kay, L.J., and the following is the conclusion I have arrived at. The case raises once more the vexed question as to what constitutes a society instituted for the purposes of science, literature, or the fine arts exclusively, provided that such society be supported wholly or in part by annual voluntary contributions, so as to be exempt from being rated. The point is, whether the Art Union of London, which in my judgment obtains its funds by means of the inducement held out by a lottery legalised for that purpose, is such a society. The Queen's Bench Division (Wright and Collins, JJ.) have held that it is not, and hence the present appeal. Upon reading sect. 1 of the Act of 1843 (6 & 7 Vict. c. 36), it is obvious that, to bring a society within the exemption contained therein, it must be firstly, a society instituted for the purpose of science, literature, or the fine arts, exclusively; secondly, a society which is supported wholly or in part by annual voluntary contributions; thirdly, a society which shall not, and by its bye-laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members; and fourthly, a society which shall have obtained the prescribed certificate of a barrister or the lord advocate. If either of these requisites are wanting, the society is not exempt from being rated for the tenements it possesses. In my judgment each of these heads is distinct, and must be treated separately. The Art Union of London was established in 1837, and it appears from its charter of incorporation and bye-laws, granted and made in the year 1846, that the society was founded for the general advancement of the fine arts in the British Empire, and for promoting a greater knowledge and love of the arts of design on the part of the public generally, and for giving encouragement to artists beyond that afforded by the patronage of individuals, and that its object was to carry out such public encouragement of the fine arts, in good faith, according to the provisions of 9 & 10 Vict. c. 48, and not to advance private or individual trading, gain, or profit. The Act of 9 & 10 Vict. c. 48, was an Act passed to legalise the allotment and distribution by chance of prizes by the Art Union of London amongst its members, who otherwise would have rendered themselves liable to the pains and penalties of the Lottery Acts. It appears that the society had raised 100,000*l*, which was to be allotted and distributed by chance as prizes amongst the members, on the condition that the sums so allotted and distributed should be expended solely and entirely in the purchase of

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paintings, drawings, sculpture, or other works of art, and that paintings or other works of art had also been purchased, to be in like manner allotted and distributed by chance amongst the members of the society. Anyone may become a member of the society for a year upon payment of a subscription of one guinea. In consideration of this payment the member is entitled to an engraving of one of the original works purchased for the society, or a large bronze medal, or by increased payment to a bust, or vase, or statuette, or other work, and in addition one chance in the annual distribution of prizes, which are drawn by lot. Prizes in works of art to large amounts in value may be obtained by a successful drawing in this lottery. If a member has subscribed ten years in advance, he is entitled to a porcelain bust or other work of art as a bonus, in addition to the annual advantages attached to his subscription; and if a member has subscribed ten guineas in successive years without gaining a prize, he is entitled to a porcelain bust or other work of art, and this is called a consolation prize. It is stated in the album published by the society that, "over and above the broad ground of the elevation of public taste and the benefits conferred on artists, the council would point out that, looking to the probable extinction of line engraving at no distant period, there is now an opportunity of acquiring fine impressions and in many cases invaluable artists' proofs of important plates, engraved for the society after the first English painters, the value of which in a few years must rise to many times their present cost; an opportunity which can never recur when once the Art Union's stock is exhausted." These subscriptions, after paying rent, taxes, and salaries and other necessary expenses, and after providing for a reserve fund, are devoted to the purchase of pictures, drawings, enamels, sculpture, medals, engravings, and other works of art, and no individual gift, division, or bonus in money is made unto or between any of its members. These being the facts, I come to consider the first point, is the Art Union of London instituted for the purpose of the fine arts exclusively? This is how Lord Watson puts it when dealing with the point in *The Commissioners of Inland Revenue* v. *Forrest* (*ubi sup.*). He says: "The society must be one instituted exclusively for the purpose of science, literature, or the fine arts . . . It is not sufficient compliance with the plain language of the Act that a society be established chiefly for the purpose of promoting science, literature, or the fine arts. One or other of these must be its exclusive object; so that an institution which also contemplated some other, though altogether subsidiary object, could not claim the benefit of the exemption." I understand by this that, if the other object be an object distinct from and not connected with the fine arts, then the society, even though that object be altogether subsidiary, has not as its exclusive object the promotion of the fine arts. But, if the other object be only a means to the one end, *i.e.*, as in this case, a lottery whereby to draw money from the public for the promotion of the fine arts, then the society has a sole and exclusive object and not another object subsidiary thereto. I find that the society has also the object of "giving encouragement to artists beyond that afforded by the patronage of individuals;" and this raises a question similar to that so much debated in the House of Lords in *The Commissioners of Inland Revenue* v. *Forrest* (*ubi sup.*), whether the object of the society was for the benefit of individuals or for the promotion of the fine arts. Upon consideration, I think that the right conclusion to draw is, that the object of the Art Union of London is the promotion of the fine arts exclusively, though as incidental to that object the lottery is brought into play, and some painters and artists are benefited whose works happen to be appreciated; and, consequently, the Art Union of London has established, within the meaning of the Act of 1843, that it is instituted for the purpose of the fine arts exclusively. I now come to the second point, which has been the source of many decisions, not altogether in harmony, as to what is a society supported wholly or in part by annual voluntary contributions. It appears to me impossible to hold that a society supported by annual voluntary contributions within the meaning of the Act is merely a society in contradistinction to one supported by annual compulsory contributions, for where is there a society instituted for the purposes of science, literature, or the fine arts exclusively, which is supported wholly or in part by annual compulsory contributions? There is no such society, for all contributions to such are otherwise than compulsory; and unless it is to be held that a society fulfilling the first requirement, that is, being exclusively for the purposes of the fine arts, necessarily embraces every such society, some limitation, as it appears to me, must be placed upon the term "annual voluntary contributions." The phrase, it will be noticed, is annual voluntary contributions, not annual voluntary payments. In the case of *The New University Club* (*ubi sup.*), where the question arose upon the words in the Customs and Inland Revenue Act 1885, "property acquired by or with funds voluntarily contributed," I set out and discussed the cases decided upon the Act of 1843, commencing with that of *The Churchwardens of Birmingham* v. *Shaw* (*ubi sup.*) in 1849, with the exception of *Reg.* v. *Brandt* (*ubi sup.*), and I do not propose to recapitulate them here, for they will be found at pages 735 to 738 of the report of that case in the Law Reports, more especially as Kay, L.J. has dealt with them to-day. Since the judgment in *The New University Club* case was delivered in 1887, the Act of 1843 has come up for discussion for the first time in the House of Lords in the case of *The Commissioners of Inland Revenue* v. *Forrest* (*ubi sup.*), and Lord Watson gave a definition of what constitutes a voluntary contribution. He says: "I do not think the Legislature intended that fixed yearly payments, which individuals agree to make in consideration of their being admitted to a society and allowed to share in its management (there being a legal obligation to make such payments as long as their membership continues), should be regarded as voluntary contributions within the meaning of the Act. But the contrary was decided after some hesitation"—I understand this to be the decision of Lord Denman in *The Churchwardens of Birmingham* v. *Shaw*—"and to that circumstance the difficulties subsequently encountered in construing the exemption appear to me to have been mainly due." This definition of Lord Watson clearly embraces a subscription to a club by one of its members, and shows that such

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a subscription would not be a voluntary contribution within the meaning of the Act, and that *The New University Club* case was rightly decided. Lord Macnaghten in the same case approved of a definition given by Lord Campbell in *The Russell Institution* v. *The Vestry of St. Giles* (*ubi sup.*), viz.: "The Legislature may have intended to throw an additional burden on the other ratepayers of the parish, by exempting from rateability property before rateable, only when it is occupied for the purposes of a society supported in part by charitable donations, and not by payments made with a view to the personal accommodation and advantage of the members, although the objects of their pursuits may be the cultivation of science, literature, or the fine arts, so that, to bring itself within the exemption, a society must have no purpose besides those specified in the Act, and must also in some degree partake of the character of a charitable institution. On these two conditions all the cases decided under the Act of 1843 seem to have turned." Lord Halsbury disapproved of this definition, but, if it is to apply, it also shows that a club subscription, though obviously in its inception a voluntary, as distinguished from a compulsory, subscription, is not within the Act. Whether it be under the Act of 1843, or the Customs and Inland Revenue Act 1885, the terms "annual voluntary contributions," or "funds voluntarily contributed," must have some limitation placed upon them other than compulsory contributions, for it is not every payment not made under compulsion which constitutes a society supported "in whole or in part by annual voluntary contributions." The question is, what is the limitation, and here is the difficulty. I will not attempt an exhaustive definition. Others have done so, and not with complete success, as will be found upon reading the reports; but I will take a concrete case to express what is my conception of the term "a society supported in whole or in part by annual voluntary contributions." I take the familiar case of the annual contributions made to hospitals, which are supported by voluntary contributions. These appear to me to be the kind of contributions aimed at by the Act. To describe them I will use the words I find in Lord Campbell's judgment in *The Russell Institution* v. *The Vestry of St. Giles*: "They are not payments of money for value received, or expected to be received, by the donor, but are gifts made from disinterested motives for the benefit of others." In my judgment, if the facts show that a payment is made to a society for value received or expected to be received, *i.e.*, that the object of the subscriber is to obtain material advantage to himself, then it is not a society supported in whole or in part by annual voluntary contributions so as to come within the exemption in the Act: but, if the contribution be made by way of gift from disinterested motives for the benefit of others, it does. It is true that in each case it may be said that the contributions are voluntary because they are not made under compulsion; but the distinction between the two cases is obvious and real, and in my judgment the above is the true meaning of the Act. I should not myself think that the object of a subscriber to a hospital supported by voluntary contributions was material advantage to himself, though it may be he gets an in-door or out-door ticket which he may distribute to others as he pleases. The object of the donation to the hospital is the benefit of the hospital to others. But it is said that this is not the true reading, because the third requirement of the Act enacts that the society must be one which shall not, and by its bye-laws may not, make any dividend, gift, division, or bonus in money unto or between any of its members, and that, as only a money benefit to a member is prohibited in this requirement, any other benefit is permitted, and consequently a subscription given to a society with the express object of obtaining material advantage to the subscriber, though not in money, constitutes it a society supported wholly or in part by voluntary contributions within the other requirement. With all deference I do not agree in this. One thing appears to me clear, viz., that all contributions to societies instituted for the purpose of science, literature, or the fine arts exclusively are made in one sense voluntarily, in this, that they are not made compulsorily, and if it be held that the effect of the third requirement is to render all contributions voluntary contributions within the meaning of the Act which are not made with the object of obtaining a return in money, the second requirement with reference to the necessity of a contribution being voluntary so that the society may obtain the exemption is wholly superfluous; and this leads me to the conclusion that this is not the correct reading of the Act. As before stated, in my opinion, some limitation must be placed upon the term "annual voluntary contributions" other than the fact that they are not compulsory, and the limitation, in my opinion, is that which I have endeavoured to express. I cannot bring myself to hold otherwise than that the object which prompts the subscribers to pay a guinea or more, as the case may be, to the Art Union of London is the hope and expectation of gaining in the legalised lottery what every subscriber has an equal chance of obtaining, viz., a prize, and the other material advantages attaching to the subscription. I cannot say that these subscriptions are gifts made from disinterested motives for the benefit of others so as to be "annual voluntary contributions" within the meaning of the Act. This being so, I am of opinion that the society fails to prove the second requirement. For the reasons above I think that the appeal should be dismissed.

Appeal allowed.

Solicitors for the appellants, *Hopgoods* and *Dowson*.

Solicitors for the respondents, *B. H.* and *E. Van Tromp*.

Friday, May 25.

(Before Lord Esher, M.R., Kay and Smith, L.JJ.)

Re Vitoria; *Ex parte* Vitoria (No. 2). (a)

APPEAL IN BANKRUPTCY.

Bankruptcy—Receiving order—Act of bankruptcy—Bankruptcy notice—Bankruptcy petition dismissed—Second bankruptcy notice in respect of same judgment debt—Res adjudicata—*Estoppel—Bankruptcy Act* 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-sect.* 3.

The petitioning creditors presented a bankruptcy

(a) Reported by J. H. Williams, Esq., Barrister-at-Law.

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petition, founded upon non-compliance with the terms of a bankruptcy notice, against the debtor in the County Court. At the hearing of this petition the circumstances under which the judgment had been obtained were fully inquired into, and the registrar refused to make a receiving order. Subsequently the debtor came within the jurisdiction of the High Court in Bankruptcy, and the petitioning creditor served upon him a second bankruptcy notice in respect of the same judgment debt, and, upon non-compliance with the terms of that notice, presented a bankruptcy petition against him in the High Court. At the hearing of the petition the whole matter was inquired into, and the registrar made a receiving order against the debtor.

Held (dismissing the appeal), that the petitioning creditors were not estopped from serving the second bankruptcy notice or presenting the second petition, and that the registrar of the High Court could make a receiving order, inasmuch as the registrar of the County Court only refused to make a receiving order in the exercise of his discretion under sect. 7, sub-sect. 3, of the Bankruptcy Act 1883, and did not and could not decide anything as to the validity of the judgment debt.

Appeal of the debtor against a receiving order made by Mr. Registrar Linklater.

The petitioning creditors, having recovered judgment against the debtor for a large amount, served a bankruptcy notice upon him in respect of the judgment debt. Upon non-compliance by the debtor with the terms of that bankruptcy notice, the creditors presented a bankruptcy petition against him in the Croydon County Court.

Upon the hearing of the petition in the Croydon County Court the circumstances under which the judgment had been obtained were fully investigated, and the registrar refused to make a receiving order.

The creditors appealed, and the Divisional Court (Williams and Kennedy, JJ.), sitting in bankruptcy, having disposed of a preliminary objection that the appeal was irregular by enlarging the time for appeal, allowed the appeal, holding that the registrar ought to have made a receiving order.

Upon an appeal to the Court of Appeal by the debtor, the decision of the Divisional Court was reversed upon the ground that the preliminary objection ought to prevail (70 L. T. Rep. N. S. 41).

Subsequently the debtor came to reside within the jurisdiction in bankruptcy of the High Court, and the creditors served upon him a new bankruptcy notice in respect of the same judgment debt.

Upon non-compliance by the debtor with the terms of this notice, the creditors presented a petition in bankruptcy against him in the High Court. At the hearing of this petition the whole matter was inquired into, and the registrar made a receiving order against the debtor.

The Bankruptcy Act 1883 (46 & 47 Vict. c. 52) provides:

Sect. 7, sub-sect. 3. If the court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition.

The debtor appealed.

Jelf, Q.C. and *F. Cooper Willis* for the appellant.—The petitioning creditors were precluded from proceeding to obtain a receiving order against the debtor upon this judgment, by reason of the previous proceedings in the Croydon County Court, and the registrar ought not to have entertained their application. At the hearing of the petition in the County Court, the whole question whether there was a good petitioning creditor's debt was gone into, and that question was decided in favour of the debtor. The creditors cannot, by serving a second bankruptcy notice in respect of the same judgment debt, reopen and fight over again that question. It has been decided in a proceeding between these same parties, that there was not such a debt as would entitle the creditors to obtain a receiving order. That decision binds the creditors, and the question cannot be again raised between the same parties. The fact that the subsequent proceedings are founded upon a new bankruptcy notice cannot make any difference, because the judgment debt is the same, and the same question arises whether there is a good petitioning creditor's debt.

Finlay, Q.C. and *A. R. Macklin* for the respondents.—The decision in the County Court was not to the effect alleged by the appellant. The registrar in the County Court could only decide whether at that time he thought that he ought in the exercise of his discretion to make a receiving order. The case of *Ex parte Lennox* (54 L. T. Rep. 452; 16 Q. B. Div. 315), and the other cases upon the same question, only decided that the registrar can go behind a judgment debt for the purpose of saying whether he thinks a receiving order ought to be made: The registrar does not adjudicate as to the validity of the judgment debt in such a case, but only says whether, under all the circumstances of the case, he thinks a receiving order should be made. He exercises the discretion which is given to him by sect. 7, sub-sect. 2, of the Bankruptcy Act 1883. This matter, therefore, is not *res adjudicata*, and there is no estoppel.

Jelf, Q.C. did not reply.

Lord Esher, M.R.—In this case a bankruptcy petition was presented in the County Court of Croydon by the present petitioning creditor against the present debtor. By that petition the court was asked to make a receiving order against the debtor, but the registrar declined to make a receiving order. Thereupon the petitioning creditor, relying upon the same debt, served another bankruptcy notice upon the debtor, who had then come within the jurisdiction in bankruptcy of the High Court. It is admitted that, if the petitioning creditor was not precluded by the matter being *res adjudicata*, the last bankruptcy notice was properly given. Upon that bankruptcy notice the petitioning creditor presented a bankruptcy petition in the High Court, alleging that the debtor was indebted to him upon a judgment, and had not complied with the terms of the bankruptcy notice, and had thereby committed an act of bankruptcy. He averred that he came within the rules, a judgment debt being due to him, and an act of bankruptcy having been committed, and asked the court to make a receiving order against the debtor. It is now said that the registrar could not entertain that application

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because the matter was *res adjudicata* between the parties. It is argued that it has been decided between the parties that there was not, and is not now, a debt due to the petitioning creditor, and that it was decided by the registrar in the County Court that this debtor never owed any debt to the petitioning creditor. I am of opinion, that, when an application is made to a court of bankruptcy, and the registrar is asked to make a receiving order, he has no jurisdiction to determine, as an adjudication, that there never was a debt due to the petitioning creditor when the debtor is a judgment debtor. The judgment stands good, and is a *res adjudicata* as between the petitioning creditor and the debtor. This is, therefore, a suggestion that there is a *res adjudicata* upon a *res adjudicata*, and that the second *res adjudicata* does away with the first. That argument cannot be maintained. When it is considered what are the powers of a registrar in bankruptcy to go behind a judgment, it appears that he is not to adjudicate whether the debt is good or not. He has a discretion, and may go behind the judgment and inquire into the circumstances, but he cannot set it aside. To take the strongest case, a case where a judgment has been obtained by fraud; the Bankruptcy Act gives the registrar power to say that he will not make a receiving order, but does not give him authority to exercise the powers of a court of equity to review the judgment and set it aside, or to do what a judge at chambers might do, that is, to stay execution or set aside the judgment. The authority of the registrar is under the statute, and is not a power to review or set aside a judgment. In no case can the registrar set aside a judgment; but he can, in the exercise of his discretion, refuse to make a receiving order in the case of any judgment debt. That is only a power to say that, although he cannot deal with the judgment he will not in his discretion make a receiving order against the judgment debtor. That is not within the doctrine of *res adjudicata* at all. If it is said that there is a *res adjudicata* because a bankruptcy notice had been previously given in respect of this judgment debt, there can be a *res adjudicata* only as to that bankruptcy notice, but not as to another bankruptcy notice in respect of the judgment debt which still stands good. The registrar might if he liked have acted in the same way in the second case as the other registrar did in the first case. It is said that if this proceeding is good it will cause much inconvenience and hardship. The remedy, however, is easy. If a petitioning creditor who has applied for a receiving order goes on repeating his application upon new materials, the Court of Bankruptcy has power to say that such a proceeding is contrary to right and justice, and that it will not in the exercise of its discretion make a receiving order. I am of opinion, therefore, that the doctrine of *res adjudicata* does not apply in this case, and that the registrar had power to make this receiving order. The appeal must be dismissed.

Kay, L.J.—On the 7th May Mr. Registrar Linklater made a receiving order against the debtor, because he had not complied with the terms of a bankruptcy notice which had been served upon him. A preliminary point has been raised that the registrar had no jurisdiction to make the receiving order because there had already been an adjudication between the parties that the judgment debt, upon which the bankruptcy notice was founded, did not constitute a debt upon which a receiving order could be made after a bankruptcy notice. I dissent entirely from that contention. Under the Bankruptcy Act 1883, all that a registrar of a bankruptcy court has to decide is whether he will in the exercise of his discretion make a receiving order. In this case the first bankruptcy notice was given upon this same judgment debt, and a petition was presented upon failure of the debtor to comply with that bankruptcy notice. The registrar of the Croydon County Court, upon the hearing of that petition, not being satisfied that the judgment should have been given against the debtor, in the exercise of his discretion declined to make a receiving order against the debtor. There was an appeal to the Divisional Court, where the judges came to a different conclusion, and allowed the appeal. There was then an appeal by the debtor to this court, and this court held that the appeal to the Divisional Court was out of time and irregular, and that the decision of the Divisional Court was therefore technically wrong. No opinion as to the merits was expressed in this court. There is, therefore, a decision of the Divisional Court that the receiving order ought to have been made in the County Court, and it is not surprising that the judgment creditor gave a new bankruptcy notice, and brought the matter forward again, and obtained a receiving order from the registrar of the High Court. Now, if the creditor had a right to take that course, ought the registrar to have refused to make a receiving order upon the ground that the proceedings were vexatious, though not upon the ground that the matter was *res adjudicata*? In the High Court there was no reason of that kind why the registrar should refuse to make a receiving order in the exercise of his discretion, because the Divisional Court had disagreed with the decision of the registrar of the County Court. I am of opinion, therefore, that the registrar was right, and that the appeal must be dismissed.

Smith, L.J.—This is an appeal by the debtor against a receiving order made against him on the 7th May. That receiving order was founded upon a judgment recovered against the debtor in 1893. that judgment, as between the petitioning creditor and the debtor, remains standing and unimpeached. It is, therefore, impossible to say that there is not a debt due to the petitioning creditor. Upon that debt the receiving order has been made. The preliminary point has been taken that the registrar of the High Court in Bankruptcy could not make a receiving order because of the decision of the registrar of the County Court on 27th March 1893. It it said that by reason of the decision in the County Court the matter is *res adjudicata*, and that it has been decided in the County Court that there is no good petitioning creditor's debt to support an adjudication in bankruptcy. The County Court has not so decided, and had no jurisdiction to decide any such question. The registrar had no jurisdiction to set aside or interfere with the judgment; the whole authority of the registrar is under sect. 7, sub-sect. 2 of the Bankruptcy Act 1883, which provides that "if the court is not satisfied with the proof of the petitioning creditor's debt . . . . or that for other sufficient cause no order ought to be made, the court may dismiss the petition." That gives the

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registrar the discretion whether he will make a receiving order or not. As pointed out by Cotton, L.J., in *Ex parte Lennox* (*ubi sup.*), "the court is not bound to make a receiving order even if a debt is established," but has a discretion. All that the registrar of the County Court did was to say that in the exercise of his discretion he would not make a receiving order, not being satisfied as to the petitioning creditor's debt. That did not at all amount to a *res adjudicata*. The appeal fails, and must be dismissed.

Appeal dismissed.

Solicitor for the appellant, *H. W. Christmas.*

Solicitors for the respondents, *Jenkins, Baker, and Macklin.*

May 10 *and* 28.

(Before SMITH and DAVEY, L.JJ.)

MUSURUS BEY *v.* GADBAN AND OTHERS. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Statutes of Limitations—Personal action—Debt due from foreign ambassador—Recall of ambassador—Accrual of cause of action—Statute of Limitations (21 *Jac.* 1, *c.* 16)—4 *&* 5 *Anne, c.* 16, *s.* 19—7 *Anne, c.* 12, *s.* 3—*Rules of the Supreme Court, Order XI.*

A writ cannot be issued against the ambassador of a foreign State accredited to the Sovereign of this country while he is so accredited, or while he remains in this country for a reasonable period after he has presented his letters of recall, and the Statute of Limitations (21 *Jac.* 1, *c.* 16) *does not begin to run against his creditors during that time.*

The provisions of Order XI., which enable a plaintiff, with leave, to issue a writ for service out of the jurisdiction, do not affect the provisions of sect. 19 *of* 4 *&* 5 *Anne, c.* 16, *which enable a plaintiff, when a defendant is beyond the seas when the cause of action accrues, to bring his action, after the defendant has returned, within the time limited by the Statute of Limitations* (21 *Jac.* 1, *c.* 16).

APPEAL of the plaintiff from the decision of the Divisional Court (Wright and Lawrance, JJ.) upon a special case stated, before trial, under an order of the judge made by consent.

The action was brought by Musurus Bey, as executor of Musurus Pacha, to recover certain bonds, and also a certain sum of money from the defendants as executors of Paul Gadban.

Musurus Pacha had been for thirty years ambassador in London, accredited by the Sultan of Turkey to Her Majesty Queen Victoria, and received by Her Majesty as such. On the 7th Dec. 1885 he presented his letters of recall. About two months afterwards, in Feb. 1886, he left England, having been engaged during that interval in winding-up and handing over his official business and in settling his own affairs. He returned to Turkey, and resided there until his death in 1890.

For the purposes of this case it was admitted that, in 1873, Musurus Pacha, whilst ambassador in London, borrowed the sum of 3107*l.* from Paul Gadban and William Watson, who were then carrying on business in partnership, and that this debt was never repaid.

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

In 1882 Messrs. Gadban and Watson dissolved partnership, and it was agreed that certain assets, including this debt of 3107*l.*, should be realised in trust for the partners in equal shares as tenants in common.

In Nov. 1891 the plaintiff, the executor of Musurus Pacha, came to England and employed Paul Gadban to collect certain bonds and other moneys belonging to the estate of Musurus Pacha. Paul Gadban died before this action was commenced.

This action was brought to recover from the defendants, as executors of Paul Gadban, the bonds and money which Paul Gadban had collected during his life pursuant to the instructions of the plaintiff. The action was commenced on the 12th Oct. 1892.

The defendants set up a counter-claim as executors of Paul Gadban and as assignees of William Watson for the debt of 3107*l.* in respect of the money lent to Musurus Pacha in 1873. After the action was commenced, but before the counter-claim was pleaded, Watson had assigned the debt in question to himself and his co-executor.

The plaintiff replied (*inter alia*) that the defendants' claim was barred by the Statute of Limitations (21 Jac. 1, c. 16).

The Statute of Limitations (21 Jac. 1, c. 16) provides:

Sect. 3. And be it further enacted that all actions of . . . debt grounded upon any lending or contract without specialty . . . shall be commenced and sued within the time and limitation hereafter expressed and not after, that is to say . . . within six years next after the cause of such actions or suit, and not after.

The statute 4 & 5 Anne, c. 16, provides:

Sect. 19. And be it further enacted by the authority aforesaid, that if any person or persons against whom there is or shall be any such cause or suit or action for seamen's wages, or against whom there shall be any cause of action of trespass, detinue, actions *sur trover*, or replevin for taking away goods or cattle, or of action of account, or upon the case, or of debt grounded upon any lending or contract without specialty, of debt for arrearages of rent, or assault, menace, battery, wounding, and imprisonment, or any of them, be or shall be, at the time of any such cause of suit or action given or accrued, fallen, or come beyond the seas; that then such person or persons who is or shall be entitled to any such suit or action shall be at liberty to bring the said actions against such person and persons, after their return from beyond the seas, so as they take the same after their return from beyond the seas, within such times as are respectively limited for the bringing of the said actions before by this Act, and by the said other Act made in the one and twentieth year of the reign of King James the first.

The statute 7 Anne, c. 12, provides:

Sect. 3. And to prevent the like insolences for the future, be it further declared by the authority aforesaid, that all writs and processes that shall at any time hereafter be sued forth or prosecuted, whereby the person of any ambassador, or other public minister of any foreign prince or state authorised, and received as such by Her Majesty, her heirs or successors, or the domestic or domestic servant of any such ambassador, or other public minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever.

Upon the argument of the special case the Divi-

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sional Court (Lawrance and Wright, JJ.) decided that the counter-claim was not barred by the Statute of Limitations, and gave no judgment upon an objection that the claim of the defendants could not be raised by way of counter-claim.

The plaintiff appealed.

Pollard for the appellant.—The defendants cannot make this claim by way of counter-claim in this action; the debt was due to Messrs. Gadban and Watson, and this action is against the defendants only as executors of Gadban. [DAVEY, L.J. referred to *Hodson* v. *Mochi*, 38 L. T. Rep. 635; 8 Ch. Div. 569.] The Statute of Limitations (21 Jac. 1, c. 16) is a bar to the defendants' claim. The statute began to run while the ambassador was in England, because the writ might then have been issued against him, although it could not be served. Such a writ might have been served after he presented his letters of recall and before he left England. The writ, after it had been issued, might have been renewed from time to time so as to prevent the statute from running. This point did not arise in *Magdalena Steam Navigation Company* v. *Martin* (2 E. & E. 94), for in that case the writ had been actually served, and the decision was that the writ could not properly be served, and not that it could not be issued. If that case did decide that the writ could not be issued, it would be quite inconsistent with the judgments in *Taylor* v. *Best* (14 C. B. 487). [DAVEY, L.J. referred to *Gladstone* v. *Musurus Bey*, 1 H. & M. 495.] During the time that the ambassador remained in this country after he had presented his letters of recall he could have been sued, and therefore the statute would run at any rate from that time. After the ambassador left this country he could have been proceeded against by a writ issued for service abroad under Order XI. The statute of 4 & 5 Anne, c. 16, s. 19, is in effect superseded by the provisions of Order XI., which now enable a creditor to issue a writ against a person who is beyond the seas.

Lawson Walton, Q.C. and *G. P. Macdonell* for the respondents.—The plaintiff is precluded from raising the point as to the counter-claim being maintainable in this action, by reason of the order made by consent at chambers. All the necessary parties are parties to the action, and therefore there can be no objection on that ground. While Musurus Pacha was ambassador the Statute of Limitations did not run because there was no person who could be sued, and therefore no cause of action within the statute:

Douglas v. *Forrest*, 4 Bing. 686.

An ambassador cannot be sued at all; and, after he has presented his letters of recall, the same privilege continues for a reasonable time:

Magdalena Steam Navigation Company v. *Martin*, 2 E. & E. 94;
Marshall v. *Critico*, 9 East, 447.

When Musurus Pacha left this country the statute did not run, because of the provisions of sect. 19 of 4 & 5 Anne, c. 16. The provisions of sect. 19 of 4 & 5 Anne, c. 16, have not been in any way affected by the Order XI. A creditor is not obliged to proceed under Order XI. when his debtor is beyond the seas, but may wait until he returns.

Pollard, in reply, referred to

Wilding v. *Bean*, 64 L. T. Rep. 41; (1891) 1 Q. B. 100.

Cur. adv. vult.

May 28.—The following judgments were read:

SMITH, L.J.—This is an appeal from the judgment of my brothers Lawrance and Wright, JJ., who held that the executor of Musurus Pacha could not set up the Statute of Limitations in answer to a claim made against him by Messrs. Gadban and Watson for money lent by them to his testator nearly twenty years ago—viz., in the year 1873. Musurus Pacha for some thirty years prior to 7th Dec. 1885, on which day he presented his letters of recall, was ambassador in London accredited by the Sultan of Turkey to, and received by, Her Majesty as such. He left England two months afterwards—viz., in Feb. 1886, having been engaged during that interval in winding up and handing over his official business and settling his own affairs. He then returned to Turkey, where he resided until his death in 1890, having appointed the plaintiff his executor. It must be taken for the purposes of this case that in the year 1873 Musurus Pacha, whilst ambassador in London, borrowed of Messrs. Gadban and Watson, who were then trading in partnership, the sum of 3107*l.*, and that this debt has never been repaid. After the death of Musurus Pacha, his executor, in the month of Nov. 1891, came to this country and engaged Mr. Gadban to collect certain bonds of the nominal value of 28,000*l.* and other moneys belonging to the estate of his testator, and this action is brought, the writ being issued on 12th Oct. 1892, to recover from Mr. Gadban's executors these bonds and moneys which Mr. Gadban had collected in his lifetime pursuant to his agreement with the plaintiff. Mr. Gadban's executors do not dispute that they are in possession of these bonds and moneys, but they assert that they are, as against the plaintiff, who, as executor, is suing them in this country, entitled to be paid the 3107*l.* lent in 1873, and which is still unpaid, and the real point in this case is whether this debt of Musurus Pacha is or is not barred by the Statute of Limitations. It is true that the executors of Mr. Gadban, of whom Mr. Watson is one, have set up this claim by way of counter-claim dated 7th Dec. 1892, and Mr. Pollard raised a technical point as to whether this claim is the subject-matter of counter-claim, the action being against the executors of Mr. Gadban, and the counter-claim being by Mr. Gadban's executors and Mr. Watson; but, considering what is the real dispute between the parties, it does not appear to me material, except possibly as to costs in this peculiarly conducted case, whether the claim to the 3107*l.* is raised by counter-claim or independent cross-action, for that this last would lie cannot be doubted, apart from the real point which arises under the Statute of Limitations. Seeing what occurred upon the consent order at chambers on 28th Feb. 1893, the object being to get this point under the statute determined before the bonds and money leave this country, the form of the special case originally drafted by agreement of the parties and argued upon in the court below, the fact that Mr. Watson has absolutely assigned to the executors of Mr. Gadban his interest in the 3107*l.*, and that no judgment has been given upon this technicality

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by the Queen's Bench Division, though for some reason leave was given to amend the special case so that it might come up to this court amended, but with no judgment given thereon, it would, in my opinion, be most unjust now to give effect to this point even if it existed, and this court had jurisdiction to decide upon an amended special case upon which no judgment has been given in the court below. I therefore refuse to entertain it. It cannot be disputed, as this debt of 3107*l.* was contracted in this country in 1873, and as the present claim to be paid it (whether raised by counter-claim or independent cross-action is immaterial) was not raised till Dec. 1892, that *primâ facie* the Statute of Limitations is an answer, for the six years would have run out in 1879; but this is an exceptional case, and it is said that as Messrs. Gadban and Watson had no cause of action against Musurus Pacha, for the money lent in 1873, before he left this country in Feb. 1886—for until then he was not capable of being sued in the courts of this country, he being an ambassador thereto—and as since then he has continuously lived beyond seas, the Statute of Limitations did not begin to run until his executor took proceedings in this country. Mr. Pollard, who argued this case for the plaintiff, the executor of the ambassador, with his well-known ability, having strenuously urged the technical point raised in the amended special case, proceeded to minimise as best he could the recognised privileges and immunities of an ambassador accredited to this country. He did not assert, for this would have been useless, that Musurus Pacha could have been effectively sued during the period he was *de facto* ambassador in London, for the case of the *Magdalena Steam Navigation Company* v. *Martin* (*ubi sup.*), which has never since been doubted, settled that he could not, for during that period he was exempt from the jurisdiction of the courts of this country. He said, however, and in this I agree, that no case had actually decided that a writ could not be sued out against an ambassador if it were not served, and he asserted that this unserved writ, as I will call it, might have been sued out prior to 1879 by Messrs. Gadban and Watson and kept alive by renewal every six months until Musurus Pacha ceased to be ambassador and became a private gentleman in 1886, and that the Statute of Limitations began to run from the date when this unserved writ might have been sued out, which constituted a cause of action which was long prior to six years before the making of the present claim. He also argued, if wrong as to this, that Musurus Pacha could have been effectively sued to judgment by suing out and serving a writ upon him during the two months between the 7th Dec. 1885 and Feb. 1886, whilst he was making ready to leave this country, and that a cause of action arose then which was also more than six years prior to the present claim. And, lastly, he said, even if wrong upon both these points and no cause of action arose until after Musurus Pacha had left this country in Feb. 1886, a cause of action arose then, for Musurus Pacha after his return to Turkey might have been sued by Messrs. Gadban and Watson by means of the procedure which permits notice of a writ to be served upon a foreigner resident out of the jurisdiction for breach of a contract to be performed within it (Order XI.), and that the cause of action therefore arose in Feb. 1886, which was more than six years before the present claim, so that whichever way it was taken, he said, a cause of action had arisen to Messrs. Gadban and Watson more than six years before they set up their claim to the 3107*l.* in 1892, and, therefore, it was statute barred. There are three statutes applicable to this case—the 21 Jac. 1, c. 16, s. 3, which enacts that all actions shall be commenced and sued within six years after the cause of action, and not after, with an exception in sect. 7, that plaintiffs, if beyond the seas, may bring such actions within six years after their return; the 4 & 5 Anne, c. 16, s. 19, which enacts that if defendants are beyond seas at the time of the accrual of the causes of action plaintiffs shall be at liberty to bring such actions within six years after the defendant's return from beyond seas; and, lastly, the 7 Anne, c. 12, which by sect. 3 declares "that all writs and processes that shall at any time hereafter be sued forth or prosecuted whereby the person of an ambassador . . . authorised and received as such by Her Majesty, her heirs, or successors . . . may be arrested and imprisoned or his goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever." The writs and processes mentioned in the Act are not confined to such as directly touch the person or goods of an ambassador, but extend to such as in their usual consequences would have this effect, as was held in the case of *Magdalena Steam Navigation Company* v. *Martin* (*ubi sup.*). The case of the *Magdalena Steam Navigation Company* v. *Martin* renders it unnecessary to resort to text writers and other cases prior thereto, for it lays down in clear and unambiguous language the principles upon which an ambassador is free from being impleaded in the courts of this country. Lord Campbell, in delivering the considered judgment of the Court of Queen's Bench, which consisted of himself, Wightman, Erle, and Crompton, JJ., used this language: "An ambassador owes not even temporary allegiance to the Sovereign to whom he is accredited, and he has at least as great privileges from suits as the Sovereign whom he represents. He is not even supposed to live within the territory of the Sovereign to whom he is accredited, and if he has done nothing to forfeit or to waive his privilege, he is for all judicial purposes supposed still to be in his own country." These being the principles upon which an ambassador is independent of the civil jurisdiction of the country to which he is sent, in my judgment it is clearly inconsistent with them to hold that an ambassador who has at least as great privileges from suits as the Sovereign whom he represents, can, even apart from 7 Anne, c. 12, have a writ sued out against him commanding him in the name of Her Majesty to appear in her courts to answer the claim of one of her subjects, even although such writ is not to be served. Moreover, what jurisdiction is there to sue out a writ in the form of a writ for service in this country against a Turk resident in Turkey, or to serve such a writ upon a Turk in Turkey? And yet this was and is the true legal position of Musurus Pacha from the date he first became ambassador in London till he died in Turkey, in 1890. If, however, such a writ were sued out, in my judgment it could not be renewed from six months to

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six months as proposed in this case, for such a renewal is only to be had "when the court or judge is satisfied that reasonable efforts have been made to serve the defendant, or for other good reason" (Order VIII., r. 1). This order clearly contemplates the case where there is a defendant capable of being sued and served when the writ is issued, but who cannot be found, or there is some other good reason for the renewal of such a writ, and it does not apply to a case like the present, where there is no such defendant at all when the writ is sued out. In my opinion, when the court or judge ascertained that the writ which they or he were asked to renew had been sued out against an ambassador at the time accredited to this country, their duty would be to refuse the application for renewal, and to hold that the writ, as in my judgment it was, had been improvidently issued. I am aware that it may be said that this view would work a hardship upon a creditor of an ambassador, for he would be unable to prevent the Statute of Limitations from running whilst the ambassador is accredited to this country, and that therefore there would be "good reason" for granting the renewal; but in my opinion the true answer is given by Lord Campbell in the above-named case that "those who cannot safely trust to the honour of an ambassador in supplying him with what he wants, may refuse to deal with him without a surety who may be sued, and recourse is always open of making a complaint to the Government by which the ambassador is accredited." For these reasons, in my judgment, it is not competent either to sue out a writ, even though it is not to be served, or to renew it against an ambassador, and that, therefore, Messrs. Gadban and Watson had no cause of action against Musurus Pacha prior to 7th Dec. 1885, when he presented his letters of recall. But there is another ground which is also fatal to this contention of the plaintiff's. It has been held that as on the one hand there cannot be a cause of action within the meaning of the statute of James, from which the six years will commence to run, unless there be a person in existence capable of suing (*Murray* v. *East India Company*, 5 B. & A. 204), so, on the other hand, there can be no such cause of action until there is somebody who can be sued (*Douglas* v. *Forrest* (*ubi sup.*). "Cause of action," says Best, C.J., "is the right to prosecute an action with effect; no one has a complete cause of action until there is somebody that he can sue." As Messrs. Gadban and Watson had no such person—at any rate, down to 7th Dec. 1885, the statute had not commenced to run before that date. As to the second point—viz., that Messrs. Gadban and Watson had an effective cause of action against Musurus Pacha during the two months between December 1885 and February 1886—in my judgment it was decided in the *Magdalena Steam Navigation Company* v. *Martin* that this is not so. It was there held that there could be no execution against an ambassador while he is accredited, nor even when he is recalled, if he only remains a reasonable time in this country after his recall, and that is precisely what Musurus Pacha did in the present case. During those two months Musurus Pacha was in the same position as he was in before his recall, as to immunity from being sued. It has been said that this was *obiter*. I do not think so; but, even if it be, in my judgment, considering the position of an ambassador, it is good law and sound sense. This point therefore fails the plaintiff. I now come to consider the last point. It cannot, I think, be doubted that the Queen's Bench Division correctly held that the 4 & 5 Anne, c. 16, s. 19, which suspended the running of the Statute of Limitations if the cause of action accrued whilst the defendant was beyond seas till he returns, is an enactment passed in favour of plaintiffs, as indeed is sect. 7 of the statute of James, though now restricted by sect. 10 of the Mercantile Law Amendment Act 1856. It is, in my judgment, impossible to hold that a rule of practice and procedure, which Order XI. is, repeals the provisions of a statute. By the 4 & 5 Anne, c. 16, s. 19, plaintiffs in the position of Messrs. Gadban and Watson are to have six years in which, after their debtor's return from beyond seas, to prosecute their claims. If Order XI. is to be read as repealing the statute, in my judgment it must at the same time be held to be *ultra vires*; but the truth is that this order does nothing of the kind. It gives the court or a judge in its or his discretion power to allow service of a writ of summons or notice of a writ out of the jurisdiction in certain specified cases; but this rule in no way conflicts with the statute, which enacts that if a cause of action accrues against a person beyond seas the plaintiff shall have six years within which to bring his action after the defendant's return. The rule has nothing whatever to do with the privilege conferred by the 4 & 5 Anne, c. 16, s. 19, upon plaintiffs. In the case of *Wilding* v. *Bean* (*ubi sup.*), which was cited, the court were not dealing with a case like the present, and the dictum of the Master of the Rolls, reported in 64 L. T. Rep., at p. 41, does not appear in the Law Reports, but even if it did it is not applicable to the present case. For these reasons the last point also fails the plaintiff. The Queen's Bench Division were, in my judgment, right when they held that the plaintiff could not set up the Statute of Limitations to the claim of Messrs. Gadban and Watson, and that this appeal must be dismissed, with costs.

Davey, L.J. read the following judgment:—In this action the plaintiff, who is the executor of Musurus Pacha, sues to recover from the defendants, who are the executors of Paul Gadban, certain bonds deposited with their testator, and a sum of money due from them in respect thereof. The plaintiff's cause of action is admitted, and under the consent order of Kennedy, J., of 28th Feb. 1893, the bonds and sum of money have been brought into court "to abide further order by judge at trial of counter-claim." The order also contains the following: "Defendants consent also that judgment is to be entered for the plaintiff in the action for the delivery to him of the said bonds and 158*l.* 15*s.* 10*d.* and costs; but on condition that the bonds and money in court shall be applied, so far as may be necessary, towards the satisfaction of such judgment (if any) as the defendants may recover on the said counter-claim." The defendants counter-claim for 3107*l.*, moneys alleged to have been advanced by Paul Gadban and William Watson, formerly trading in copartnership, to the plaintiff's testator in and prior to the year 1873; in defence to which the plaintiff relies on the Statute of Limitations. The principal question which has been argued before us is whether the debt claimed

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is barred by the statute. But the plaintiff has also relied before us on a technical defence. His counsel says that the alleged debt cannot be claimed by way of counter-claim in this action, and that the counter-claim ought to be struck out. It will be convenient to deal with this point first. It has been raised by amendment of the special case after the judgment of the Divisional Court. The point was not argued before that court, and the learned judges gave no judgment upon it, and I must concur with my learned brother's protest against a point being brought before this court in the first instance in this way. As, however, it has been argued, I will express my opinion on it. The debt was originally due to Gadban and Watson as copartners, and as Gadban is dead and Watson survives, it is now due in law to the latter as surviving partner. Watson is one of the executors of Gadban, and is a defendant in that character. The partnership was dissolved on 31st Dec. 1882, on terms which are contained in a deed of 8th Jan. 1883, one of which was that certain scheduled assets (including this debt) shall be realised under the joint direction and control of the late partners in trust for them in equal shares as tenants in common. Gadban's executors, therefore, are beneficially entitled to one moiety of the debt as part of their testator's estate, and Watson as respects that moiety is a bare trustee for them. On the 27th Jan. 1893, before the counter-claim was put in, Watson assigned to himself and co-executors the debt in question, retaining the same beneficial interest. But no notice was given of this assignment, except by the counter-claim, so as to comply with the Judicature Act 1873, s. 25, sub-sect. 6. Two questions arise upon these facts: (1) Whether the defendants can counter-claim for the debt in this action; (2) Whether that question is not settled and precluded by the consent order of Kennedy, J.? That order was made upon a summons taken out by the plaintiff to strike out certain paragraphs of the defence and the whole of the counter-claim, on the ground that it could not be pleaded or asserted without the leave of a court or a judge; or that it be excluded under Order XXI. r. 15. The effect of the order of the 28th Feb. 1893 is to negative the matters pleaded as a defence, but to retain (as it seems to me) the counter-claim, and to provide, by consent, that the bonds and money shall remain in court to abide the result of the trial of the counter-claim; or, in other words, I think the order amounts to an agreement that the counter-claim shall stand and be tried on its merits. I am, therefore, of opinion that the defendants' answer to Mr. Pollard's technical point is a good one. This is sufficient to dispose of the technical point; but, independently of this, I am bound to say that I think the point a bad one. One moiety, at any rate, of the debt belongs to Gadban's estate beneficially. The defendants, as executors, therefore are entitled in equity to one moiety of the debt; and whether the legal right of action for it is vested in themselves or in Watson alone as their trustee, or in themselves as executors and Watson, they have the person or persons with the legal right of action before the court, and I cannot conceive of any reason why the defendants should not counter-claim for, at any rate, that moiety of the debt, and it is sufficient to support the counter-claim if anything can be recovered under it. But, further, as regards the debt generally, although it would not usually be convenient or proper to try in the same action a personal claim by an executor in an action brought against him to recover a debt due from him as executor, I am not prepared to say it may not be done where no inconvenience will arise and where no conflict can take place between the executor's duty to his testator's estate and his personal interest. The case of *Hodgson* v. *Mochi* (*ubi sup.*) is some authority for that position. But, for the reasons stated above, it does not appear to me necessary to express a concluded opinion upon it in the present case, and I do not desire to do so. The question of substance on this appeal is a curious one, and of some general interest. Not the least singular feature is, that it is the representative of the ambassador who wishes to limit and minimise the privilege. I need not recapitulate the facts relating to Musurus Pacha, which have been fully stated by my learned brother. Mr. Pollard contends: (1) That to issue a writ without serving it, would have been no breach of the ambassador's privilege, and therefore a writ might have been issued for the purpose of saving the statute, and renewed from time to time; (2) That, at any rate during the two months or more that Musurus Pacha remained in this country after his recall, the writ might have been issued and served; (3) That after his return to Turkey the writ might have been served on him abroad under Order XI., and therefore the statute began to run from at least that time, or (in other words), that Order XI. has had the effect of repealing the provisions of 4 Anne, c. 16, s. 19. I am against Mr. Pollard's argument on each of these contentions. With regard to the first, it is in my opinion sufficient to refer to the 3rd section of 7 Anne, c. 12, which is in these terms: "And to prevent the like insolences, be it further declared by the authority aforesaid, that all writs and processes which shall at any time hereafter be sued forth or prosecuted, whereby the person of any ambassador, or other public minister of any foreign prince or state, authorised and received as such by Her Majesty, her heirs or successors, or the domestic or domestic servant of any such ambassador or other public minister, may be arrested or imprisoned, or his or their goods or chattels may be distrained, seized, or attached, shall be deemed and adjudged to be utterly null and void to all intents, constructions, and purposes whatsoever." It has been decided in *Magdalena Steam Navigation Co.* v. *Martin* (*ubi sup.*), that this section applies not only to writs of execution against the property or person of a privileged person, but also to writs which lead up to, and would in ordinary course have the consequence of attaching his goods or person. If so, I am of opinion that a writ of summons in an action is of that character, and that the effect of the statute (which is said to be declaratory only of the common law), is to make such a writ void and of no effect. Mr. Pollard is quite right in saying that the writ had been served in *Magdalena Steam Navigation Co.* v. *Martin* (*ubi sup.*), and that all that it was necessary to decide was that the service was bad. But the grounds upon which the decision was based in Lord Campbell's judgment go beyond that point, and, in my opinion, show a total want of jurisdiction of the court to entertain the action at all. Lord Campbell thus states the principle at p. 111: "He is to be left at

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liberty to devote himself body and soul to the business of his embassy. He does not owe even a temporary allegiance to the sovereign to whom he is accredited, and he has at least as great privileges from suits as the sovereign whom he represents. He is not supposed even to live within the territory of the sovereign to whom he is accredited, and if he has done nothing to forfeit or to waive his privilege, he is for all judicial purposes, supposed still to be in his own country. For these reasons, the rule laid down by all jurists of authority who have written upon the subject is, that an ambassador is exempt from the jurisdiction of the courts of the country in which he resides as ambassador," and at the end of his judgment he says: "It certainly has not hitherto been expressly decided that a public minister, duly accredited to the Queen by a foreign State, is privileged from all liability to be sued here in civil actions; but we think that this follows from well-established principles." The passage quoted, in my opinion, correctly states the legal principles on which the exemption is founded, and is in accordance with the course of decision in our courts—see the latest case of *The Parlement Belge* (5 P. Div. 197) in the Court of Appeal, in which it was said that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence of every other sovereign State, each State declines to exercise by means of any of its courts any of its territorial jurisdiction over the person of any sovereign or ambassador, or over the public property of any State which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory. I am unable to think that the issue of a writ in an action, which action the court has no jurisdiction to entertain, and which writ therefore the court has no jurisdiction to issue, can prevent the statute running. I agree with, and will not repeat, what has been said by my learned brother on the practical difficulty of supposing that the leave of the court would be given to the renewal of such a writ. I am, therefore, of opinion that Gadban and Watson, or Gadban or his executors, could not have issued a writ properly against Musurus Pacha, or (in other words) had no right of action against him while he was ambassador. The doubts suggested in *Taylor* v. *Best* (14 C. B. 487) cannot, in my opinion, be supported. The answer to Mr. Pollard's point that the writ might have been served on Musurus Pacha while he was still in this country is given by Wright, J., and, in addition to the authority cited by him, I may refer to Lord Campbell's judgment in the *Magdalena Steam Navigation Company* v. *Martin* (*ubi sup.*), in which he says (p. 114): "There can be no execution upon the writ while the ambassador is accredited, nor even when he is recalled if he only remains a reasonable time in this country." Paragraph 2 of the reply avers that, "Musurus Pacha remained in England only for the purpose of making the necessary preparations for his departure, and no longer than was necessary for the purpose." Nothing to the contrary is stated in the special case, and there is nothing from which we can infer that he stayed longer than a reasonable time. I am, therefore, of opinion that the privilege continued until his return to Turkey, and it appears to me it would be almost an outrage on common sense to say that the privilege ceased the moment he had presented his letter of recall. In handing over the affairs of the embassy to his successor the ex-ambassador is still engaged in his sovereign's business, and must have a reasonable time allowed for that purpose. Mr. Pollard's last point is one of some novelty, and, if I may be permitted to say so, of some boldness. In the first place Order XI. does not purport to repeal the Statutes of Limitation or any of them, or say anything about them. If repeal there be, therefore, it is not by express words, but must be implied from the inconsistency of the provisions of the order with the provisions of the statute in question. This must, in order to effect a repeal, be a necessary implication. Now I do not see any necessity in the case. Order XI. provides a means by which litigants may in certain cases, with the leave of the court, serve a writ upon a defendant out of the jurisdiction. The statute of 4 Anne, c. 16, s. 19, in effect provides that the Statute of Limitations shall not run in favour of a defendant who is beyond the seas. Where is the inconsistency? A plaintiff has the alternative right. He may either apply for leave to serve the writ abroad, or he may wait till his defendant comes within the jurisdiction. I ought, however, to add that I should hesitate some time before I expressed any opinion that the judges, under a power to make rules relating to the practice and procedure of the courts, can repeal the Statutes of Limitation, although they are no doubt part of the *lex fori*. Could they, for example, say that the time for recovery of debts shall be five years instead of six? It is unnecessary, however, to say more about this as, in my opinion, the point does not arise. I am, therefore, of opinion that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant, *Bush* and *Mellor*.

Solicitors for the respondents, *Austin* and *Austin*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Friday, July 13.

(Before KEKEWICH, J.)

Re MAPLIN SANDS. (*a*)

Practice—Evidence—Documents produced by witness not party to proceedings—Putting in evidence en bloc—*Referee's report—Motion to vary for rejection of evidence—New trial, analogy of—Order XXXIX., r.* 6.

Where documents are produced by a witness who is not a party to the proceedings, the proper course is for an adjournment to be made to enable the parties to ascertain which of those documents are material. The parties are not entitled to put in the whole of the documents en bloc, *or to ask the witness to produce the documents* seriatim, *and question him thereon.*

The report of a referee will not be varied or sent back to the referee on the ground of improper rejection of evidence, unless it can be shown that a substantial wrong has been done thereby.

(*a*) Reported by J. H. BAKEWELL, Esq., Barrister-at-Law.

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MOTION.

This was a petition for payment out of court of certain moneys paid in by the Crown, under the Artillery Ranges Act 1882, in respect of the purchase-money of part of the Maplin Sands. There were numerous rival claimants to the fund, and the matter was, by consent of the parties, referred to a special referee. During the hearing before the special referee, a witness who was not a party to the petition was examined and cross-examined. During the cross-examination of this witness he was asked by counsel for one of the respondents to the petition, whether he had any letters in his possession relating to the Maplin Sands. And he then offered to produce a large quantity of correspondence. Counsel thereupon proposed to call for each portion of this correspondence *seriatim*, and to read it and to question the witness thereon. The referee refused to allow this to be done, on the ground that such a course would occupy an excessive length of time. Counsel then submitted that he was entitled to put in the whole correspondence, and to have copies which he could examine at leisure, but the referee refused to allow this.

The referee held that the petitioners had established their claim to the fund, and reported accordingly.

One of the respondents to the petition now moved to vary the report on the ground that the special referee had improperly rejected the correspondence.

H. Terrell for the respondents to the petition.

Warmington, Q.C. and *Sheldon* for the petitioners.

Sir *J. Rigby* (A.-G.) and *Ingle Joyce* for the Crown.

KEKEWICH, J.—The difficulty in this case arises from there being no power to get discovery from a witness who is not a party to the litigation. That is a difficulty inherent in the present system of procedure. As to the letters produced by the witness in the present case, the proposal by the cross-examining counsel to put them all in *en bloc* is entirely contrary to all practice, and would be most dangerous if allowed. The trial would never come to an end, and the costs would be greatly increased by the introduction of a number of possibly irrelevant matters. Such a course has never, in my experience, been proposed before, and I will not encourage such an application as this. Counsel, however, put another point, namely, that he was entitled to ask the witness to produce in succession documents 1, 2, 3, and so on. The referee objected to that on the ground that it would occupy an inordinate time. There the matter was left. I am now asked to find fault with the report, and to send it back to the referee because he did not receive that evidence. There might have been a miscarriage if one could see that these documents would have been of any use, but I do not think that there has been any miscarriage on the part of the referee. I think that the proper course in such a case as the present, when it comes either before a judge or a referee, is for counsel to say, "I am entitled to have these documents produced; I am entitled to look at the documents that are material; and I ask for a reasonable adjournment in order that I may look into them, and then ask the witness such questions upon them as I think are material to my case." That is the reasonable course to pursue, and if such an application had been made to the referee it should have been granted. But the referee was not asked for an adjournment for the purpose. The motion is somewhat analogous to that for a new trial under Order XXXIX., r. 6, on the ground of the improper rejection of evidence, but that rule does not apply unless substantial wrong has been done by the rejection. Looking at the referee's report, I am satisfied that the production of these letters would have been useless, and would only have caused a waste of time. The result is that the report must stand, and the motion must be refused with costs.

Solicitors: *Lumley* and *Lumley*; *Fowler, Perks*, and *Co.*, for *Stamford* and *Metcalfe*, Bradford; *Hare* and *Co.*

Friday, June 29.

(Before KEKEWICH, J.)

Re DUNNING; STURGEON *v.* LAWRENCE. (*a*)

Practice — Contempt — Attachment — Notice of motion—Service of copies of affidavits with notice of motion—Proof of service—Order LII., r. 4.

A notice of motion for attachment for disobedience to an order for payment of money into court did not specify the affidavits which were intended to be used on the hearing of the motion, and no evidence was adduced at the hearing that a copy of the affidavit of service of the order had been served with the notice of motion.

Held, that the notice of motion was irregular, since it did not appear that copies of the affidavits had been served with the notice of motion.

MOTION.

On the 9th May 1894 a four-day order was made in this action in chambers, directing the defendant to pay 200*l.* into court. The order was served on the defendant on the 13th June, and on the 22nd June the plaintiff's solicitor filed an affidavit of service of the order. On the 25th June the plaintiff's solicitor served the defendant with notice of motion for leave to issue a writ of attachment against him for contempt in not having complied with the order, and also on the same day filed an affidavit of non-payment of the money into court. The plaintiff's solicitor wrote to the defendant's solicitor and stated his intention to read the affidavit of nonpayment of the money into court, but he did not mention the affidavit of service of the order to pay the money into court.

The notice of motion did not contain any notice of the affidavits intended to be read by the plaintiffs on the hearing of the motion; it did not state that the order directing payment into court had been served on the defendant; and the plaintiff did not adduce any evidence that the affidavits of service and non-payment had been served with the notice of motion upon the defendant.

The defendant paid the sum of 200*l.* into court on the day on which the motion was to be heard.

Eastwick for the plaintiffs.

Eustace Smith for the defendant.—The notice of motion is irregular, because no notice was given by the plaintiffs of the affidavit proving

(*a*) Reported by J. H. BAKEWELL, Esq., Barrister-at-Law.

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service of the order to pay the money into court:

Rules of Supreme Court 1883, Order LII., r. 4; *Re Lysaght; Blyth* v. *Baumgartner*, 82 L. T. 265; (1887) W. N., p. 23.

KEKEWICH, J.—In my opinion the first point to consider in all these questions is that the practice should be uniform. My own notion is that it is very much better—unless gross injustice would result—that one judge should follow another, even if he thinks the other judge is wrong, rather than disturb the practice. Here I have a considered judgment of North, J. in *Re Lysaght* (82 L. T. 265; Weekly Notes (1887), p. 23), delivered, after argument and the citation of the earlier cases, as long ago as Feb. 1887. There is nothing to show that this decision has since been departed from. The registrar informs me that he has no note showing that it has been departed from, although it is usual for the registrars to have notes of such cases; and the result is that I am bound to consider that, notwithstanding the earlier decisions. But I feel bound to say that, in my opinion, North, J.'s view is the right one. You cannot enforce an order of this kind until it is served. What service is necessary—whether it should be on the defendant personally, or on his solicitor, or simply by filing—is quite another question. Somehow or other you must serve the order, and here the evidence is not sufficient to show that the order was served. Mr. Eustace Smith is entitled to take advantage of the technicality, namely, that the plaintiffs have not, under Order LII., r. 4, served with the notice of motion copies of all the affidavits they intend to use upon this motion. That ought to have been done. I desire to repeat what I have often mentioned before, that in all these cases, much the safest course is to specify the affidavits that are intended to be used, and to specify them in the notice of motion itself. Here I am told by the plaintiffs' counsel that he is instructed to say that copies of the affidavits were in fact served with the notice of motion, but in my opinion I must act upon the strict interpretation of the rule. Accordingly, as it appears that the defendant has paid 200*l.* into court, there will simply be no order on the motion.

Solicitors: *Routh, Stacey,* and *Castle; E. J. Moeran.*

Friday, June 15.

(Before KEKEWICH, J.)

COLLINS v. NORTH BRITISH AND MERCANTILE INSURANCE COMPANY. (a)

Practice—Service out of the jurisdiction—Concurrent writ—Application for leave to serve concurrent writ—Evidence in support—Application before service of original writ—Service of incorrect copy of concurrent writ—Necessary parties—Separate relief against defendant out of the jurisdiction—Order VI., r. 1.; Order XI., rr. 1 (g), 4.

A person entitled to a share of property in Canada, which was vested in a trustee resident in Canada, mortgaged his interest, and subsequently became bankrupt. The trustee in bankruptcy brought an action against the mortgagees, and the Canadian trustee, claiming as against the mortgagees an account and redemption of the mortgage, and as against the trustee that he might be directed to pay the amount found due to the mortgagees, and for an account.

The plaintiff obtained leave to issue a concurrent writ for service upon the Canadian defendant; the application for leave was made before service of the original writ upon the defendants within the jurisdiction, and the affidavit in support did not state that the Canadian trustee was a necessary or proper party to the action, or that the plaintiff had a good cause of action against him.

The copy of the concurrent writ which was served upon the Canadian defendant was not marked "concurrent."

Held, that the defendants within the jurisdiction should have been served before the application for leave to serve the writ out of the jurisdiction was made; that the application was not supported by proper evidence; that the copy of the writ served upon the Canadian defendant was not a true copy.

Held, that the Canadian defendant was not "a necessary or proper party" to the action against the mortgagees, since the action claimed separate relief against the different defendants.

Held, therefore, that the order giving leave to serve the concurrent writ must be discharged, and service of the writ on the Canadian defendant must be set aside.

Yorkshire Tannery and Boot Manufactory v. Eglinton Chemical Company (54 L. J. 81, Ch.) *followed.*

MOTION.

Under the will of F. Wells, deceased, who was at the date of his death domiciled in Canada, his son G. F. Wells was equitably entitled to one-half of the testator's estate. The testator's will was proved in the county of York, Canada, by two of the executors and trustees therein named, of whom the defendant, Mr. Christopher Robinson, Q.C., was now the sole survivor. In 1891 G. F. Wells mortgaged his interest under his father's will to secure an advance made to him by the North British and Mercantile Insurance Company Limited. G. F. Wells was subsequently adjudicated a bankrupt, and the plaintiff, E. H. Collins, was appointed trustee in the bankruptcy. This was an action by Mr. Collins, as trustee in bankruptcy of the property of G. F. Wells, against the North British and Mercantile Company, the first mortgagees, and also against other second mortgagees, and against Mr. Robinson as executor and trustee of the will of F. Wells, asking that as against the two first-mentioned defendants accounts might be taken of what was due to them under their respective mortgages, and that as against Mr. Robinson he might be directed to pay the sum found due to the mortgagees upon taking the said accounts, and to pay and account for the value of the said property to the plaintiff.

Before the writ in this action had been served on the defendants in England, the plaintiff applied for and obtained leave to issue a concurrent writ and to serve the same upon Mr. Robinson, who was resident at Toronto, in Canada. In his affidavit filed in support of this application, the plaintiff did not state that Mr. Robinson was a necessary or proper party to the action, nor that the plaintiff believed that he had a good cause of

(a) Reported by J. H. BAKEWELL, Esq., Barrister-at-Law.

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action against such defendant. The concurrent writ was issued and marked as "concurrent," and the writ was served upon Mr. Robinson at Toronto on the 1st May 1894. The copy served upon him was not, however, marked "concurrent."

Mr. Robinson did not enter an appearance, but gave notice of motion that the order giving leave to serve him with the writ might be discharged, and the service of the writ upon him set aside, on the grounds that the writ was irregularly served, and that the action was not one in which service out of the jurisdiction ought to be allowed as against him, under Order XI., r. 1, clause (*g*), or otherwise.

This was the hearing of the motion.

Warmington, Q.C. and *J. H. Redman* for the motion.—There was no proper evidence upon which to give leave to serve the writ out of the jurisdiction. The copy of the writ served was not a true copy. The defendant within the jurisdiction should have been served before the application to serve the writ out of the jurisdiction was made:

Yorkshire Tannery and Boot Manufactory v. *Eglinton Chemical Company*, 54 L. J. 81, Ch.

For this reason the service of the writ was irregular. Moreover, this is not a proper case for service to be made out of the jurisdiction. The relief asked against Mr. Robinson is not connected with that asked against the other defendant within the jurisdiction:

Witted v. *Galbraith*, 68 L. T. Rep. 354, 421; (1893) 1 Q. B. 431, 577.

Muir Mackenzie for the plaintiff.—*Yorkshire Tannery and Boot Manufactory* v. *Eglinton Chemical Company* was overruled in *Tassell* v. *Hallen* (66 L. T. Rep. 196; (1892) 1 Q. B. 321).

KEKEWICH, J. held that the application for leave to serve the writ out of the jurisdiction was not supported by proper evidence, and that the copy of the writ served on the defendant out of the jurisdiction was not a true copy of the concurrent writ, and continued:—The defendants within the jurisdiction had not been served when the application for leave to serve the writ out of the jurisdiction was made. In the case of *Yorkshire Tannery and Boot Manufactory* v. *Eglinton Chemical Company* (*ubi sup.*), Pearson, J. was of opinion that the persons within the jurisdiction should have been served with the writ before that application was made; although doubt has been thrown upon that case by *Tassell* v. *Hallen* (*ubi sup.*), I do not think that it has been overruled. The service of the writ was therefore irregular. These questions of service out of the jurisdiction are, however, of only subsidiary importance, and the technical objections in this case might be overcome by obtaining the leave of the court afresh, and beginning *de novo*. The main question in this case, whether the writ ought to have been issued against the Canadian defendant, is now open to review; and if the proceedings were in substance correct, I should not insist upon a strict compliance with the matters of form. Is this a case in which service out of the jurisdiction ought to be allowed? Is Mr. Robinson a necessary or proper party in an action against the North British and Mercantile Insurance Company, against whom the plaintiff has apparently a good cause of action? The rule cannot mean that A. and B. can be joined as parties in proceedings asking for one relief against A., who is within the jurisdiction, and another relief against B. who is out of the jurisdiction. The relief asked against the one defendant need not, indeed, be the same, but it must be connected with that asked against the other defendant; that is the principle laid down in *Witted* v. *Galbraith* (68 L. T. Rep. 354, 421; (1893), 1 Q. B. 431, 577). The defendant Robinson has no connection with the North and British Mercantile Company. It was never intended that a plaintiff should be able to make a defendant out of the jurisdiction a party to an action simply because the plaintiff has a cause of action against a defendant within the jurisdiction. This action is really two actions rolled into one—an action for redemption against the mortgagees, and an action for accounts against the Canadian trustee. The plaintiff may have a very good cause of action against the latter, but the action must be brought in Canada where he is, and not in this country where he is not. The order for service out of the jurisdiction must accordingly be discharged, and the service of the writ set aside.

Solicitor for the plaintiff, *Ralph Raphael*.

Solicitors for the defendant Robinson, *Jordan* and *Davis*, agents for *Henry O'Brian*, Toronto.

Friday, July 7.

LUSK v. SEBRIGHT. (*a*)

Practice—Foreclosure action—Receiver appointed—Rents and profits prior to foreclosure—Form of judgment—Credit given by mortgagee for sum certain.

When in a foreclosure action the plaintiff, in order to avoid opening the foreclosure by claiming payment of rents come to the hands of the receiver in the action between the date of the certificate and the day fixed for the redemption, submits to be charged in account with a sum certain in the hands of the receiver in respect of such rents, the judgment should reserve liberty to either party to apply for payment of any money come to the hands of the receiver.

Barber v. Jeckylls (1893) *W. N.* 91, *considered.*

THIS was an action for foreclosure of a mortgage. A receiver of the rents and profits of the property had been appointed in the action. The plaintiff now moved for judgment. The minutes of judgment were in the form given in Seton on Judgments, vol. 3, p. 2142, which follows the form of judgment in *Barber* v. *Jeckylls* (1893) W. N. 91, whereby, after the direction for the usual accounts, it is directed that, in taking the accounts, such a sum, if any, as the plaintiff shall submit to be charged with in respect of rents and profits in the receiver's hands at the date of the chief clerk's certificate, or to come into his hands prior to the order for foreclosure absolute, shall be deducted; this form being adopted to avoid re-opening the foreclosure by the plaintiff claiming moneys coming into the receiver's hands between the date of the certificate and the day fixed for redemption. The minutes of judgment concluded with the words, "Liberty to the defendant redeeming, or to the plaintiff in the event of foreclosure, to apply at chambers for payment of any money paid into court by the receiver, or in his hands," according

(*a*) Reported by J. H. BAKEWELL, Esq., Barrister-at-Law.

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to the form given in Seton on Judgments, vol. 2, p. 1577.

Eve for the plaintiff.—Since the plaintiff gives credit for a sum certain in the hands of the receiver, whether the defendant be foreclosed or exercises his right of redemption, in the latter case there might be moneys come to the receiver's hands which belonged to the plaintiff, and therefore the judgment ought to conclude with the words, "Liberty to any party to apply at chambers for payment of any money paid into court by the receiver or in his hands."

The defendant did not appear.

KEKEWICH, J. approved of the proposed alteration, and gave judgment accordingly.

Solicitors: *Gush, Phillips, Walters,* and *Williams.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

July 26 and 30.

(Before the PRESIDENT (Sir F. H. Jeune.)

THE KATY. (a)

Charter-party—Running days—How computed.

The term "running days" in a charter-party must, in the absence of any indication to the contrary, be taken to mean calendar days and not periods of twenty-four hours.

ACTION for demurrage.

The plaintiffs, Messrs. R. Gordon and Co., were the owners of the steamship *Katy* and their claim was for 71*l.* 8*s.* 8*d.*, being two days' demurrage of that vessel—the claim for freight indorsed on the writ having been paid by the defendants.

By a charter-party, dated the 1st Feb. 1894, the *Katy* was chartered to Messrs. F. Menal and Co. Seven days were occupied in loading, and accordingly the bill of lading was indorsed with the clause, "Seven lay days have been used at the port of loading."

The vessel was ordered to Barrow, where Messrs. Walmsley and Smith, the defendants, were consignees of her cargo and holders of the bill of lading. She arrived there on Saturday, the 31st March, was moored in berth, and, except that she had not cleared at the Custom-house, was in every respect ready to discharge at 8.30 a.m. The captain made her entries at the Custom-house at its opening at 10 a.m. on the same day. Until this was done the discharge could not commence.

At about 10.30 a.m. on the 31st March the defendants received the following notice from the captain: "Dear Sirs,—I beg to give you notice that the steamship *Katy* from Sulina is now in berth and ready to discharge.—Yours faithfully, E. G. LANGLEY." When handing such notice to the defendants the captain requested that the discharge should be commenced at once, but the defendants declined to do this. The discharge commenced about 1 p.m. on the same day, and was finished at 9 a.m. on Monday, the 9th April.

The usual working hours at Barrow are from 6.30 a.m. to 5 p.m., except Saturdays, when work ceases at 4 p.m., and the average daily quantity discharged by the *Katy* was 445 tons. When work was finished on the evening of Friday, the 6th April, there remained in the ship only some forty tons of cargo. The work was resumed on the following morning, but was stopped at 10 a.m. by the defendants, who declined to proceed with the work unless the plaintiffs would pay them the sum of 10*l.* if the discharge was completed that day.

Under these circumstances, the plaintiffs contended that the lay days expired on Saturday, the 7th April, whilst the defendants contended that the lay days did not expire until Monday, the 9th April, and that therefore there was no demurrage due from them.

T. E. Scrutton for the plaintiffs.—It is admitted that the vessel was discharging on parts of eight days. The defendants contend that the time is made up of seven periods of twenty-four hours; but it is submitted that in this charter-party it is clearly indicated that the days are to be taken as calendar days:

Nielsen v. *Wait*, 54 L. T. Rep. 344; 5 Asp. Mar. Law Cas. 553; 16 Q. B. Div. 67.

[The PRESIDENT.—In that case Lord Esher practically means that "running days" and "days" are the same. Lay days begin at a place where she is able to deliver.] The only English case on the point is *The Commercial Steamship Company* v. *Boulton* (33 L. T. Rep. 707; L. Rep. 10 Q. B. 346; 3 Asp. Mar. Law Cas. 111). There the jury found that the day on which the vessel was cleared about noon was a working day, and the court held that they could so find. *The Osseo* (*Shipping Gazette*, June 8, 1894) was a similar case to the present one, but was too complicated to report. [The PRESIDENT.—Barnes, J. and myself there decided that a working day could not be made up by taking parts of three or four days.]

Hough v. *Athga*, 6 Scotch Sess. Cas. 4th series, 961.

In *Allen* v. *Johnston* (19 Scotch Sess. Cas., 4th series, 364) Lord McLaren said: "When it is ascertained that the lay days have been exhausted, demurrage must, I think, be held to begin at the hour at which the lay days are exhausted, and the days of demurrage are reckoned as periods of twenty-four hours from that hour. Any surplus interval of time in excess of a number of full days is to be counted as an additional day. [The PRESIDENT.—Does part of twenty-four hours reckon as a day whether it starts at a particular hour or whether it is running?] It is open to the parties to agree as to the day being any period of twenty-four hours; but, unless they so agree, then it must be the ordinary calendar day.

T. G. Carver for the defendants.—This charter cannot be read to mean calendar days in every instance. Clause 12 says: "Lay days are to count from forty-eight hours after her arrival at a safe anchorage." The charter-party says that lay days shall commence at an hour which may be any hour. The intention must have been to contract for periods of twenty-four hours. It is unreasonable to contend that Saturday, when work was only carried on from 1 to 4 p.m., should be counted as a lay day:

Brown v. *Johnson*, 10 M. & W. 331.

In *The Commercial Steamship Company* v. *Boulton* (*ubi sup.*) the broken Tuesday was not claimed. He also referred to

Nelson v. *Dahl*, 41 L. T. Rep. 365; 4 Asp. Mar. Law Cas. 392; 6 App. Cas. 38.

Scrutton in reply.

(a) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

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Judgment was reserved, and delivered on the 30th July.

The PRESIDENT.—The questions which arise in this case are two: First, does the phrase "running days" in this charter-party mean calendar days or periods of twenty-four hours, beginning from the commencement of discharging? Secondly, if calendar days are intended, is Saturday, the 31st, to be included in the lay days? There does not seem to be any direct authority on the first of these questions, but it appears to me that it is only by the suggestion of inferences to be drawn from various parts of the charter-party that any doubt can be created. It is clear from the case of *Nielsen* v. *Wait* (*ubi sup.*) that "running days" means all days as opposed to "working days;" in fact, means "days." It cannot be disputed that the word "days," standing by itself, means calendar days, and, indeed, I think it would require a clear context to show it means periods of twenty-four hours, as, if a certain number of hours is intended, it is natural and ordinary to specify the time by hours. Is there anything, then, in this charter-party to show that the word days has not its natural meaning? It was argued on behalf of the defendants that clause 12 of the charter-party, providing that in a certain event lay days were to count from forty-eight hours after the arrival of the vessel, shows that the lay day must be reckoned from some point in the calendar day. This clause, however, hardly, I think, advances the question, because, apart from the consideration that the language of clauses 7 and 12 is different, it may be that all that is intended is, that the beginning of the lay day should be coincident either with the beginning of that calendar day in which the forty-eight hours end, or of the next calendar day, according as a part of a lay day is or is not considered to reckon as a whole day. Clause 9 C., providing that on all days on which lighters are unable to go outside the bar or harbour are not to count as lay days, appears to me consistent with either view, as also do clauses 2 and 3, which provide for orders to be given within twelve or twenty-four running hours of arrival, lay days, Sundays only excepted, to count, as in such cases the lay days begin to run twelve or twenty-four hours after arrival as they do in the ordinary cases from the time of arrival. But in these clauses it is to be observed that when running hours are intended running hours are specified. On the whole, I can see nothing in the charter-party to compel us to assign to "running days" in clause 7 anything but the natural interpretation of calendar days. The balance of authority, I think, confirms what I take to be the natural sense of the words. The inference to be drawn from the case of *Commercial Steamship Company* v. *Boulton* (*ubi sup.*) on this point is not quite clear, but I think that it shows those days were understood to be calendar days, because the demurrage days were not reckoned as running from 5 p.m. on the Tuesday when the ship got into dock, but as commencing on the following morning; and the argument on the successful side in that case was that, though demurrage began to run from the time the ship was in dock, that is, 5 p.m. on Tuesday, the demurrage days began to run on the morning of Wednesday. This certainly was the view of the above case taken by the Court of Session in the case of *Hough* v. *Athga* (*ubi sup.*). In that case the Lord Ordinary considered that the *Commercial Steamship Company* case decided that the running days were to be counted by days and not by periods of twenty-four hours; and the same view was afterwards expressed by the Court of Session, the Lord President saying that he saw no distinction between lay days and days of demurrage in the matter of counting. A later case in the Court of Session, *Allan* v. *Johnstone* (*ubi sup.*), appears to me to have been in harmony with the above decision. I think that the judgments in that case, except perhaps some qualified expressions which fell from Lord Maclaren, proceed on the principle that, unless the words in the charter-party prescribing a certain number of running days are overridden, what must be taken to be intended are calendar days. In that particular case the learned judges thought that these words in the charter-party were controlled by an indorsement on a bill of lading, and by a special arrangement stated in a letter of the shipowner's agents. The words of Lord Kinnear are very explicit: "I take it that according to the general rule laying days mean whole days, but if the parties to a contract are so minded, it is quite within their power to stipulate that a day shall be divisible; and the question is whether they have so stipulated in the present case." It appears to me clear, therefore, that "running days" in this case mean calendar days, and, therefore, the case turns on the question whether Saturday the 31st is to be reckoned as a lay day. The discharge commenced in fact at 1 p.m., and at Barrow work usually commences on Saturday at 6.30 a.m. and ceases at 4 p.m. I do not think, as was contended before me, that the decision in the *Commercial Steamship Company's* case, as reported in the Law Reports, shows that for this purpose part of a day can be considered a whole day; indeed, I think the reverse inference is to be drawn from it. It was there held that, when a ship is on demurrage, a day broken into by the conclusion of her loading must be paid for as a demurrage day. The reason for this is, that the shipowner is entitled to the use of his ship for the whole of that day, and, as days cannot be split up, if he is deprived of the use of his ship for part of the day the whole must be paid for. But a charterer is entitled to the whole of each of the specified number of lay days for his loading and unloading if he needs it. Why is he to take a part, perhaps a small part, of a day for the whole? It appears to me that the same reasoning which gives the shipowner as against the charterer the whole of a demurrage day, should give the charterer as against the shipowner the whole of a lay day. I am strengthened in the belief that the above may well have been the view of the learned judges who decided the case of the *Commercial Steamship Company* v. *Boulton*, as reported in the Law Reports, by observing that the same tribunal had at the same time before them the case of the ship *Boston*, the decision in which is reported in 3 Asp. Maritime Law Cases, 111, though not in the Law Reports. Except that the case of *The Boston* is one of loading, and the present one of unloading, the question in that case was the same as in this. The *Boston* was cleared at Muhlgraben about noon on Monday, April 20, but was not ready to load till about 4 p.m. The cargo, which was timber, was floated down from Riga in rafts, and some of it came alongside on Monday, April 20, and was taken on board, part on that day after 4 p.m., and the rest the next morning. The

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question whether Monday, April 20, was a working day was left to the jury at the trial, who found that it was. When the matter came before the court the presiding judge said: "As to the *Boston* a more difficult question arises whether a working day can be counted when only part of a day has been used. I agree that the charterers are entitled to a fair working day, but if for the convenience of all parties a portion of the day is used it may be counted." This is, I think, tantamount to saying that as a rule part of a lay day cannot be reckoned as a lay day, but that it may be a question of fact in each case whether the parties have not expressly, or, by their conduct, impliedly, agreed that it shall be so treated. There remains, therefore, in the case the question of fact whether, as stated by Mellor, J., in the case of *The Boston*, the day in question was, by assent of the parties, treated as a lay, in that case a loading, day. I have said that I can see no distinction in law between days occupied in loading and unloading on the question whether a part is to be reckoned as the whole. But on the question of fact whether the parties agreed to treat the day as a lay day, there may be a great deal of difference between loading and unloading. In the particular case of *The Boston* the cargo was timber sent down the river, and Lush, J. observed that he could not suppose that the freighters intended it to remain in the river. In this case I do not see why the charterers should have desired the unloading to commence on Saturday, and in fact they did not, for they apparently declined to take part in the discharge from 10.30 to 1. I think that the three hours of Saturday occupied in discharging were so occupied by the wish and for the advantage of the shipowners, who probably thought that it would become practicable to get the ship discharged and free a considerable time before the expiration of the lay days. Indeed it so turned out, and, as the charter-party does not provide for payment of despatch money, the shipowner would have been clearly the gainer had the charterers not declined to concede this benefit for nothing. I come, therefore, to the conclusion on the facts that both parties did not assent to treating the Saturday as a lay day. The result is, that the lay days did not expire till Monday, April 9, and there must be judgment for the defendants.

Solicitors: *Botterell* and *Roche*; *Field, Roscoe*, and *Co.*, for *Batesons, Warr*, and *Wimshurst*, Liverpool.

Supreme Court of Judicature.

COURT OF APPEAL.

Thursday, June 7.

(Before LINDLEY, LOPES, and DAVEY, L.JJ.)

DRIELSMA *v.* MANIFOLD. (*a*)

APPEAL FROM THE COUNTY PALATINE COURT OF LANCASTER.

Solicitor and client — Costs — Scale charges — Auctioneer paid fixed sum for taking bids — Amount paid by client — Solicitor otherwise conducting sale — Right to scale charge — General Order under Solicitors' Remuneration Act 1881, sect. 4, sched. I., part 1, r. 11.

A solicitor is not entitled to the scale fee for conducting a sale by auction if the client is charged with a fixed fee on each lot, paid to the auctioneer for merely attending in the auction-room and receiving the bids, although the solicitor has done the whole of the other work in connection with the sale.

THIS was an appeal from the Vice-Chancellor of the Palatine Court of Lancaster.

The question was whether a vendor's solicitors who had done all the work in connection with the sale of some property by public auction, except actually taking the bids in the auction-room, were entitled to remuneration according to the scale in schedule I., part 1, of the General Order made in pursuance of the Solicitors' Remuneration Act 1881, the client having paid the auctioneer's fees for taking the bids.

Sect. 4 of the General Order provides that:

The remuneration prescribed by schedule I. to this Order is not to include stamps, counsel's fees, auctioneer's or valuer's charges, travelling or hotel expenses. . . or other disbursements reasonably and properly paid.

Schedule I., part 1, is headed "Scale of Charges on Sales, Purchases, and Mortgages, and Rules applicable thereto," and a certain percentage on the price is fixed for "vendor's solicitor for negotiating a sale of property by public auction, including the conditions of sale."

Then rule 11 of the rules thereto provides:

The scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer.

In this case the Palatine Court made an order in an action directing certain property in various parts of Liverpool to be sold, and the solicitors of the plaintiff in the action had the conduct of the sale.

The practice in Liverpool which has prevailed for many years in sales by auction, and which was followed in the present case, is for the solicitor having the conduct of the sale to do all the work of and incident thereto, save and except the mere taking of bids in the auction-room, which can only be done by a duly licensed auctioneer, for which the auctioneer is paid a fixed fee of two guineas for each lot sold and a fee of one guinea for each lot not sold.

On the sale in question ten lots were offered, three were sold and seven were unsold. The auctioneer merely attended the auction and received the bids, and was accordingly paid the sum of 2*l.* 2*s.* for each of the three lots sold, viz., 6*l.* 6*s.* and the sum of 1*l.* 1*s.* per lot for the seven lots unsold, viz., 7*l.* 7*s.*, making together the sum of 13*l.* 13*s.* The three lots sold fetched 1070*l.* and the reserve price of the seven lots unsold amounted to 16,205*l.*

Among the items in the appellants' bill of costs were the following:

To conducting sale by auction, including conditions of sale on lots 2, 5, and 6, sold, aggregate purchase money 1070*l.*, 10*l.* 10*s.*

Ditto on lots 1, 3, 4, 7, 8, 9, and 10, withdrawn, aggregate of valuation for reserve price 16,205*l.*, 22*l.* 13*s.* 9*d.*

There was also a charge for the 13*l.* 13*s.* paid to the auctioneer.

(*a*) Reported by W. C. BISS, Esq., Barrister-at-Law.

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The taxing master allowed the sum paid to the auctioneer, but disallowed the two sums of 10*l.* 10*s.* and 22*l.* 13*s.* 9*d.* on the ground that the sum paid to the auctioneer was a "commission" within rule 11, and directed the solicitors in substitution therefor to bring in a detailed bill under schedule 2.

The Vice-Chancellor having upheld the taxing master's decision, the solicitors appealed.

During the hearing of the appeal the Court sent for and consulted Mr. Ryland, in order to obtain information as to the practice in the taxing office on the point.

Cozens-Hardy, Q.C. and *R. F. Norton* for the appellants.—The appellants have done all the work connected with this sale except actually taking the bids at the auction, and that can only be legally done by a licensed auctioneer. The amount paid to the auctioneer was not a "commission," it was a fixed "charge" of 2*l.* 2*s.* for each lot put up and sold, and 1*l.* 1*s.* for each lot not sold, and therefore under sect. 4 of the Order under the Solicitors' Remuneration Act 1881, the amount is payable by the client in addition to the scale fee. Rule 11 in part 1 of schedule I. to the General Order was only intended to apply where the auctioneer does all the preliminary work, such as advertising and lotting. It was not intended to override clause 4 of the Order, and so prevent the solicitor obtaining the scale fee whenever an auctioneer was employed. In the cases where the scale fee has been disallowed, it was held that the solicitor did not do all the work:

Re Wilson, 53 L. T. Rep. 406; 29 Ch. Div. 790;
Re Sykes; Sykes v. *Sykes*, 56 L. T. Rep. 425;
Wood v. *Calvert*, 55 L. T. Rep. 53.

The case of *Re Peace and Ellis* (57 L. T. Rep. 753) was wrongly decided, and should now be reversed. The judgment of Cotton, L.J. in *Re Merchant Taylors' Company* (52 L. T. Rep. 775, 780; 30 Ch. Div. 28, 37) shows that the mere fact that an auctioneer is employed, does not deprive the solicitor of his right to the scale fee. The amount paid to the auctioneer was not a lump sum for "commission":

Parker v. *Blenkhorn*, 59 L. T. Rep. 906; 14 App. Cas. 1;
Burd v. *Burd*, 60 L. T. Rep. 228; 40 Ch. Div. 628.

In *Re MacGowan*; *MacGowan* v. *Murray* (63 L. T. Rep. 793, 796; (1891) 1 Ch. 105, 117, 119), the scale fee was allowed, though fees were paid to two valuers for reporting as to the value of the property. In that case Bowen, L.J. said: "A commission means a payment on a particular scale paid to an agent for agency work." Fry, L.J. said the valuers "were not employed in this case as agents, and therefore they could earn no commission. . . What . . . is payable to them are fees, in the one case for inspecting and making an affidavit as to the value of the property, and in the other for making an affidavit with regard to the value of the property without inspecting. They are not commissions." The payments made here to the auctioneer were fees.

T. R. Hughes for the respondent.—The amount paid to the auctioneer is "commission," and none the less so because it is a lump sum:

Parker v. *Blenkhorn* (*ubi sup.*);
Burd v. *Burd* (*ubi sup.*).

A commission is not necessarily a percentage, it may be a payment for each piece of work done. *Peace and Ellis* (*ubi sup.*) is correct, and is in the respondent's favour. Sect. 4 of the Order is perfectly general, and is subject therefore to the specific rule 11. The important part of that rule is not the word "commission," but "paid by the client," and a solicitor is not entitled to the scale fee if the client pays anything to the auctioneer.

Cozens-Hardy in reply.

Lindley, L.J.—This case raises a question of difficulty and of considerable importance. The question is whether a solicitor who has conducted a sale by auction, and who has paid an auctioneer, according to the custom which prevails in the north of England, a fee or sum of money for taking the biddings—for the actual work done in the auction-room—is entitled to be paid according to the scale, or is to be paid according to the pre-existing method of payment, by what is called a *quantum meruit*. Of course he is entitled to be paid for his services one way or the other. He wishes to be paid according to the scale, which, I suppose, is more beneficial to him; but it has been contended that he is not entitled to be paid according to the scale for what he has done. The 4th section of the General Order, made in pursuance of the Solicitors' Remuneration Act 1881, provides that "The remuneration prescribed by schedule I. to this Order" (I may describe that shortly as the remuneration by scale) "is not to include stamps, counsel's fees, auctioneer's or valuer's charges," and other things to which I need not refer. It would appear, therefore, that though the solicitor is remunerated according to the scale, there may be some auctioneers' charges which he may charge against the client. It is very difficult to construe sect. 4 without coming to the conclusion that there may be some. Now when we look at the remuneration prescribed by schedule I., part 1, we see how the difficulty in the case arises. Schedule I., part 1, runs thus: "Scale of charges on sales, &c., and rules applicable thereto. Vendor's solicitor for conducting a sale of property by public auction including the conditions of sale" (that is the case we have to deal with), and then the percentage is set out. Stopping here, there would be no difficulty in working that with sect. 4. But the difficulty arises when we come to the rules applicable to the scale, rule 11 of which runs thus: "The scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer." The difficulty is, what is the difference between a "commission," in rule 11, and a "charge," within sect. 4 of the General Order? I confess I cannot see that there is any difference. An auctioneer who is employed by a solicitor to sell is certainly employed as agent. The auctioneer does not act as principal, he acts as agent; and if you take the remuneration of the agent to be what is generally meant by the word "commission," everything paid to the auctioneer for his services in the course of his agency comes within the expression "commission," and I cannot see what the framers of the General Order and of the schedule and rules meant, if they really intended to draw a distinction between a "charge" in sect. 4 of the General Order and a "commission" in rule 11. If they did not intend to draw any distinction, the case would stand thus: that the two words mean the same

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thing, and the result would then be comparatively easy, for then there is a general enactment or a general rule applying to ordinary cases, and also a specific regulation applying specifically to sales by auction; and viewing it thus, I take it that the specific regulation must prevail over the general. That was the view adopted in the Court of Appeal in *Re Wilson* (*ubi sup.*), and which has prevailed ever since. In the case of *Re Peace and Ellis* (*ubi sup.*), North, J. decided the very point, but it has now been contended before us that that case was wrongly decided. I think there is much weight in the argument of Mr. Hughes that the real object of rule 11 is not to draw a distinction between "charge" and "commission," but between what is to be paid by the client and what is not, and that if any of the expenses incurred on account of an auctioneer are charged to the client the scale fee is not applicable, and the solicitor is be to paid upon the *quantum meruit* method for the work he actually does; but, if the sums paid to the auctioneer are not charged to the client, then the scale fee applies. I think that is what the framers of the rule intended rather than (as suggested by Mr. Cozens-Hardy) to draw any contrast between "charge" and "commission." If the client is to be charged with anything paid to the auctioneer —call it what you will, "charge," "commission," or anything else—then the scale fee is not applicable, and the other method of remuneration is to be applied. We have been informed that that is the view adopted ever since 1881 in the taxing office, and all over the country. It is true that this is the first case in which the question has come for actual decision before the Court of Appeal. I agree that sect. 4 of the General Order gives rise to some difficulty, but there is no case which conflicts with the view I have now indicated, and the cases I have mentioned are clear authorities, so far as they go, in favour of that view. The case of *MacGowan* v. *Murray* (*ubi sup.*) is not at all opposed to it, because there the fee which was allowed in addition to the scale fee was something which did not come within the expression "negotiating a sale of property;" *i.e.*, the client was not paying the solicitor a scale fee for negotiating a sale of property and paying another fee for work which came within the description "negotiating a sale." He was paying a fee to a valuer, who certified to the court that the price arrived at by the negotiation was a fit and proper price for the court to accept. That is quite consistent with our present decision. Here the fee charged or sum paid to the auctioneer is clearly comprised in the remuneration for conducting the sale, as of course one of the important parts of conducting a sale by auction is taking the biddings and conducting what goes on in the auction-room. I think we ought not to disturb the practice which has prevailed since 1881, and giving the General Order and the rule the best consideration I can, I think the view I have taken is the correct one. The appeal must be dismissed, and with costs.

Lopes, L.J.—I am of the same opinion. It is extremely difficult to reconcile sect. 4 of the General Order with rule 11 and schedule I. The only way I can do it is the way which has been suggested by Lindley, L.J., and that is in holding that the word "commission," as used in rule 11, has not any specific meaning, but that it is to be read in a general way, and means that the scale for conducting a sale by auction shall apply only to cases where no payment in respect of the conducting of that sale is paid by the client to the auctioneer. In coming to that conclusion, I was struck by an argument that was addressed to us by Mr. Hughes. He said, and I think with reason, that if any other construction is put upon this section of the Order and this rule, in effect the client would be paying twice over, because the remuneration in the scale, I take it, was intended to include all expenses in respect of the conduct of the sale, and therefore would include that which is a part of the conducting of the sale, namely, the auctioneer's charges. If, on the other hand, that was to be a payment outside the remuneration in the scale, the client would be paying it in the scale fee, and again paying it in an independent payment. I cannot think that was intended. That view has been taken in the matter in the cases which have come before the court for some years past, and I think we should not be right in departing from it.

Davey, L.J.—I am of the same opinion. If I could see my way to holding that commission in rule 11 means the commission which is usually paid I believe in London, and in the south of England, to an auctioneer, and comprises not only his remuneration for actually taking the bids, but also for doing other work such as preparing the particulars, advertising, getting posters printed, and things of that kind, which I believe in the south of England is usually done by the auctioneer, and if I could hold that a fee paid to the auctioneer for merely taking the bids (which we are told is the practice in the north of England) was not a "commission," I would so hold. In other words, if I could construe this as meaning that where the auctioneer does part of the work which is solicitor's work, and included in the scale fee for conducting a sale by a solicitor, in that case where such a commission was paid the scale fee was not to apply, because part of the work for which the scale fee is given had not been done by the solicitor, but that it would apply where nothing more than a fee for taking the bids was paid to the auctioneer, I would do so, for I think that would be a reasonable result, and might well express the intention of those who framed the rule. But, on consideration, I cannot see my way so to construe "commission." Commission is *primâ facie* the payment made to an agent for agency usually according to a scale—it may be, but not necessarily, an *ad valorem* scale. It is the most general word that can be used to describe the remuneration paid to an agent for agency work other than a salary. I cannot therefore see how logically or consistently with the use of language we can restrict the word "commission" in rule 11 so as not to apply to the fee payable to an auctioneer for taking the biddings at a fixed agreed rate of so much per lot. I think nobody could properly say that the auctioneer in such a case was not an agent, or that the sum paid per lot—2*l.* 2*s.* if the lot is sold, and 1*l.* 1*s.* if it is not sold—was not a commission, and that being so I am of opinion that the fees which were paid in this case to the auctioneer were a commission, and as they have been charged to the client in addition to the scale fee in the remuneration claimed by the solicitor, it appears to me that *primâ facie*

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the rule applies, and that the solicitor is not entitled to the scale fee, although, according to the decision of the House of Lords in *Parker* v. *Blenkhorn* (*ubi sup.*), he will be entitled to charge a *quantum meruit* for his services. And in coming to this conclusion I have been much struck by the observations addressed to us by counsel for the respondent, who said, "If the argument put forward on behalf of the appellant is correct, then in the south of England where the auctioneer's commission comprises other things than taking the bids, the client will pay only the scale fee, or if he pays the auctioneer's commission, the solicitor will only have a *quantum meruit* for what he really does; but, on the other hand, in the north of England, the solicitor will get his full scale fee, and the client will also have to pay the auctioneer's remuneration for taking the bids." I can see no escape from that. This is a rule made by skilled persons who were no doubt well acquainted with the practice both in the north of England as well as in the south, and it must be a rule which is applicable to every part of the country. And the substance of the rule appears to me to be this, that the scale fee is intended to include all the expenses of conducting the sale including the auctioneer's commission, understanding by the auctioneer's commission the remuneration which is paid to the auctioneer, whether for the mere purpose of taking the bids, or whether for doing other work as well. But then it is said that this is inconsistent with sect. 4 of the General Order. No doubt there is a certain inconsistency, and I do not attempt to explain it. Wiser persons than I have attempted to do so, but have not altogether succeeded. But, according to the ordinary rule of construction, where there is a specific rule, notwithstanding that there is a general rule to which the specific rule seems to be contrary, if you cannot reconcile the two, then you must apply the specific rule. It is quite possible that sect. 4 of the General Order was drawn in its present form before the scale and the rules applicable to the scale were settled, and it may be that, by an oversight or *per incuriam*, those words "auctioneer's charges" were omitted; but it may be, as Mr. Hughes pointed out, that sect. 4 of the General Order is applicable to every kind of transaction which is dealt with in the scale, and it is possible that there may be a case, although one cannot for the moment think of it, in which auctioneer's charges, not possibly for selling by auction, might be charged even in a mortgage transaction, or some other transaction of that kind. At any rate, sect. 4 is a general provision applicable to all kinds of transactions dealt with in the schedule, whereas rule 11 is a specific provision which, according to the construction I have put upon it, is directly applicable to the present case. I do not think that we ought to refuse to apply rule 11 to the case to which it is directly applicable merely because there is some difficulty in reconciling it with sect. 4 of the General Order.

Solicitors: *Burton, Yeates,* and *Hart,* for *Tyrer, Kenion,* and *Co.,* Liverpool.

May 29, 30, *and* 31.

(Before Lord Esher, M.R., Kay and Smith, L.JJ.)

The Ecclesiastical Commissioners for England v. Parr and others. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Copyhold — Admittance — Implied admittance— Receipt of quit rents with knowledge of facts— Seizure quousque*—Proclamations or notice— Statutes of Limitation* (3 *&* 4 *Will.* 4, *c.* 27; 37 *&* 38 *Vict. c.* 57).

The acceptance of quit rents by the steward or lord of a manor in respect of copyholds from a person entitled to be admitted is an implied admittance of such person if the steward or lord have knowledge of the facts, and if such person afterwards refuses to come in and be admitted after notice the lord cannot seize quousque.

The right of the lord of a manor to enter and seize quousque *first accrues when the tenant refuses to come in and be admitted after proclamations or notice, and the Statutes of Limitation begin to run from the time of such refusal.*

Appeal of the plaintiffs from the judgment of Wright, J., at the trial, without a jury, in Middlesex.

This action was brought by the plaintiffs, as lords of the manor of Mucking, in Essex, to recover possession of certain copyhold tenements of the manor, upon the ground that they had a right to enter and seize *quousque*, because the defendants refused to come in and be admitted as tenants.

In 1868 the father of the defendant Hicks was tenant upon the court-rolls of part of the lands, known as Sutton's Farm; he died in that year, and was succeeded by the defendant Hicks, his heir-at-law, as trustee for one Cox.

In 1870 Cox, who was the tenant upon the court-rolls of the rest of the lands, known as Mucking Hall Farm, died, having devised to the defendants Saunders and Hicks all his estate and interest in Sutton's Farm and Mucking Hall Farm.

From 1875 the quit rents were regularly paid by Saunders and Hicks, in respect of the two farms, to the collector of the plaintiffs, under such circumstances that the court was of opinion that the steward of the manor received such quit rents with knowledge of the death of Hicks senior and of Cox, and knowing that Saunders and Hicks were paying the quit rents as being the persons entitled to the two copyhold farms.

After the death of Hicks senior and of Cox no person was admitted as tenant upon the court rolls of either farm.

In 1893 the steward of the manor gave notice in writing to Saunders and Hicks to come in and be admitted as tenants. They refused to come in and be admitted, and thereupon this action was brought against them, and their tenants, the defendants Parr and Clark, claiming possession upon a forfeiture *quousque*.

At the trial before Wright, J., without a jury, in Middlesex, the learned judge gave judgment in favour of the defendants (70 L. T. Rep. 170).

The plaintiffs appealed.

Bosanquet, Q.C. and *Archibald Brown* for the appellants.—The plaintiffs, as lords of the manor,

(a) Reported by J. H. Williams, Esq., Barrister-at-Law.

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are entitled to seize *quousque*. They had a right to call upon the defendants to come in and be admitted as tenants upon the court-rolls, and to pay the fines due upon admittance, and upon their default the plaintiffs had a right to seize *quousque*. The lord has no right to seize *quousque* until the tenant has refused to come in and be admitted after notice or proclamations, and no right of entry or of action accrues to the lord until default after notice or proclamations. It can make no difference whether the lord does or does not know that the tenant whose name is upon the court rolls has died. By the general law of copyholds, a tenant is bound to come in and be admitted as tenant upon the court-rolls, and do fealty and homage; and when that has been done he is liable to pay the accustomed fine:

Roe v. *Loveless*, 2 B. & Ald. 453.

The defendants rely upon the case of *Froswell* v. *Welch* (Godb. 268; 1 Cro. Jac. 403; 1 Roll. Rep. 415; 3 Bulstr. 214). The passage upon which they rely is an *obiter dictum* at the end of the report in Godbolt. If that dictum is correct it can only apply to a case where a surrender has been presented, and the surrenderee accepted as tenant, though no formal admittance has been made. In that case the lord of the manor was not a party, and the decision can have been only that the tenant had a sufficient title as against a third party. There is no case in which it has been held that an implied admittance is good as against the lord, or that the lord could claim a fine upon an implied admittance:

North v. *Earl of Strafford*, 3 P. Wms. 148.

The lord cannot assess the fine until he knows who is coming in to be admitted; there may be one or more tenants. After the death of the tenant upon the rolls, in this case no person or persons came forward to be admitted as devisee:

Wills Act 1836 (7 Will. 4 & 1 Vict., c. 26), ss. 3, 5

The only evidence of the title of a copyholder as against the lord of the manor, is the copy of the court rolls, except secondary evidence of that which is upon the court rolls. The lord is only concerned with the tenant whose name is upon the court rolls, and a copyhold tenant has no title until admittance upon the court rolls:

Holdfast d. Woollams v. *Clapham*, 1 T. R. 600; *Brown* v. *Dyer*, 11 Mod. 73.

[SMITH, L.J. referred to *Reg* v. *Garland*, L. Rep. 5 Q. B. 269; *Garland* v. *Mead*, L. Rep. 6 Q. B. 441.] At any rate only an admittance by the lord personally may be implied; admittance by his steward must be express;

Rawlinson v. *Green*, 3 Bulst. 237; 2 Poph. 127 Bridg. 81.

When the lord accepts from the steward quit rent, which the steward has received, he does not ratify all the, to him, unknown consequences which would flow from a receipt and ratification. There is no evidence here of any knowledge by the plaintiffs of what the steward did.

Channell, Q.C. and *Godefroi* for the respondents.—This action depends on the notice which is set out at length in paragraph 7 of the statement of claim. That notice states all the facts that are necessary to create an implied admittance. Anything by which the lord's assent is shown to the person, who, in fact, is in possession of the copyhold estate, being entitled to hold it, is enough to create an implied admittance. The mere acceptance of rent is not of itself an admittance, but if the lord accepts it from a person, as being the copyholder, that amounts to an admittance because the lord's assent is thereby given to the fact of the person holding the copyhold estate at the will of the lord. Presentments, admittances, &c., are all unnecessary if the holder of the land has been allowed possession by the will of the lord. That is the doctrine which was supposed to be laid down in *Froswell* v. *Welch* (Godb. 268; 3 Bulst. 214; 1 Cro. Jac. 403) where it was said that, "if he had laid the payment and acceptance of the rent by the lord of him, as of his copyholder, this would then have amounted unto a good admittance of him as a copyholder." That dictum has been cited in all the text-books, and has been admitted to be law, and has been cited as law ever since, and it is submitted that the court ought to follow it now:

Gilbert on Tenures, pp. 281, 282:
Watkins on Copyhold, pp. 268, 269.

Coventry in his note, at page 270 in his edition of Watkins on Copyhold, says of *Rawlinson* v. *Green* (*ubi sup.*) "that the case ended in a compromise, and so nothing certain can be collected from it." The right of the lord of the manor is to have possession of the copyhold tenement when there is no tenant. Before exercising those rights he must do certain things, but the doing of those things is not part of his right of action to recover possession of the land, or of his right of entry, within the meaning of the Real Property Limitation Acts. The real right of action or right of entry arises from the fact of there being no tenant of the copyhold tenement. The time within which the action must be brought, or the entry made, runs therefore from the death of the tenant upon the court-rolls. In *Re Lidiard* (61 L. T. Rep. 322; 42 Ch. Div. 254) Kay, J. expressed an opinion that the lord must make proclamations within a reasonable time after the death of the tenant, and that his right of entry would be barred by the Statutes of Limitation after the expiration of twelve years from the time when the proclamations ought to have been made. In *Doe d. Tarrant* v. *Hellier* (3 T. R. 162), Lord Kenyon, C.J. and Buller, J. thought that the lord's right of entry for a forfeiture would be barred by the statute.

Bosanquet, Q.C. in reply.—The substance of the decision in *Doe d. Bover* v. *Trueman* (1 B. & Ad. 736) is that there is no right of entry or right of action until three proclamations have been made or notice given to come in and be admitted. These tenants never could have compelled the steward to enter their admittance upon the court rolls because the necessary facts were not known to him or given to him by these tenants.

Lord ESHER, M.R.—In this case the plaintiffs are the lords of the manor, and they have brought an action of ejectment against the defendants upon the ground that they were properly called upon to come in and be admitted tenants of the manor, and refused to do so, and that thereupon the right accrued to the plaintiffs to bring this action to take possession of the copyhold tenements until the defendants do come in to be admitted. The defendants answer that they are in possession of the copyhold tenements, and have

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not refused to come in and be admitted because they have already been admitted. Now, it cannot be denied that the defendants have not been admitted to be tenants of the manor by admission in court, and according to all the formalities which in old times were necessary; but the defendants say that they have been admitted by a kind of admittance which is recognised and acknowledged by law. The defendants are not upon the court rolls as tenants, and therefore the plaintiffs make out a *primâ facie* case. The defendants meet that case by saying that they can show that, although they are not tenants upon the court rolls, they have been admitted as tenants of the manor, not only as against other people, but also as against the lord of the manor. The first question, then, is whether the law recognises such an admittance. The admittance alleged is an admittance made within the ambit of the manor, though not made in court. The defendants say that such things have happened as the law declares to be an admittance by necessary implication, and that those things are as follows: that they were the persons entitled to the copyhold tenements, and to have possession of them; that they took possession and paid the quit rents which they would have been obliged to pay if they had been in the strictest manner admitted; that they paid them as quit rents, and paid them to the authorised agent of the steward and of the lord of the manor; that they have paid quit rents, and that the steward of the manor knew that they were paying quit rents as such; and that if the steward or the lord of the manor knew that they, being in possession of the copyhold tenements, were paying the quit rents, the law implies conclusively that, as against the lord and all other persons, they are to be treated as tenants who have been admitted. Now, this question must be decided according to the authorities, and our knowledge of what has taken place for 200 years and more. It is said that it has been decided by judicial authority that under such circumstances the law will raise that implication of admittance, and that this was decided in *Froswell* v. *Welch* (*ubi sup.*). If that case stood alone, as it appears in the reports, that conclusion might be doubted; but from that time until now in all the text-books that case has been recognised and acted upon as being a decision to that effect, and in subsequent judgments has been so treated. Now, with regard to the authority of text-books, they are not of any binding authority like the decisions of superior or co-ordinate courts; they are only guiding authorities. Some text-books have long been treated as guiding authorities of great power. The text-books Gilbert on Tenures, Watkins on Copyhold, and Scriven on Copyholds have certainly been treated by all lawyers as books of remarkable guiding authority. It would not, therefore, be proper for the court to deal with the law of copyholds without being guided by those authorities. According to those books, for 200 years or more it has been an admitted rule of copyhold law that there can be a valid admittance of a proper person to be a copyhold tenant of a manor, although that which is done is done out of court, and although the name of the tenant does not in fact appear upon the court rolls as an admitted tenant. The passages which have been read from Gilbert on Tenures, Watkins on Copyhold, and Scriven on Copyholds are decisive upon that point. I think that the case is most clearly stated in Gilbert on Tenures, at p. 364, as follows: "But, however, there are cases of admittances by construction and implication, without any express admittance; and as the last case is reported by Rolle, it is said that the acceptance of rent out of court by the *cestui que use* (the lord knowing of the surrender) is an admittance in law." There are passages in Watkins and in Scriven to the like effect. We ought therefore, in deciding this case, to be guided by what those writers say as to the admitted law and practice in respect of all manors, and to determine that there can be an admittance in law made out of court. I think that before that rule of law can be applied certain things must be shown, and that the persons who rely upon an implied admittance must prove the necessary facts. Those facts are that they had a right to be admitted, and that they did things which they could be obliged to do only if they were admitted tenants, and that those things must have been known to the lord or his steward to be the things which would be done if they were admitted tenants. The principal thing is the payment of quit rents. But mere proof that they have paid quit rents, and no more, is not sufficient. They must show that the payments were known to be payments of quit rents by them as if they were tenants of the manor. When all that is proved, then the implication of law as to admittance arises. Now, is it necessary that such circumstances should be known to the lord of the manor personally? If the circumstances are known to the steward but not to the lord of the manor, will the implication of law arise? That depends upon the authority of the steward in respect of such admittance. It might be said that the steward has only authority to admit a tenant if everything is done in court, when the lord of the manor is not present. Now, has not the steward authority to admit a proper person as complete tenant of the manor? If he has, has he not authority to do that in any ordinary and accustomed manner? I should say that he has such authority. If so, for two hundred years and more one mode of admitting a tenant of a manor has been this mode of implied admittance, an admittance implied from such circumstances as I have already described. I am of opinion that the steward has authority to admit in that way. When the steward does so admit, he must do it in the same way as the lord of the manor himself would do it, and therefore the steward must have the same knowledge as the lord must have had. The steward, then, must know that payments of quit rents, as such, are made by the persons who are to be treated as admitted tenants, and he must know substantially who those persons are, though he need not know them personally. That being the law, the question then arises whether the facts of this case bring it within that rule of law. It is clear that the persons who have been called upon to come in and be admitted were entitled to be admitted ever since 1872. Did these persons pay the rents for the land in question? They did. Did they pay the rents as quit rents? It is equally clear that they did so. The intention of those tenants is shown, by the payment of the quit rents by them, that they did so as tenants of the manor. Then comes the question whether there was sufficient knowledge by the lord or his

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steward that these rents were paid as quit rents by tenants of the manor. If the lord or his steward thought that the payments were made by other people, then there was not sufficient knowledge. Upon that matter there is evidence upon both sides. The name of the predecessor was upon the court-rolls as tenant. If the steward knew that the person whose name was on the court rolls was dead, then he would know that the persons paying were paying quit rents as tenants. Did the steward know that the predecessor was dead; and, if so, when did he know it? There was evidence that the steward did know, and the judge at the trial had a right to draw a reasonable inference of fact. Upon the facts I think that the proper inference is that the steward did know. I am of opinion, therefore, that all the circumstances necessary to give rise to the legal implication have been proved, and that these persons were admitted as tenants of the manor in law, and were right in saying that the lord of the manor cannot maintain this action of ejectment against them for not coming in to be admitted, because they had already been admitted. Another defence has been raised, that the lord of the manor is barred by the Statute of Limitations. I think that we ought to decide that point as if it were the only point raised, and as if this action could be maintained if the plaintiff were not barred by the statute. Now, the foundation of the Real Property Limitation Act 1874 (37 & 38 Vict. c. 57) is the enactment in sect. 1 that "after the commencement of this Act no person shall make an entry or distress, or bring an action to recover any land or rent, but within twelve years next after the right to make such entry or distress, or to bring such action, shall have first accrued." This is an action to recover possession of land for a limited purpose, and is therefore to that extent within this Statute of Limitations, and it has been so held. Then the question arises whether the time within which this action must be brought has elapsed. When had the plaintiff a right to make an entry upon this land, or to bring an action to recover possession of this land? Had the lord of the manor a right to make an entry or bring an action immediately upon the death of the tenant, or within a reasonable time after, or not until he had given notice to the successor to come in and be admitted, or had made three proclamations? I think that he had no such right until after notice or proclamations. If the notice or proclamations are mere procedure, and the lord had a right of entry before notice or proclamations, and those things were merely proceedings to enforce a right of entry, I would say that the statute ran from the time the right of entry accrued, and not from the time when such proceedings were taken. The question, however, is whether, according to the law relating to copyholds, there is a right of entry upon the decease of the tenant, and the non-admittance of his successor, that is, a right in the lord of the manor to enter and take possession until a tenant comes in to be admitted. The law upon this point seems to me to be most fully considered in *Doe d. Bover* v. *Trueman* (1 B. & Ad. 736). Now, does that case decide that these things are more than mere procedure, and that the right of entry does not accrue until those proceedings have been taken? In that case Bayley, J. says: "The next question is, whether three proclamations were necessary to entitle the lessor of the plaintiff to seize the copyhold? When a copyholder dies, it appears from all the authorities that notices should be given that the heir is to come in and be admitted. There is no case or dictum to show that the mere neglect to appear at the first court after the death of the copyholder will entitle the lord to seize. Indeed, such a right would be contrary to that rule of law which says that the heir may maintain an ejectment without admittance. Such a right in the heir has never been limited to ejectment brought before the first court. But if the lord could enter after the first court, without more being done, that would show the legal title to be in him; whereas, by the generally received opinion as to the right of the heir, the legal estate is in the latter." Upon that ground the lord of the manor was there defeated, and I take that to be a clear decision upon the point. Later in his judgment, Bayley, J. relies on certain authorities, and at p. 750, says: "In Jacobs Court Keeper, p. 13, it is said, upon the descent of any copyhold of inheritance, the heir is tied upon three several proclamations made at three several courts to come in and be admitted to his copyhold. If he faileth to come this failure works a forfeiture." That is equivalent to saying that there is no forfeiture unless three proclamations have been made, or notice has been given to the successor to come in, and he refuses to come in to be admitted. If that be so, it is the refusal to come in and be admitted which gives the lord a right of action. The proclamations or notice are, therefore, not mere procedure, and there is no right of action until refusal after proclamations or notice. If that be so, the Statute of Limitations runs only from the time when the right of action accrued, that is, from the notice or proclamations and the refusal to come in and be admitted. It has been suggested that this ruling would work hardship, but it is answered that there is no hardship because the tenant delays the payment of the fine and keeps the amount in his pocket, and has possession all the time. For these reasons I am of opinion that the Statute of Limitations is no answer to the action for in the case of an action of ejectment *quousque* by the lord of a manor, the statute does not begin to run until after notice or proclamations and refusal by the tenant to come in and be admitted. The appeal fails, however, upon the first ground and must be dismissed.

KAY, L.J.—I am of the same opinion. The facts of the case are shortly as follows: The manor is situate in the county of Essex, and the two tenements in question contain sixty acres and 20 acres respectively. The manor formerly belonged to the Dean and Chapter of St. Paul's, and is now vested in the Ecclesiastical Commissioners. The last tenant upon the court rolls of the sixty acre tenement was one Hicks, the father of the defendant Hicks, who was admitted in 1821. A. Z. Cox was admitted as tenant of the other tenement. Hicks, the elder, was trustee for Cox and he died in 1868, leaving the defendant Hicks his heir-at-law. In 1870 Cox died, having devised to the defendants Hicks and Saunders all his estate and interest in both tenements. Since then no tenant has been admitted as tenant upon the court rolls. This action was commenced in 1893 twenty-three years after the death of Cox. In 1872 a collector was appointed for the lords of the

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manor, and all the quit rents then due were paid to him by the solicitors of the Cox family, and were regularly paid afterwards. Looking at the forms of the receipts given, and at the accounts rendered to the steward of the manor, it is impossible for the lord or his steward to say that they did not know who were the copyholders entitled, and that Cox was dead. I think that the quit rents were paid as such by the persons entitled to the copyhold tenements, and were received by the lord or his steward with knowledge that they were so paid from 1875 until this action was brought. This action has been brought, after notice given to the defendants to come in and be admitted, to recover possession *quousque*, because the defendants refused to come in for admittance after the notice. The action has really been brought for the purpose of getting the fines paid. Two defences have been raised: (1) That there had already been an implied admittance; and (2) that the action was barred by the Real Property Limitation Act 1874. I will deal with the second point first, because some reliance has been placed upon some words of mine in *Re Lidiard* (61 L. T. Rep. 322; 42 Ch. Div. 245). In that case it was decided that after a long lapse of time an enfranchisement must be presumed, and, incidentally, the other question about the Statute of Limitations was raised. On that question I said: "Now, the question which I have to determine in effect is, whether the lord can now insist on this being treated as copyhold land. The only remedy of the lord would have been by seizure *quousque*, and the only way in which he could have done that was by having proclamations made at three consecutive courts of the manor, and then entering upon and seizing the land until the proper tenant came in. Those proceedings ought to have taken place (if at all) within a reasonable time after the death, and the lapse of seventy years from that time to this would make such an entry as that a very extraordinary proceeding. The question is—and it is a question upon which no direct authorities have been produced—whether such an entry as that is an entry such as is spoken of in sect. 2 of 3 & 4 Will 4, c. 27, an entry which, under that Act, could only be made within twenty years, and could now, under the later Act of 37 & 38 Vict. c. 57, only be made within twelve years. In the absence of authority I should think that it was. Copyholds are within the Act of Will. 4, being expressly mentioned in the interpretation clause (sect. 1), and therefore an entry as to copyholds is one of the things which the Act says must be made within twenty years. Therefore, if that point arises in this case, I should be inclined to hold that such an entry could not be made on land after the lapse of seventy years, but that the lord was bound long before that time had elapsed to make proclamation and seize *quousque* if he meant to do so at all." That question has now been fully argued before us, and, having reconsidered that opinion, I come to a different conclusion. The statutes provide that "land" shall include copyholds, and that an action to recover possession must be brought within twelve years next after the right to bring the action first accrued. When did the right to recover possession first accrue in this case? It has been argued that the right accrued when the copyhold tenement became vacant by the death of the tenant and that the notice or proclamations are only a machinery for entering, and that the right of entry accrues upon the death of the tenant. Now, an action to recover possession *quousque* cannot be maintained until after notice or proclamations and refusal to come in and be admitted. That refusal causes a forfeiture which entitles the lord of the manor to take action to recover possession. Until refusal to come in and be admitted there is no forfeiture, and, therefore, there is no right of entry or of action until such refusal. That is the reasonable view, because the lord cannot enter or bring an action of ejectment until proclamations have been made or notice given. The right of action, therefore, in this case first accrued upon refusal to come in after notice. Upon the other point I think that we must come to the conclusion that it was decided in *Froswell* v. *Welch* (*ubi sup.*) that there may be an implied admittance by the lord, of persons entitled to be admitted as copyhold tenants, by his treating them as being copyhold tenants in various ways, as, for instance, by receiving quit rents from them, for the lord is not entitled to claim payment of quit rents until the tenant is admitted. An admittance may be made by the lord, either in or out of court, by his distinct consent to admit. The entry upon the court rolls is only a record of the admittance. The admittance is perfect when the lord has expressed his will that the tenant shall be admitted. There is a summary of the law upon this point in Rolle's Abridgement, page 505, placitum X., as follows: "If a copyholder surrender to the use of another, and then the lord having knowledge of the surrender accepts the rent from the surrenderee out of court, that is an admittance in law." That statement of the decision in *Froswell* v. *Welch* (*ubi sup.*) has been repeated in Watkins on Copyholds, Gilbert on Tenures, and Scriven on Copyhold, books of great authority. Even if, upon a close examination of *Froswell* v. *Welch* (*ubi sup.*), it should appear that that statement is not fully borne out by the case, yet after such a long lapse of time it would be wrong for the court to treat that statement as not being good law. The case of *Froswell* v. *Welch* is reported in several reports, and those reports do not agree. The appellants rely upon the report in 3 Bulstrode, 214. I accept, however, the statement of that case in 1 Roll. Rep. 415, as being correct. That being the law, do the facts of this case bring it within that rule? I think that they do. The lord of the manor must be taken to have known that the tenant upon the court rolls was dead, and that the persons entitled to be admitted as tenants were paying the quit rents as such. The knowledge of the steward is to be imputed to the lord of the manor, especially in a case like this, where the lord is a corporation aggregate. There was, therefore, an implied admittance of these tenants, and the action cannot be maintained.

Smith, L.J.—In this case there were in the years 1868 and 1870 tenants upon the court rolls. In the latter part of 1870 there was no living tenant upon the court rolls. From 1875 the quit rents were paid and received regularly. In 1893 a notice was given by the lord of the manor to the defendants to come in and be admitted, and an action to recover possession *quousque* was brought because they did not come in and be admitted. The first answer to the claim is that there can be a seizure *quousque* only if there is no

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tenant of the copyhold tenements, and that the defendants were admitted by the lord of the manor as such tenants. The lord replies that they are not tenants upon the court rolls, but the defendants say that they were admitted by implication, and were therefore tenants of the copyhold tenements. It is also said that the action was brought too late. Now, it has been argued by the appellants that, as between the lord of a manor and a copyholder, there can be no such thing as admittance by implication. I am clearly of opinion that for a very long period of time the law has been that things done out of court between the lord and the tenant may raise an implication that the tenant has been admitted by the lord. That being the law, the question arises here whether the facts show that there was an admittance by implication. I agree that the onus is upon the defendants to establish that. Upon the facts of this case I think that the true inference is that the tenants paid quit rents as tenants of the copyhold tenements, and that the lord, by his steward, received them with knowledge of the facts and as quit rents for those copyhold tenements. That being so, there is a good defence to the action, and the appeal must fail. I agree also with the judgments of the Master of the Rolls and Kay, L.J. upon the point as to the Statute of Limitations. In an ejectment *quousque* the cause of action does not accrue until refusal by the tenant to come in and be admitted after notice or proclamations.

Appeal dismissed.

Solicitor for the appellants, *F. A. Manley.*
Solicitors for the respondents, *Hicks* and *Co.*

Monday, July 2.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

ROBINSON *v.* GEISEL AND OTHERS. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Parties—Non-joinder of defendant—Joint contractors—Joint contractor who cannot be found—Staying proceedings until joinder—Discretion of court—Order XVI., r. 11; Order XXI., r. 20.

One of two joint contractors, who is sued alone, has not an absolute right to have the other joint contractor joined as a defendant; and though as a general rule, when they are both within the jurisdiction, an order ought to be made that they shall both be joined as defendants, yet the court or judge will properly refuse, in the exercise of their discretion, to make such an order when one of them cannot be found by the plaintiff.

THIS was an appeal by the defendant Geisel from an order of the Divisional Court (Cave and Collins, JJ.), setting aside the order of Lawrance, J., at chambers, staying proceedings in the action until the defendant Hoffmann had been served.

This action was brought by the plaintiff to recover the amount due upon a guarantee. There were three joint guarantors, Geisel, Schreiber, and Hoffmann. The action was commenced against Geisel only.

The defendant Geisel, upon an application at chambers, obtained an order that Schreiber and Hoffmann should be added as defendants.

The names of both Schreiber and Hoffmann were added to the proceedings as defendants, but the amended writ was served upon Schreiber only.

The defendant Geisel thereupon obtained an order that all proceedings in the action should be stayed until Hoffman was served.

Upon an appeal to the Divisional Court a new affidavit was filed by the plaintiff, from which it appeared that Hoffman was out of the jurisdiction, and the court (Cave and Collins, JJ.) held that the proceedings ought not to be stayed.

The defendant Geisel appealed. In the Court of Appeal new affidavits were filed which showed, in the opinion of the Court, that Hoffmann was not out of the jurisdiction, but that the plaintiff was unable to find him to serve him with the amended writ, though he had done all that he could do to find him.

W. E. Hume Williams for the appellant.—The defendant Geisel is entitled as of right to have his joint contractor Hoffmann effectively joined as a defendant, unless he is out of the jurisdiction. In *Pilley* v. *Robinson* (58 L. T. Rep. 110; 20 Q. B. Div. 155) it was laid down by Stephen and Charles, JJ., that one of two joint contractors who is sued alone has an absolute right to have the other joint contractor joined as a defendant, and that decision was founded upon the judgments in *Kendall* v. *Hamilton* (41 L. T. Rep. 418; L. Rep. 4 App. Cas. 504). In the later case of *Wilson, Sons, and Co.* v. *Balcarres Brook Steamship Company* (68 L. T. Rep. 312; (1893) 1 Q. B. 422) it was held in this court that when one joint contractor was a foreigner resident out of the jurisdiction, the other joint contractor who was sued alone was not entitled as of right to have the other joined as a defendant; but otherwise the rule laid down in *Pilley* v. *Robinson* (*ubi sup.*) was not altered. It is, therefore, immaterial whether Hoffmann can be found or not, if he is resident within the jurisdiction, and the appellant has a right to have him effectively joined as a defendant.

Mitchell (*G. M. Cohen* with him) was not heard for the respondent.

Lord ESHER, M.R.—This appeal fails. The authorities which have been cited do not lay down so wide a rule as the appellant has suggested. This action was brought to recover the amount alleged to be due upon a guarantee, upon the default of the person on whose behalf the guarantee was given. There were three guarantors, and the action was commenced against one of the three. Under the old law, before the Judicature Acts and Rules, the plaintiff would have been bound to sue all the three, otherwise he would have been met by a plea in abatement, which would have defeated the action. Then came the Judicature Acts and Rules. Order XVI., r. 11, provides that "no cause or matter shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The court or a judge may at any stage of the proceedings . . . on such terms as may appear to the court or a judge to be just, order that the names . . .

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added." That and Order XXI., r. 20, entirely do away with the old plea in abatement. If the cause will be "defeated" by saying that all the co-contractors must be joined as defendants and served with the writ, then the provisions of Order XVI., r. 11, will be nullified by ordering that all the co-contractors must be joined and served. The courts have dealt with this matter in two reported cases. The first case is *Pilley* v. *Robinson* (*ubi sup.*), and it is said that that case decided that one of several co-contractors has an absolute right to have the other co-contractors joined as defendants, subject to the exception established in a later case. That rule would have "defeated" the cause whenever the co-contractors were not joined. That rule, as expressed in *Pilley* v. *Robinson* (*ubi sup.*), if not overruled, has been modified in *Wilson, Sons, and Co.* v. *Balcarres Brook Steamship Company* (*ubi sup.*), in which the rule was laid down as being that, if all the co-contractors can be joined, the court ought to make an order for them to be joined; and it was said that the rule was not imperative, but that the court had a judicial discretion which ought generally to be exercised as nearly as possible in accordance with the old practice. In the present case, if, when the application was made, no difficulty was shown to exist in joining and serving all the co-contractors, the court ought to have exercised its discretion by making an order that all the co-contractors should be joined and served as defendants. What is done upon an interlocutory application of this kind in chambers is not final, it is only an interlocutory step in the action. If fresh evidence is produced before the Divisional Court or the Court of Appeal, which tends to show that the order made in chambers was wrong, though it was rightly made upon the materials before the judge at chambers, then the Divisional Court or Court of Appeal will act upon such fresh evidence. If it is made clear to the Divisional Court or to this court that the order made in chambers was not the right order, then the Divisional Court or this court will make the right order. It has now, I think, been shown that Hoffmann is within the jurisdiction. Is the court bound to make an order that he shall be joined as a defendant and served because he is within the jurisdiction? It has not been so decided in any case. There is a strong indication to the contrary in *Wilson, Sons, and Co.* v. *Balcarres Brook Steamship Company* (*ubi sup.*), where I said: "Therefore, where there are two joint contractors, both resident within the jurisdiction, I think that, *primâ facie*, if one of them is sued on the joint contract, he would have a right to have the other made a co-defendant. Order XVI., r. 11, so far as its terms are concerned, gives a discretion. It is not necessary to say that, even where all the joint contractors are within the jurisdiction, there might not be circumstances under which the court could refuse to insist on their all being joined as defendants. It is not necessary to decide that point in this case. I doubt whether, in extreme cases, the court would be bound, even in that case, to order the joinder of a joint contractor; but, as a general rule, I should say the court would be bound to do so." That intimates a strong opinion that there may be, in some cases, reasons why the court should not say that the plaintiff is bound to join and serve all the joint contractors even if within the jurisdiction. What, then, is a strong case for refusing to make such an order? If the court believes that the plaintiff, although he cannot swear that one joint contractor is out of the jurisdiction, cannot find that joint contractor so as to be able to serve him, then the *primâ facie* case is destroyed, and the court may properly say that it would be contrary to justice and right to order the plaintiff to join and serve such joint contractor. There may be some difficulty and inconvenience imposed upon the joint contractor who is sued, but we have to see whether injustice would be done to the plaintiff, who would have his cause "defeated" if the order were made. In my opinion, law and justice demand that, in the present case, the decision of the Divisional Court should be affirmed and the appeal be dismissed.

Kay, L.J.—Order XXI., r. 20, provides that "no plea or defence shall be pleaded in abatement;" and Order XVI., r. 11, that "no cause or matter shall be defeated by reason of the mis-joinder or non-joinder of parties, and the court may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it." In this case the action was commenced against one of three joint contractors, and that one applied for an order that the other two should be joined as defendants; he obtained an order at chambers to that effect, and they were added as defendants; one of those two has not been served. The evidence before us makes it quite clear that this one cannot be found even if he is within the jurisdiction, as I am inclined to think he is. Then the defendant applied for an order that the plaintiff's action should be stayed until that defendant was served. The Divisional Court decided that the action ought to be allowed to proceed without that defendant being served. Would it be right and just in this case, where the plaintiff has done all that he can do to join that joint contractor as a defendant, to stay the proceedings until some indefinite time when that joint contractor can be served? To do so would, in my opinion, be contrary to right and justice. If all three were made defendants and served, and judgment given against them, execution might issue against any one of them, and then there would be further litigation among them. In my opinion, therefore, it would be unjust to say that the action shall not proceed if one of the joint contractors who cannot be found is not joined and served. The rules do not support the contention of the appellant. Order XVI., r. 11, is in terms as wide as possible, and a discretion is given to the court in the matter. Here the Divisional Court, in the exercise of their discretion, have allowed the action to proceed, and this court, with additional evidence before it, cannot do otherwise than affirm the decision of the Divisional Court.

Smith, L.J.—The question upon this appeal is, whether the Divisional Court were right in refusing to stay this action because one of the joint contractors had not been served as a defendant. It has been argued that the rule is, that

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if two joint contractors are resident within the jurisdiction the one who is sued is entitled as of right to have the action stayed until the other is joined and served. Order XVI., r. 11, is in its terms clearly permissive, and gives the court a discretion. The case of *Pilley* v. *Robinson* (*ubi sup.*) has been referred to, in which Stephen and Charles, JJ. laid down the rule that when an action is brought against one only of several joint contractors the defendant is entitled as of right to have the other joint contractors joined as defendants. The same point came before the Court of Appeal in *Wilson, Sons, and Co.* v. *Balcarres Brook Steamship Company* (*ubi sup.*), and it was held in that case that when one joint contractor is resident out of the jurisdiction, it is not necessary for the one who is out of the jurisdiction to be joined. So far the hard and fast rule laid down in *Pilley* v. *Robinson* (*ubi sup.*) was overruled. The later case is a direct authority that when one joint contractor is out of the jurisdiction he need not be joined as a defendant. In that case Lord Esher, M.R. showed that there might perhaps be other cases in which the plaintiff ought not to be compelled to join a joint contractor. This, I think, is such a case. I entirely agree with the Master of the Rolls that, if two joint contractors are both resident within the jurisdiction, the rule is that both should be joined unless the plaintiff shows that there is good reason to the contrary. Is there good reason to the contrary in the present case? I think that there is upon the facts now before us, which show that one of the joint contractors cannot be found.

Appeal dismissed.

Solicitor for the appellant, *Pumfrey.*

Solicitors for the respondent, *Wood, Bird,* and *Wood.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

May 30 *and* 31.

(Before CHITTY, J.)

Re BUDGETT; COOPER *v.* ADAMS. (*a*)

Bankruptcy — Partnership — Administration of partners' estate—No joint estate—Right of joint creditor against separate estates—Bankruptcy Act 1883 (46 *&* 47 *Vict. c.* 52), *s.* 40, *sub-sect.* 3.

In 1891 *A. made an advance to a partnership firm consisting of B. and C.; subsequently B. and C. admitted D. into partnership, and the new firm undertook to pay the liabilities of the old firm. In Oct.* 1892 *B., C., and D. assigned their joint and separate estates to a trustee for the benefit of their creditors to be distributed in the same way as if they had been adjudicated bankrupt. There was no joint estate of B. and C.*

Held, that A. was entitled to draw dividends out of the separate estates of B. and C. in competition with their separate creditors.

Sect. 40 *of the Bankruptcy Act* 1883, *which in substance is in the same terms as the order of Lord Loughborough of the* 6*th March* 1794 *relating to the distribution of the joint and separate estates of bankrupts, is to be construed in the same way as that order, and is subject to the same exceptions.*

(*a*) Reported by G. WELBY KING, Esq., Barrister-at-Law.

IN Jan. 1891, Adams lent the firm of S. Budgett and Son, then consisting of two partners, Samuel Budgett and Arnold Budgett, a sum of 1500*l.* Subsequently Walter Felix Budgett was taken into the partnership, and the new firm undertook to pay the liabilities of the old firm, but Adams was not a party to this arrangement. In Oct. 1892 the three members of the new firm assigned their joint and separate estates to a trustee for the benefit of their creditors to be distributed in the same manner as joint and separate estates, and joint and separate debts as if they had been adjudicated bankrupt. Adams was admitted to prove, but there being no joint estate of the old firm, the question arose whether he was entitled to draw dividends out of the separate estates of Samuel Budgett and Arnold Budgett, in competition with their separate creditors. Sect. 40, sub-sect. 3, of the Bankruptcy Act 1883 provides that in the case of partners the joint estate shall be applicable in the first instance in payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts, and this section is practically in the same terms as Lord Loughborough's order of the 6th March 1794 with reference to the distribution of the joint and separate estates of bankrupts, and although the decisions upon that order had determined that it did not apply where there was no joint estate, it was contended that the section of the Act must be construed without reference to those decisions.

C. E. E. Jenkins for the trustee of the deed.—Although, under the practice prior to the Bankruptcy Act 1883, joint creditors were allowed to prove in competition with separate creditors where there was no joint estate, this being an exception to the rule established by Lord King in *Ex parte Cooke* (2 P. Wms. 500), which rule was adopted by Lord Loughborough's order of 1794, *Ex parte Bauerman* (3 Deacon, 476), *Ex parte Fisherton* (6 Ves. 814, n.), *Ex parte Clay* (6 Ves. 813), *Ex parte Kennedy* (2 De G. M. & G. 228), *Lodge* v. *Pritchard* (1 De G. J. & S. 610), *Cowell* v. *Sikes* (2 Russ. 191), sect. 40 of the Bankruptcy Act 1883 must be construed without regard to these decisions, and the rule established by them must be taken to have been abolished by the Act.

Frederic Thompson for Adams.—The section in the Act of 1883, which is in substance in the terms of Lord Loughborough's order, must be construed in such a way as to give effect to the exceptions to the order which existed at the time the Act was passed:

Re Carpenter, 7 Mor. Bkcy. Reps. 270.

He also referred to

Read v. *Bailey*, 37 L. T. Rep. 510; L. Rep. 3 App. Cas. 94.

C. E. E. Jenkins in reply.

CHITTY, J.—The trust estate under the deed of Oct. 1892 falls according to the terms of the deed to be distributed in the same manner as joint and separate estates, and joint and separate debts as if the three persons who executed the deed had been adjudicated bankrupt, and the effect of the provisions to which I have thus shortly referred is to import the bankruptcy rules under the Act of 1883 into the deed. Adams has been admitted to prove, and the question is whether he can draw

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dividends in the proper administration of the estates that have been assigned, out of the separate estates of Samuel and Arnold Budgett, in competition with their separate creditors. He is a creditor of those two debtors jointly. They carried on business as father and son, and afterwards took the third debtor, another son, Walter Felix, into partnership, and the debt in respect of which Adams makes his claim was incurred before the admission of Walter Felix. The estates of the two under the first partnership were assigned to the partnership constituted by the three, and, as between the two firms, the second firm undertook to pay the liabilities of the first firm, but Adams did not agree to accept the three as his debtors, consequently there was no novation, and the result is that Adams is a creditor of the first partnership, that is of the two debtors whom I have first named, and not of the third. The facts which are admitted show that there is no joint estate whatever of the father and son under the first partnership. The question turns on the 40th section of the Bankruptcy Act 1883. It is not necessary for me to read the section at length. I have had presented at the bar a very learned argument tracing the history of this section back to the time of Lord King, and especially to the well-known order of Lord Loughborough, in 1794. I have that order before me, and again I think it unnecessary to cite it at length. It was properly admitted by the counsel for the trustee of the deed that in substance the section is in the same terms as the order. Now in regard to that order the decisions settle the meaning of it, and again it is unnecessary to refer to the long course of decisions, and, I may add, the well-known rule of administration in bankruptcy, with reference to that order. According to the statements in the text-book (I am referring to Lindley on Partnership, by way of example, 6th edit., p. 749), there were four exceptions allowed to the order. It is not, I think, material to discuss the verbal question whether it would not be more proper to say that there are four cases which did not fall within the order. The latter phrase is clearly correct, and it is one which I propose to adopt without saying the other term as to "exceptions" is not a proper one. Now, the first of the cases not covered by the order relating to the administration of joint and separate estates, and the application of them to joint and separate debts, is this, that where there is no joint estate, the rule does not apply; and the question really is whether, seeing that the language of the Legislature in the 40th section is practically the same as the language of Lord Loughborough's order, the court ought not to interpret the section in the same way as the order. I have referred to the historical argument, and I would mention merely one point upon it. As is well known, there was bankruptcy legislation in 1830, when the Act of 6 Geo. 4 was passed, in 1849 again, and in 1869. In those three Acts, sect. 62 of the first, sect. 160 of the second, and sect. 103 of the third, there were provisions contained which were substantially the same; but none of them, though they have been referred to in the argument, apply to the case that I have to decide; in other words, they did not embody the substance of Lord Loughborough's order. Then under the Act of 1869, the Lord Chancellor with the advice of the chief judge, had power to make rules (see sect. 58); the effect of such rules when made was equivalent to an Act of Parliament. The 76th rule made in virtue of that section in 1870 practically repeated Lord Loughborough's order. Now it appears to me to be a reasonable conclusion, and a right conclusion, to say, that the framers of the rules did not intend to alter the construction of the order itself. In other words, by placing among their statutory rules a rule to the same effect as Lord Loughborough's order, they intended not to alter the law on the subject, but to embody it as it stood. Therefore when the Legislature passed, in the Act of 1883, the 40th section, it seems reasonable and proper to infer, and to adopt the inference as correct, that the Legislature, though now for the first time it put the substance of the order on the Statute-book, intended the law to stand on the construction of the section in the same way that it stood previously to the passing of the Act. I referred during the argument to the Lord Chancellor's observations in the case of *The Bank of England* v. *Vagliano Brothers* (64 L. T. Rep. 353; (1891) App. Cas. 107), with reference to the Bills of Exchange Act, and those observations do not in my opinion apply to the Act of 1883. The substance of what fell from the Lord Chancellor is, that where there is an Act, such as the Bills of Exchange Act, codifying the law, the proper rule of interpretation is to read the Act, and to interpret its provisions without reference to previous decisions or to previous legislation, that being a *primâ facie* rule only to which there would be reasonable exceptions. The Lord Chancellor in his judgment said: "I am, of course, far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code." Then he gives some examples which I need not cite at length. But I have here to deal not with an Act of Parliament codifying the law, but with an Act to amend and to consolidate the law, and therefore it is I say those observations do not apply, and I think it is legitimate, in the interpretation of the sections in this amending and consolidating Act, to refer to the previous state of the law for the purpose of ascertaining the intention of the Legislature. Now I have said there is a course of authority upon the subject previous to the Act of 1883. I mention merely among the later authorities *Ex parte Kennedy* (*ubi sup.*), in 1852, which was before Knight Bruce and Turner, L.JJ., where it appears that the Lords Justices adopted the proposition that a joint creditor would be entitled to prove in competition with separate creditors against the separate estate, if there was no joint estate. I say that not by reason of any actual statement of the law to that effect by Knight Bruce, L.J., but from reading the report as it stands. Knight Bruce, L.J. referred to the unreported case of *Ex parte Clay*, but in the result the court held that this rule or exception (whichever I ought to call it) did not apply, because there was joint estate, though of very trifling amount. Another case that I mention among the more recent ones is *Lodge* v. *Pritchard* (*ubi sup.*), where Turner, L.J. again refers to this rule or exception, whichever it ought to be called: "It was said, however, on the part of the appellant, that in the cases above referred to there was joint estate remaining to be administered; and the further rule in bankruptcy that joint creditors may prove against the sepa-

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rate estate when there is no joint estate and no solvent partner was relied upon in support of the appeal, and contended to be applicable in this case." The court held that the rule did not apply to the case before it, but Turner, L.J., whose accuracy and carefulness are well known, adopts the rule in the passage which I have just stated. Now there has been one decision since the Act of 1883 on this point—that is the decision of Cave, J., in *Re Carpenter* (*ubi sup.*). One of the partners in that case had not been adjudicated a bankrupt, but he was insolvent and signed a declaration of insolvency, and the official receiver was satisfied that he could pay nothing. Cave, J. decided the case on the footing, according to the admissions properly made, that the one partner not paying who had not been made bankrupt had been adjudicated a bankrupt—he acted on the footing that the non-bankrupt partner had been adjudicated a bankrupt—and then he decided that the joint creditor was entitled to rank for dividends against the separate estate of Carpenter, the actual bankrupt, in competition with the separate creditors of Carpenter. Now, it has been very properly observed that in that case Cave, J. had not presented to him the elaborate argument that I have heard, and in making the order Cave, J. does not deal elaborately with the question, but he had the 40th section before him and made the order, and it appears to me that this is a decision in point, and one which I ought not to dissent from unless I can find plain reasons for thinking it wrong. So far from finding reasons for thinking it wrong, I express my own opinion, after the excellent argument that has been delivered on both sides, that the decision is right, and the consequence is that I follow it. The result therefore on the whole is, that Mr. Adams is, in respect of the joint debt of the two, entitled to draw dividends in competition with the separate creditors of each of the two, and my order will be accordingly.

Solicitors: *Ingle, Cooper*, and *Homes*; *Simpson* and *Cullingford*.

Feb. 27 *and April* 11.

(Before CHITTY, J.)

Re REBBECK; BENNETT *v.* REBBECK. (*a*)

Will—Devise of lands—Charge of legacy—Executor's power of sale—Lord St. Leonards' Act (22 *&* 23 *Vict. c.* 35), *s.* 18.

A testator, who beneficially devised lands in fee, charged them with so much of a legacy of 7000l., which he bequeathed to his executors upon certain trusts, as his personalty should be unable to bear.

The devisee, who was one of the executors, mortgaged the real estate during the life of his co-executor, and the personalty being insufficient to pay the legacy of 7000l., this action was brought to have it paid out of the realty. The question arose whether the legacy had priority over the mortgage, and whether by virtue of this charge of the legacy the executors had power to sell the real estate and give a good discharge for the purchase money.

Held, that the charge of a legacy did not give the executor such a power.

(*a*) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

ACTION.

John Rebbeck, by his will dated the 11th Feb. 1868, bequeathed to his only son John Rebbeck, Henry Parham, and the defendant John Rogers, whom he appointed executors, the sum of 7000*l.* on certain trusts in favour of his daughter, her husband and children, and declared that his real estate should stand charged with so much of the 7000*l.* bequeathed on the aforesaid trusts as his personal estate should be unable to bear. And the testator devised and bequeathed his residuary real and personal estate to his son, John Rebbeck, his heirs, executors, administrators, and assigns absolutely.

In 1869 the testator died, and the will was proved by his son, John Rebbeck, and the defendant John Rogers, only.

The testator's daughter died in 1875.

In 1879 John Rebbeck deposited the title deeds of the testator's real estate to secure a loan of about 5000*l.*, and the equitable mortgagee had full notice of the charge of the legacy of 7000*l.*

John Rebbeck died in 1883, leaving John Rogers surviving executor; and the husband of the testator's daughter died in 1890.

The children brought this action to have the legacy of 7000*l.* raised out of the real estate, the personal estate being insufficient to pay it.

An amount of 2500*l.* still remained due on the equitable mortgage, and it became necessary to determine whether the legacy had priority over this mortgage, the estate probably not being sufficient to pay both charges in full.

Levett, Q.C. and *Peterson* for the plaintiffs.—Lord St. Leonards' Act (22 & 23 Vict. c. 35) has no application to this case (see the exception in sect. 18), and apart from that Act it is clear upon the old authorities that, there being only a charge of a legacy, the executor cannot give a good discharge for the money raised by sale or mortgage of the real estate, and the mortgagee's title is subject to this charge:

Horn v. *Horn*, 2 Sm. & St. 448;
Johnson v. *Kennett*, 3 Myl. & K. 624;
Williams on Real Assets, p. 61;
Sugden on Vendors and Purchasers, 14th edit., p. 658;
Lewin on Trusts, 9th edit., p. 505.

Farwell, Q.C. and *Dauney* for the executor of the mortgagee.—There is no question that the devisee, who is also one of the executors, could have made a good title if there had been a charge of debts:

Corser v. *Cartwright*, L. Rep. 7 H. L. 731; affirming 29 L. T. Rep. 596; L. Rep. 8 Ch. 971;
Eidsforth v. *Armstead*, 2 K. & J. 333;
Ball v. *Harris*, 4 My. & Cr. 264;
Shaw v. *Borser*, 1 Keen, 559;
Forbes v. *Peacock*, 1 Phil. 717;
Carlyon v. *Truscott*, 32 L. T. Rep. 50; L. Rep. 20 Eq. 348;
Collyer v. *Finch*, 5 H. of L. 923;
Dart, 6th edit., p. 696.

And here the charge, being for the purpose of raising so much of the legacy as the personalty should be insufficient to pay, amounted to a charge of debts, and a power to mortgage or sell and give receipts is thus impliedly given to the executor devisee.

C. E. E. Jenkins for Eliza Ann Rebbeck, the

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executrix and devisee on trust for sale of the estate of John Rebbeck, the son.

Levett, Q.C. replied.

CHITTY, J.—The devisee of the land was also one of two executors, and, whilst his co-executor was still alive, he mortgaged the real estate upon which the testator had charged a pecuniary legacy. The charge, like all charges of legacies on real estate, was a charge in aid of the personal estate, and, in fact, it was so expressed in the will. The mortgagee now claims that he is entitled to be paid off in priority to the legatees. The first question is, whether the executor had a power of sale? The question as to an executor's power of sale has been before the court for years and years past, and has been the subject of continual discussion. Where there is a general charge of debts, the executors have not only a power of sale, but also a right to give a good discharge to the purchaser for the purchase money. This is for "the great convenience of mankind" (see *Collyer* v. *Fisch*, *ubi sup.*); as it is unreasonable that the purchaser should be involved in the administration of the estate. But where land is devised charged with a scheduled debt or a particular legacy the same reasoning does not apply, and the court has held that purchasers of such real estate are bound to see to the application of the purchase money. Thus, in *Horn* v. *Horn* (*ubi sup.*), a case not distinguishable from the present, where legacies alone were charged, it was held that the purchaser from a sole executor devisee was bound to see to the application of the purchase money; and the same rule was also laid down by Lyndhurst, L.C. in *Johnson* v. *Kennett* (*ubi sup.*). The special ground of exception does not apply where the purchaser has only to look at the will in order to ascertain the sums to be paid and the persons to whom they are payable. In such a case the purchaser does not get a good discharge by paying the executor. He must see to the application of his purchase money; and it is plain that the legatee must concur in the sale to give him a good discharge. No authority has been produced for the proposition that one of the executors can sell real estate where it is only charged with the payment of a legacy; and it is not for me to create such a new power of sale in the year 1894. There is no difference between a charge by contract and a charge by will. A deposit of deeds by way of mortgage gives neither the mortgagor nor the mortgagee a power of sale; and, similarly, if land is devised charged with the payment of a sum other than a legacy, there is no reason for giving a power of sale to anyone. Of course, it may be possible to gather from the general terms of a will that the testator intended to give a power of sale to someone; but such an intention may also be manifested by a contract. Lord St. Leonards' Act does not apply, as the case falls within the excluding words in the latter part of sect. 18. Upon the settled authorities, then, I must hold that the mortgagee has got no title against the legatees, whose charge on the property has priority over the mortgagee's.

Solicitors: *Nash, Field,* and *Co.*; *W. D. Dowding*; *Taylor, Hoare,* and *Box,* agents for *Wilson,* and *Son,* Salisbury.

April 10 *and* 11.

(Before CHITTY, J.)

WALKER v. THE LAMBETH WATERWORKS COMPANY. (a)

Water rate—Supply for domestic purposes—Fixed bath—Right to demand supply for, without extra charge—Lambeth Waterworks Act 1848, *ss.* 37, 38, 39.

The defendants, a water company, had been in the practice of making a special charge of 10*s. per annum for the supply of water to fixed baths in dwelling-houses in their district, their Act providing that they could make a special agreement as to charge in the case of water supplied "for other than domestic purposes," and that "a supply of water for domestic purposes" should "not include a supply of water for baths, horses, cattle, or for washing carriages, or for any trade or business whatsoever."*

The plaintiff, who had long occupied a house in the district, containing a fixed bath supplied with water from the defendants' main, had until recently paid the charge of 10*s. per annum, but now refused to do so, or to sever the connection between his bath and the main, contending that he was entitled to the supply upon payment of the ordinary rate for water for domestic purposes.*

Held, that, upon the proper construction of the Act, the supply of water to the fixed bath was "for other than domestic purposes."

SPECIAL CASE.

The defendants were the Lambeth Waterworks Company, and the plaintiff had been for the last fifteen years the occupier of a residence within the company's district of the rateable value of 167*l.* per annum.

By sect. 37 of the Lambeth Waterworks Act 1848 it is enacted:

> The company shall at the request of the owner or occupier of any house or part of a house in any street within the limits of this Act in which any pipe of the company shall be laid, or of any person who, under the provisions of this Act or any Act incorporated therewith, shall be entitled to demand a supply of water for domestic purposes, furnish to such owner or occupier or other person a sufficient supply of water for their domestic uses at the rates hereinafter specified,

being a rate varying according to the annual value of the house.

By sect. 38:

> It shall be lawful for the company to supply any person or body within the limits of this Act with water to be used within the limits aforesaid for other than domestic purposes, at such rent and upon such terms and conditions as shall be agreed upon between the company and the person or body desirous of having such supply of water.

By sect. 39:

> A supply of water for domestic purposes shall not include a supply of water for baths, horses, cattle, or for washing carriages, or for any trade or business whatsoever

It had been the practice of the company, since 1848, to make a special charge of 10*s.* per annum for the supply of water to every fixed bath in a dwelling-house; but the company made no charge

(a) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

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for water used in filling hip, sponge, and other movable baths.

In the plaintiff's residence was a fixed bath, supplied with water from the company's main passing through a tap affixed to the bath.

The plaintiff had until recently paid the charge of 10*s.* per annum for the fixed bath, but had since refused either to pay or to sever the connection with the company's main.

The question submitted to the court was, whether or not the company was bound to supply water to the plaintiff's bath upon his making or tendering payment under sect. 37 of the Act.

Byrne, Q.C. and *W. F. Hamilton* for the plaintiff.—The supply of water to the plaintiff's bath is clearly within the "domestic purposes" of sect. 37 of the Act, and not within the exception in sect. 39. We rely on the decision in *Weaver* v. *Corporation of Cardiff* (48 L. T. Rep. 906), where the language of the Act is very similar; and it was held by Field, J., that baths meant public baths. If fixed baths are to be excepted, why not also movable baths? They also cited the unreported case of *Sheffield Waterworks Company* v. *Bingham* referred to in the same judgment, and to *Cooke* v. *New River Company* (58 L. T. Rep. 830; 8 Ch. Div. 56).

Sir *Richard Webster*, Q.C., *Farwell*, Q.C., and *Yate Lee* for the defendant company.—The plaintiff's fixed bath is clearly within the exception in sect. 39. The collocation of words in that section is quite different from that in the section of the Act interpreted in *Weaver* v. *The Corporation of Cardiff* (48 L. T. Rep. 906). If baths in sect. 39 of the Act in this case meant public baths, the last clause would run "or for any *other* trade or business whatsoever." In *Busby* v. *Chesterfield Waterworks Company* (E. B. & E. 176), water for washing carriages was held to be used for domestic purposes, and in the present Act it has been expressly excluded. So, too, baths. The amount of water used in fixed and movable baths is very different, and the fixed bath has a definite supply pipe.

Byrne, Q.C. replied.

CHITTY, J.—The question, of course, turns on the construction of the Act of Parliament, and I think I may say, having seen many of these Acts and having been referred to many of them during the course of the argument of the present case, that this Act is not open to the objection of being stuffed full of words, and with complicated sections doing and undoing and leaving matters in a state of confusion. At any rate this observation is correct—namely, that the plan of this Act is simple. Under sect. 37 the company are bound to afford a supply of water for domestic uses. So far the obligation is plain; it is to supply for domestic uses. Then I go to sect. 38, which is a mere empowering section. The company are empowered by that section to supply water for other than domestic purposes upon such terms as may be agreed upon. There is no compulsion upon them, therefore, to supply water for other than domestic purposes. Thus far I have nothing special in the Act to show what is the meaning of domestic purposes or uses. But then comes sect. 39. [His Lordship read sect. 39, and continued:] Now, the argument of the plaintiff is, that I must interpret baths in some sense so as not to include this fixed bath. I have done my best to gather from counsel what is the limitation that is to be put upon the term "baths" in sect. 39, which is there used as a general term, and I understand as the result of the argument that I am to read in the word "public"—that is, baths means public baths. The observation is, however, most obvious that there is an absurdity in supposing that the Legislature should say a supply of water for domestic purposes shall not include a supply of water for public purposes. There may have been absurdities in some of these Acts of Parliament, but I am not to imagine such a thing. It appears to me that the words are intended to exclude something which otherwise would have been for a domestic purpose. Now there follow the words "horses, or for washing carriages." Counsel for the plaintiff were constrained to say that meant where there was an establishment of horses, or a business of washing carriages, or the like; but, again, there is no ground on the words of sect. 39 or in the context for inserting any such limitation with regard to "horses or for washing carriages." And here—although I have not much assistance, for one case on one Act of Parliament is not much guide or assistance in determining another case on a different Act of Parliament—I have a very pertinent decision of the Court of Queen's Bench, presided over by Lord Campbell, in *Busby* v. *The Chesterfield Waterworks Company* (*ubi sup.*). There the question was, where a horse and carriage were kept for private use, whether the water supplied was supplied for domestic uses, and there being nothing special in the Act Lord Campbell decided the question in the affirmative. That decision is in point here. Because here I get immediately after the word "baths" an exclusion from the domestic purposes of something which otherwise would be included in it. That decision shows, and good sense also shows, that there is no ground for inserting any words qualifying baths, &c. Then, again, the concluding words are "for any trade or business whatsoever," and not "for any other trade or business." There may be some imperfection in the drafting of the Act, but I am not prepared to say that there is, because I can well conceive that there may be some trade or business carried on in a dwelling-house the occupier of which would be entitled to demand a supply for domestic purposes, and I think the concluding words are words of caution. It is said that I must construe the word baths so as to include everything that can fairly be called a bath in a house. The distinction between a fixed and movable bath is most palpable, and involves a great difference in the consumption of water. The water here is supplied for the bath. There is no escaping from that by any dexterity of argument. All kinds of suggestions have been made. It was asked, supposing there is a fixed bath, could not the plaintiff draw water from a cistern and fill the bath? I am not concerned with such a case. It is not a case at all likely to arise, and I leave it with the observations already made. In my opinion the plaintiff's case fails, but I may mention at the end of this judgment the case of *Sheffield Waterworks* v. *Bingham* (an unreported case), where the Court of Appeal thought that a bath like the present one was a

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fixed bath, and distinguishable from a movable bath. The plaintiff's case fails.

Solicitors: *H. C. Morris*; *Bell, Stewards, May,* and *How.*

April 17, 18, *and May* 9.

(Before CHITTY, J.)

Re HODSON; WILLIAMS *v.* KNIGHT. (*a*)

Married woman—Infant—Settlement—Covenant to settle after-acquired property—Affirmation during coverture after attaining full age—Disability of coverture.

A married woman, whilst a spinster and an infant, executed a marriage settlement, which contained a covenant by her husband and herself to settle after-acquired property, so framed as to include a reversionary interest to which she was contingently entitled under her grandfather's will. The settlement was not sanctioned by the court under the Infants' Settlement Act.

After coming of age she executed a deed, indorsed on the settlement, varying some of its trusts and affirming the covenant. The deed was not acknowledged.

After the death of her husband her interest fell into possession, and she claimed to be absolutely entitled to it, on the ground that she was incapable during coverture of affirming the covenant entered into while she was an infant, and that the settlement was not binding on her.

Held (*following* Barrow *v.* Barrow, 4 *K. & J.* 409; *and* Wilder *v.* Piggott, 48 *L. T. Rep.* 112; 22 *Ch. Div.* 263), *that there was no disability to affirm the covenant during coverture, and the fund was bound by the marriage settlement.*

BY his will, dated in 1862, Thomas Knight devised and bequeathed to his trustees certain real and personal estate upon trust for his daughter Eliza Heap for life, and, subject thereto, upon trust for all his grandchildren living at the death of his said daughter, who being sons should attain twenty-one, or being daughters should attain that age or marry, in equal shares if more than one, as tenants in common.

By a settlement dated the 3rd Jan. 1879, being a settlement made prior to and in contemplation of the marriage of Agnes Knight, who was then an infant, one of the testator's grandchildren, with C. M. Hodson, certain sums of stock and cash, to which the said Agnes Knight would become absolutely entitled on attaining twenty-one, were assigned to trustees upon the usual trusts, and the settlement contained a covenant by the intended husband and wife that they would convey, assign, and transfer to the trustees all property, whether real or personal, to which Agnes Knight was then, or to which during the coverture she or the said C. M. Hodson in her right should become entitled by any means whatsoever, and which should amount in value to the sum of 100*l.*, from any one source at any one time.

All the other necessary facts, and the question arising for determination on this summons, which was taken out by the trustees of the settlement, are fully stated in the judgment.

Chubb for the trustees of the will.

Bovill Smith for the trustees of the settlement.—This sum is clearly bound by the settlement, which was deliberately affirmed by Mrs. Hodson by the deed of June 1880, and thus became as binding as if she had been of age when she originally made it:

Barrow v. *Barrow*, 4 K. & J. 409;
Smith v. *Lucas*, 45 L. T. Rep. 460; 18 Ch. Div. 531;
Wilder v. *Pigott*, 48 L. T. Rep. 112; 22 Ch. Div. 263.

A man is bound by his covenant voidable on the ground of infancy unless he disaffirms it within a reasonable time after coming of age:

Edwards v. *Carter*, 69 L. T. Rep. 153; (1893) App. Cas. 360.

It has been held that where a woman, who had entered into a covenant during infancy before marriage to settle other and after-acquired property, died without doing any act during the coverture affirming or disaffirming the voidable covenant, it could not be avoided after her death:

Burnaby v. *Equitable Reversionary Interest Society*, 52 L. T. Rep. 350; 28 Ch. Div. 416.

If a woman can disaffirm during coverture, she ought to be able to affirm. She can elect whether she can take under or against an instrument made by another:

Williams v. *Bailey*, L. Rep. 2 Eq. 731;
Smith v. *Lucas* (*ubi sup.*);
Greenhill v. *North British and Mercantile Insurance Company*, 69 L. T. Rep. 526; (1893) 3 Ch. 474.

He referred also to

Re Jones, 69 L. T. Rep. 45; (1893) 2 Ch. 461.

Byrne, Q.C. and *Ingpen* for Mrs. Hodson.—The disability of coverture makes it impossible for a married woman to affirm a covenant entered into as an infant; for the affirmance is equivalent to entering into a new covenant:

Seaton v. *Seaton*, 58 L. T. Rep. 565; 13 App. Cas. 61;
Cooper v. *Cooper*, 59 L. T. Rep. 1; 13 App. Cas. 88.

They referred also to

Hamilton v. *Hamilton*, 66 L. T. Rep. 112; (1892) 1 Ch. 396;
Pike v. *Fitzgibbon*, 44 L. T. Rep. 562; 17 Ch. Div. 454.

Bovill Smith replied. *Cur. adv. vult.*

May 9.—CHITTY, J.—The question is, whether the sum of 1380*l.*, being the share of Mrs. Hodson under her grandfather's will, is bound by the settlement executed by her and her intended husband previously to their marriage in 1879. It represents her share in the proceeds of sale of realty directed by the will to be sold on the death of the tenant for life, but which was, in fact, sold by the tenant for life under the Settled Land Acts. When the settlement was executed, she was entitled to a contingent reversionary interest in her share. She was then a spinster and an infant in the twentieth year of her age. The settlement was not sanctioned by the court under the Infants' Settlement Act. It contains a covenant by her and by her husband so framed as to include this share, whether it fell into possession during the coverture or afterwards. Her husband died in 1893, and her share fell into possession on the death of the tenant for life in June of the same year. She is absolutely entitled to the 1380*l.*, unless it is bound by her covenant in the settle-

(*a*) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

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ment. In June 1880, shortly after she had come of age, she executed a deed relating to and indorsed on the settlement. In this deed her husband concurred, and the trustees were parties or named as parties to it. It recites that, the settlement having been executed by her while an infant, was not binding on her, and the deed proceeds on this footing. It shows that on this footing she was then entitled for her separate use to certain property which the settlement had purported to deal with specifically. In regard to this particular property she varied the provisions and trusts of the settlement, including the trusts for investment. No question arises as to this property. Subject to these variations she expressly ratified the settlement, declaring that (except as to the variations) the several trusts, covenants, and provisions of the settlement should take effect as fully and effectually in the same manner in all respects as the same would have done if she had been of full age when the settlement was executed. The deed was not acknowledged by her under the Fines and Recoveries Act or Malins' Act. There can be no doubt that she deliberately intended to affirm the covenant in question, and that she did thereby solemnly affirm the covenant, subject only to the point now raised on her behalf that the disability of coverture precludes a married woman from affirming a covenant entered into by her while a spinster and an infant by any instrument which would not operate as a new disposition of property by a married woman. Put shortly, the objection is that a married woman is incapable, either with or without the concurrence of her husband, of merely affirming her covenant made while an infant. Now the husband was, of course, bound by his covenant. Her covenant was voidable only and not void. It was plainly for her benefit. In the case of a man the law is settled by the decision of the House of Lords in *Edwards* v. *Carter* (*ubi sup.*). He is bound by his covenant voidable on the ground of infancy, unless he disaffirms it within a reasonable time after he comes of age; what is a reasonable time depends on the circumstances of the case. If he allows the reasonable time to elapse without doing anything either affirming or disaffirming the covenant, it stands as absolutely binding on him. In *Edwards* v. *Carter* the covenant was a covenant to settle property, and, a reasonable time having elapsed, the covenantor and the property comprised in it were held to be finally bound in equity. This decision shows that the affirming, either expressly or tacitly, by allowing the reasonable time to elapse, is not equivalent to entering into a new covenant or making a new disposition of the property comprised in the covenant. This distinction between a new promise and a ratification after majority of a promise made during infancy was maintained in *Harris* v. *Wall* (1 Ex. 122), where ratification was defined to be any act or declaration which recognises the promise as binding, a definition which was subsequently approved in *Mawson* v. *Blane* (10 Ex. 206). These authorities dispose of the objection, so far as relates to the point that the affirmance of the voidable covenant is equivalent to a new covenant or a new disposition; but they leave the point as to the disability of coverture open for consideration. On this point the decision of Pearson, J. in *Burnaby* v. *Equitable Reversionary Interest Society* (*ubi sup.*) is not immaterial. There the covenant for the settlement of her other and after-acquired property was entered into by the lady during infancy before her marriage; she did no act during the coverture affirming or disaffirming the covenant, and it was held that after her death the voidable covenant could not be avoided, and that the property was bound. Thus far, then, there is no distinction between the voidable covenant of a woman afterwards marrying and that of a man. The disability of coverture does not extend to a case of equitable election; she can elect whether she will take under or against an instrument executed by another person, and she can elect out of court: (*Williams* v. *Baily*, *ubi sup.*; *Smith* v. *Lucas*, *ubi sup.*; and *Greenhill* v. *North British and Mercantile Insurance Company*, *ubi sup.*). The right of election is the right to approbate or reprobate, to affirm or disaffirm. It would seem inconsistent to hold that she can exercise her right of choice in the case of an instrument executed by another, but not exercise the analogous right in reference to a voidable instrument executed by herself. In regard to her own voidable instrument, it is unquestionable that she can repudiate it—that is, disaffirm it—during coverture. If she has capacity to exercise her choice by disaffirming, it ought to follow, almost necessarily, that she can exercise her choice by affirming. In my opinion, however, the point is covered by authority. In *Barrow* v. *Barrow* (*ubi sup.*) it was held that a married woman, by obtaining a decree for specific performance of a covenant in an ante-nuptial settlement, relating to real estate of which she was tenant in tail, had elected so as to bind in equity her interest in the real estate, and had become bound by her acts when covert to carry the whole of the settlement into effect. The circumstance that she had obtained the decree showed that she had deliberately acted and affirmed or confirmed (it matters not which term is used) the settlement; but she had not applied to the court to assist her, nor had the court assisted her, in determining her choice. In his judgment, Lord Hatherley (then Wood, V.C.) refers to fraud, but in a loose sense in which it would not now be employed. It is clear that the married woman was not guilty of any fraud in the proper sense of the term as now understood. There was no fraudulent misrepresentation or concealment on her part. What she was doing, when afterwards being discovert she sought to disaffirm the settlement, was to set up her coverture as a disability; and if her coverture did create a disability in law or in equity, a court of justice would not hold that it was a fraud to set up a disability which was allowed in law or in equity. The effect of the decision was to negative the disability. The principle of the decision was adopted and enforced by Kay, J. in *Wilder* v. *Pigott* (*ubi sup.*). That case is not distinguishable from the present. There the married woman had by deed elected to confirm a settlement made by her while an infant, and it was held that her contingent interest in personalty was thereby bound. The circumstance that the deed had been acknowledged by her was immaterial, because Malins' Act did not apply to the interest in question. The case, therefore, stands upon the deliberate intention of the married woman, expressed in writing, to recognise as binding a settlement which was voidable by reason of her

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infancy. I refrain from citing the judgment because the material parts have recently been set forth and adopted by Stirling, J. in *Greenhill* v. *The North British Mercantile Insurance Company* (*ubi sup.*). For these reasons I hold that the fund in question is bound by the settlement of 1879.

Solicitors: *W. Houghton* and *Son*; *Parish* and *Hickson*.

May 24 and 25.

(Before NORTH, J.)

Re SHAW; ROBINSON *v.* SHAW. (*a*)

Settlement—Illegal marriage—Illegitimate child—En ventre sa mère at date of settlement.

Two persons within the prohibited degrees went through the ceremony of marriage and shortly afterwards executed a settlement whereby a certain sum belonging to the lady was settled upon trust after the death of the survivor of them for the child, children, or other issue of the marriage, or all or any one or more of them as the lady should appoint; and in default of appointment upon trust for the child or children of the lady by her husband; and in default of a child or children to take under the last-mentioned limitation, upon trust for the lady in case she should survive her husband, which happened. There were ten children, of whom the eldest, a daughter, was born within one month after the date of the execution of the settlement. An originating summons was taken out by the executors of the surviving trustee of the settlement for the determination (inter alia) *of the question who were entitled to the settled fund.*

Held, that, although the child en ventre sa mère *at the date of the settlement might have taken under it if apt words had been used to describe her, such as the child already begotten and not yet born, yet she could not take under the limitation in favour of the children of the marriage, or of the child or children of the lady by her husband, as there was not, at the date of the settlement, any evidence of reputation of paternity of the illegitimate child not then born.*

IN the year 1843 William Shaw (since deceased) went through the form of marriage with Emma Bentley (also since deceased), Emma Bentley being aunt by half blood to William Shaw.

By a settlement dated 19th April 1844, and expressed to be made between William Shaw and Emma his wife of the one part, and Robert Bentley and Bentley Shaw of the other part, after reciting that Emma, the wife of William Shaw, was at the time of their intermarriage entitled in her own right to 15,000*l.* and other personal estate, which William Shaw had had and received with Emma his wife, and that, in consideration of having received the same and for the purpose of making some provision for her, William Shaw had agreed to pay 15,000*l.* to the trustees, to be held upon the trusts thereinafter expressed, and that he had paid the said sum to the trustees; it was declared that the trustees should hold the said sum upon trust to invest the same as therein mentioned, and that they should stand possessed of the investments upon trust to pay the income thereof during the life of Emma Shaw to such person as she should appoint, and in default to Emma Shaw for her separate use apart from William Shaw her husband or any future husband, and without power of anticipation, and after her death upon trust to permit William Shaw and his assigns during his life to receive the income, and after the death of the survivor of William Shaw and Emma his wife as to the trust funds and the income thereof,

Upon trust for the child, children, grandchild, grandchildren, or other issue, or all or any one or more of the children, grandchildren, or other issue of the said marriage of the said William Shaw and Emma his wife (such issue to be born during the lives of the said William Shaw and Emma his wife, or the life of the survivor of them) in such manner and form, and if more than one in such parts, shares, and proportions, and with such limitations over as the said Emma Shaw, at any time or times, and from time to time during her life, by any deed or deeds, instrument or instruments, in writing, to be sealed or delivered by her in the presence of, and attested by, two or more credible witnesses, with, or without power of revocation and new appointment (such new appointment to be in favour of some one or more of the objects of this present provision) or by her last will and testament in writing, or any codicil or codicils thereto, to be by her respectively duly executed and attested, shall direct and appoint.

And in default of appointment upon trust for the child or children of Emma Shaw by William Shaw, her husband, as therein mentioned. And in case there should not be any children "of the said marriage" of William Shaw and Emma his wife, who, being a son should attain twenty-one and leave issue living at his death, or being a daughter should attain that age, or be married under that age with such consent as therein mentioned, or who should leave lawful issue her surviving, to pay and assign the last-mentioned parts or shares (meaning the parts or shares to be taken by the said children and their issue in default of appointment) and premises thereby settled, or the unapplied or unappointed part thereof, unto Emma Shaw, her executors, administrator, and assigns, in case she should survive the said William Shaw (which happened).

There was issue of William Shaw and Emma Shaw ten children and no more, of whom the eldest, a daughter, was born on the 3rd May 1844.

William Shaw made his will, dated the 29th July 1880, and thereby gave to his "dear wife, or reputed wife, Emma Shaw, otherwise Bentley," all his real and personal estate, and appointed her his executrix. The testator died on the 18th Aug. 1880 and his will was proved in the Manchester Probate Registry, by Emma Shaw, on the 20th Nov. 1880.

Emma Shaw made her will, dated the 14th Jan. 1892, and thereby appointed executors and trustees thereof, and after giving certain legacies, devised and bequeathed all the residue of her real and personal estate and effects, including her properties in Rotherham and district and at Harrogate (and she thereby exercised any power of appointment she might have under the settlement made after her marriage with her late husband, William Shaw), unto and to the use of her trustees, upon trust to call in and convert into money the same, and out of the net proceeds thereof to pay her funeral and testamentary expenses and debts, and the pecuniary legacies (other than certain legacies therein mentioned, and certain legacy duty), and as to the residue

(*a*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

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thereof, upon trust to invest the same as therein mentioned, and to stand possessed of such investments and the income thereof upon trust for her children and grandchild, therein named, in equal shares, subject nevertheless, as to the shares of her daughters, to the trusts thereinafter declared concerning the same, being trusts for the settlement of the daughters' shares.

Emma Shaw died on the 23rd May 1892, and her will was proved on the 24th Sept. 1892, in the Principal Probate Registry, by the executors therein named.

This was an originating summons, taken out by the executors of the surviving trustee of the settlement of the 19th April 1844, the defendants being the executors and trustees of the will of Emma Shaw, her surviving children and grandchildren, and the husband of her eldest daughter, for the determination (*inter alia*) of the question to whom in the events that had happened the fund comprised in the settlement belonged.

Strickland, for the plaintiffs, stated the facts.

Vernon R. Smith for the eldest daughter, born shortly after the date of the settlement, and her husband.—The eldest daughter takes the whole of the settled fund, as she was *en ventre sa mère* at the date of the settlement. The marriage between her parents was illegal, and although a settlement on future illegitimate children is void as contrary to public policy, yet a settlement on an illegitimate child already begotten is valid. He referred to

Occleston v. *Fullalove*, 29 L. T. Rep. 785; L. Rep. 9 Ch. 147.

[NORTH, J.—In that case the illegitimate child was born and acknowledged by the testator as his child, before the will came into operation at his death.] The daughter in the present case was always recognised by the parents as their child. The parents knew when they made the settlement that it was impossible that they could have a legitimate child, as their marriage was not legal. [NORTH, J.—The test of reputation was furnished at the death of the testator when the will took effect. Here there was no evidence of reputation at the date of the settlement respecting the daughter who was then unborn.] He referred to

Gordon v. *Gordon*, 1 Mer. 141;
Re Horner; *Eagleton* v. *Horner*, 58 L. T. Rep. 103; 37 Ch. Div. 695;
Pratt v. *Mathew*, 22 Beav. 328;
Re Bolton; *Brown* v. *Brown*, 54 L. T. Rep. 396; 31 Ch. Div. 542.

I claim the whole of the settled fund, as the other children cannot take. [NORTH, J.—You do not form the whole class, but are only one of the class of illegitimate children mentioned in the settlement.]

Fellowes, for the nine younger children, admitted that they could not take under the settlement.

Christopher James, for the other defendants, was not called on.

NORTH, J.—The intercourse between William Shaw and Emma Bentley commenced in 1843. They went through the form of marriage, but their circumstances were such that they could not be lawfully married and have legitimate issue. The settlement they made, with the intention of benefiting their children, is dated 19th April 1844. The first child was born on the 3rd May 1844; the next was born more than nine months after the date of the settlement, and eight others were born subsequently. The husband died in 1880 and the wife in 1892. The question is, whether the first child takes the whole of the settled fund and the other nine children take nothing. It is conceded that, according to law, the other nine take nothing under the settlement, as a settlement on unbegotten illegitimate children is void at law as being contrary to public policy. The case is different if a settlement is made on an illegitimate child alive at the date of the settlement. The limitations of the settlement are: [his Lordship read the provisions set out above and continued:] The phrase "children of the said marriage" is used several times. There is no doubt the provisions were intended to apply to all such illegitimate children as might be born. It was not the intention that they should only apply to one born shortly afterwards. It is said that the legal effect of the settlement is to give the whole of the settled property to one child. In my opinion, that is not the legal effect of it. No doubt the first child was *in esse*, in whose favour a settlement might have been made, and if apt words had been used in the settlement, such as "the child already begotten and not yet born," the first child might have taken under it. But no such words were used. I do not find in the settlement any description indicating the first child as a person to take thereunder, other than as one of a class of future illegitimate children for whom such a provision cannot be made. It is said that the word "child" in the settlement means the reputed child of William Shaw and Emma Bentley, and that the first child takes thereunder as being such child by reputation. But that is not enough, as we are dealing with a deed and not with a will. A will takes effect at the death of the testator, when there may be evidence that a child, unborn at the date of the will, who is living at the testator's death, is the reputed child of the testator. But the settlement took effect at the date of its execution, when the first child was not born, and reputation cannot identify a child not already born at the time the settlement was made. I cannot apply the reputation of being a child of a particular person to a natural child not already born. That being so, the lady does not take under the settlement. [His Lordship made a declaration that the settlement formed part of the personal estate of Emma Bentley.]

Solicitors: *J. R. Gole*, for *Oxley* and *Coward*, Rotherham; *Stibbard, Gibson*, and *Co.*, for *C. H. Booth*, Ashton-under-Lyne.

April 7, 21, and 24.

(Before NORTH, J.)

Re FRAPE; *Ex parte* PERRETT. (a)

Costs—Taxation—Agreement—Scale fee—Freeing property sold from charges before conveyance—Retainer—Admission of retainer—General Order under Solicitors' Remuneration Act 1881 (44 & 45 *Vict. c.* 44), *rr.* 2 (*a*), 3, 4, *and sched.* 1, *part* 1.

A solicitor retained a sum of money for costs in pursuance of an agreement with his client under the Solicitors' Remuneration Act 1881, *and the*

(a) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

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client received the balance of the purchase money of the property sold by him, and obtained an order for delivery by the solicitor of a bill of his costs. The solicitor delivered ten bills of his costs, amounting altogether to a sum considerably larger than that retained by him. The client then obtained an order for taxation of the ten bills, without reserving any right to dispute the retainer of the solicitor as to any of the bills. The solicitor appealed from the order for taxation and the Court of Appeal affirmed that order so that the taxing master might certify whether the agreement was fair and reasonable. The taxing master, by taxation reduced the amount of the bills to a sum less than the sum retained by the solicitor under the agreement, but certified that the agreement was fair and reasonable. In taxing the bills the taxing master allowed the costs of a reconveyance by a mortgagee to the vendor previously to the execution of the conveyance to the purchaser, of a power of attorney given by a person abroad who concurred in the conveyance, and of a deed of confirmation by the vendor, as well as the scale fee for the conveyance; and also allowed the charges in one of the bills with respect to which the client disputed the retainer of the solicitor. On a summons for a review of the taxation:

Held, that the taxing master was not unreasonable in allowing the costs of deeds freeing the property sold from the charges upon it, in addition to the scale fee for the conveyance; and that the client, by obtaining an order to tax the ten bills without reserving any right to dispute the retainer of the solicitor as to any of the bills, had admitted retainer as to each of the bills.

On the 24th Feb. 1892, H. D. Frape, who had acted as solicitor for Frederick Perrett in obtaining advances on mortgages of certain property, and afterwards in selling the property, paid to Frederick Perrett, at his request, the balance of the purchase money, upon his signing a document called a "Statement of account and agreement," from which it appeared, as the fact was, that H. D. Frape had retained the sum of 80*l.* as the agreed amount of his costs, since there had not been time to make out detailed bills of the costs due to him.

On the 5th May 1892, on the application of Frederick Perrett, dated the 25th April 1892, an order was made by consent for the delivery by H. D. Frape of bills of the costs, who in pursuance of that order, delivered to Frederick Perrett ten bills of costs amounting altogether to 140*l.* 7*s.* 6*d.*

On the 12th July 1892 Frederick Perrett took out a summons for taxation of the ten bills, and an order for taxation was made by North, J. on the 13th Jan. 1893 (*Re H. D. Frape*, 68 L. T. Rep. 47), which order was varied by the Court of Appeal by adding a direction that the taxing master was to certify whether the agreement was fair and reasonable: (*Re H. D. Frape*, 68 L. T. Rep. 558; (1893) 2 Ch. 284.)

On the taxation of the ten bills, the amount of 140*l.* 7*s.* 6*d.* was reduced to 65*l.* 19*s.* 10*d.*, with a sum of 6*l.* 15*s.* in addition, which was admitted to be due to H. D. Frape. And the taxing master certified that the agreement to fix the costs at 80*l.* was fair and reasonable.

Two questions (*inter alia*) arose upon the taxation. First, it appeared that, in carrying out and completing the sale of land subject to a mortgage, the method adopted was first to obtain a reconveyance from the mortgagee, and then to execute a conveyance to the purchaser. This necessitated two distinct deeds, and the solicitor charged the costs of the reconveyance in addition to the scale fee for the conveyance to the purchaser. To this it was objected that the scale fee covered the mortgagee's reconveyance and the conveyance to the purchaser, which might have been carried out by one deed, to which the mortgagee and the vendor might have been parties, and in that case the solicitor would have been entitled only to the scale fee for the conveyance, with an additional 2*l.* for the mortgagee. Besides this, a power of attorney was obtained from a person in America, who concurred in the conveyance; and it was objected that the scale fee for the conveyance covered the costs of the power of attorney also. The taxing master, however, allowed costs in respect of the mortgagee's reconveyance and the power of attorney, in addition to the scale fee for the conveyance. There was also a deed of confirmation, the charge for which it was contended ought also to be covered by the scale fee for the conveyance, but for which the taxing master allowed certain costs.

The second question was raised in respect of bill No. 2, which referred to one transaction, and was made up of two items only, as to the whole of which bill Perrett disputed the retainer of H. B. Frape. The taxing master, however, certified that the work charged for was done, and that the charges were correct; but that Mr. Perrett did not know of, and had not authorised, what had been done.

This was a summons, on behalf of Frederick Perrett, for a review of the taxation by way of appeal from the ruling of the taxing master on these two questions.

As to the first question,

T. L. Wilkinson for the summons.—A vendor's solicitor, in carrying out a sale of property subject to a mortgage, is not entitled first to obtain a reconveyance from the mortgagee to the vendor and to charge for that, and then to charge the scale fee for the conveyance. If this were allowed, a solicitor, in a case where the property sold was subject to several mortgages, might get a separate reconveyance of each incumbrance and charge for each reconveyance, and then, when the title was clear, charge the full scale fee for the conveyance to the purchaser. In this case the mortgagee ought to have joined with the vendor in the conveyance, and the solicitor is only entitled to the full scale fee for the conveyance and to an additional 2*l.* for each party joining in the conveyance after the first. The scale fee for the conveyance also covers the power of attorney, and the deed of confirmation which was unnecessary. He referred to

General Order made in pursuance of the Solicitors' Remuneration Act, 1881, 2 (*a*);
Schedule I., Part I. of the General Order;
Rules 3 and 4 of the General Order;
Re Robson, 63 L. T. Rep. 372; 45 Ch. Div. 71;
Re Emanuel and Simmonds, 55 L. T. Rep. 79; 33 Ch. Div. 40;
Parker v. *Blenkhorn*, 59 L. T. Rep. 906; 14 App. Cas. 1.

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C. J. Peile for H. D. Frape.—The sale was carried out by several deeds, according to the wishes of the parties. I submit that the certificate of the taxing master, who has reported the agreement to be fair and reasonable, ought not to be challenged in this way. The application should be to set aside the finding that the agreement is fair and reasonable. With respect to the first question raised by this summons, the clearing of the title by the deeds in question does not come within the scale fee "for deducing title and perusing and completing conveyance." The taxing master is right in treating these deeds as outside the scale fee. He referred to

Re Purcell, 27 L. Rep. Ir. Ch. 375;
Re Emanuel and Simmonds (*ubi sup.*);
Savery v. *Enfield Local Board*, 68 L. T. Rep. 722; (1893) App. Cas. 218.

T. L. Wilkinson replied.

NORTH, J.—I am not going to decide whether the decision in *Re Purcell* (*ubi sup.*) ought to be adopted in this country, a matter which would require further examination into the case and further consideration. But I have to decide whether the agreement between the solicitor and client is fair and reasonable or not. For the purpose of deciding that it was necessary that the bills of costs should be taxed, and this has been done. It is objected, that this summons is not a proper mode of questioning the finding of the taxing master; but I am unable to see how the amount allowed by the taxing master can be attacked except by getting at the items which go to make up that amount. The taxation is not the end, but only the means of finding out whether the agreement is reasonable or not. Having regard to the case of *Re Purcell* (*ubi sup.*) I cannot say that the taxing master was wrong in allowing the items objected to. Then, as regards the costs of the power of attorney, the concurrence in the conveyance of a person in America was obtained, and the question whether the power of attorney was the proper way of obtaining such concurrence or not was considered by the taxing master when he allowed the items in respect of it; and since the taxing master has allowed those items it cannot be said that the concurrence was obtained in an unreasonable way. Then, as to whether the power of attorney and the deed of confirmation ought to have been charged for in addition to the scale fee for the conveyance or not, I see no reason to differ from the decision of the taxing master. As regards these charges, therefore, I must dismiss the summons.

As to the second question,

T. L. Wilkinson for the summons.—The client is entitled to dispute the retainer as to bill No. 2, although he obtained an order for taxation of the ten bills. The costs might have been included in one bill, and in that case the client would have had a right to dispute the retainer as to the two items which make up bill No. 2. Why should the client be deprived of this right because the solicitor has chosen to make up the costs in ten bills? The client may object to every item in a bill where the solicitor has obtained the common order to tax the bill. He referred to

Re Herbert, 56 L. T. Rep. 522; 34 Ch. Div. 504;
Re Jones, 57 L. T. Rep. 26; 36 Ch. Div. 105.

C. J. Peile for H. D. Frape.—The items which make up bill No. 2 are properly placed in a separate bill. The client has admitted retainer as to that bill, and cannot now dispute it. The decisions in *Re Herbert* (*ubi sup.*) and *Re Jones* (*ubi sup.*) are in my favour.

NORTH, J.—In my opinion the decision of the taxing master is right. Mr. Perrett employed Mr. Frape as his solicitor for several years, and, after signing the agreement which has been referred to, applied for an order that Mr. Frape should deliver his bills of costs. Mr. Frape delivered ten bills of costs, and, as to bill No. 2, it is not disputed that it relates to a separate and distinct transaction. After Mr. Frape had delivered the ten bills Mr. Perrett accepted the situation, and applied that the taxing master might be ordered to certify the proper charges and disbursements contained in bills ten in number. If each of those bills had stood alone, Mr. Perrett could not have applied without admitting retainer, and when he applied to tax ten bills he admitted retainer as to each, as he did not reserve the right to dispute the retainer as to any one bill. When this case first came before me I made an order for taxation of the ten bills, but held that the words "by agreed costs" did not constitute an agreement within the Solicitors, Remuneration Act 1881. The Court of Appeal affirmed the order for taxation, but held that there was an agreement within the Solicitors' Remuneration Act 1881, and referred the case to the taxing master to certify whether the agreement was fair and reasonable or not. As regards bill No. 2 the taxing master has found that the work charged for was done, and that the charges are correct; but that Mr. Perrett did not know of or authorise what has been done. But it was not then open to Mr. Perrett to dispute retainer as regards that particular bill which is not part of one transaction, but a bill for a separate isolated transaction which Mr. Perrett has applied to have taxed. The taxing master might have found that, as regards bill No. 2, there had been no retainer, but he has not done so. I think the taxing master is right, and I must dismiss the summons with costs.

Solicitors: *Atkinson* and *Dresser*, for *Trevor Pollard* and *Co.*, Brighton; *Venn* and *Woodcock*, for *H. D. Frape*, Brighton.

April 24, 25, *and June* 9.

(Before ROMER, J.)

THE PORTSEA ISLAND BUILDING SOCIETY v. BARCLAY. (a)

Building society—First mortgage—Postponement of security—Borrowing powers—Ultra vires.

According to the rules of a building society, which had exhausted its borrowing powers, no property was to be deemed a sufficient security for advances which should be subject to previous mortgage otherwise than to the society; but the directors were empowered to release a portion of a mortgaged estate, if satisfied that the remainder was sufficient. A sum considerably in excess of 6000*l.* *had been previously advanced by the society to H., one of its members, upon mortgage of various houses. The directors were in need of money, and in pursuance of an arrangement, which was*

(a) Reported by G. MACAN, Esq., Barrister-at-Law.

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carried out by a mortgage deed of the 1st Dec. 1891, H. mortgaged the same houses to a life insurance company for 6000l., the building society joining in the deed to release and postpone its security, so that the life insurance company had a first charge. The 6000l. was paid to H., who immediately handed it to the building society in reduction of his debt, the balance of the debt being thus secured by a second mortgage of the property. All the costs of this transaction were paid by the building society.

Upon the society going into liquidation, this transaction was impeached:

Held, that the mortgage of the 1st Dec. 1891 was ultra vires, and not binding upon the society, inasmuch as it was not within either the express or implied powers of the directors to enter into such a transaction, nor could it be upheld as a realisation of their security as mortgagees.

THE Portsea Island Building Society was in liquidation, and the two liquidators, William Edmonds and William Frederick James Hunt, were joined as plaintiffs. The defendants were Charles Barclay, Sir George Henry Chambers, and John Hampton Hale (the trustees of the Imperial Life Insurance Company), and Charles William House, William Lowe, and Robert Lowe.

The plaintiff society was incorporated under the Building Societies Act 1874, on the 20th Sept. 1876. Under the rules of the society it was provided by rule 1, that the objects of the society were to raise a fund by the subscriptions of its members for making advances to members out of the funds of the society, upon the security of freehold, copyhold, or leasehold property by way of mortgage.

Rule 8 provided that the directors should have power to borrow from any person any sum (not exceeding two-thirds of the sum then due on mortgage to the society from its members), for the purpose of enabling the society to make advances to its members.

Rule 11 related to security for advances, and contained a provision that in no case should any property be deemed a sufficient security for moneys to be advanced by the society which should be subject to previous mortgage otherwise than to the society. The directors were also empowered, by the same rule, from time to time, to accept any other security, in manner thereinbefore mentioned, in place of any existing security, or to direct the release of any portion of any mortgaged estate, if they should be satisfied that the remainder would be a sufficient security.

By an indenture of mortgage dated the 16th Feb. 1883, made between the defendant, Charles William House, and the plaintiff society, House granted to the society the hereditaments comprised in the schedule thereto, by way of mortgage, to secure the repayment of 8250l., and by various other indentures further charges were made upon the said hereditaments, amounting in the aggregate to 11,000l. with interest.

By other indentures made on the 1st Dec. 1891, between the defendants, William Low and Robert Low, various hereditaments comprised in schedules to the said indentures, were granted to the plaintiff society to secure various sums, with interest and other payments.

In Sept. 1891 the directors of the plaintiff society discovered that the borrowing powers of the society had been greatly exceeded. They required financial assistance, and the Imperial Life Insurance Company were approached. An arrangement was come to, which resulted in the deed next stated. By this indenture, which was dated the 1st Dec. 1891, and made between C. W. House of the first part, the plaintiff society of the second part, William Besant, George Maurice Beck, and William Charles Redward (the trustees of the Building Society) of the third part, and the defendants, Charles Barclay, Sir George Henry Chambers, and John Hampton Hale, of the fourth part, after reciting that the defendants Barclay, Chambers, and Hale had agreed at the request of the plaintiff society, and of the defendant House, to lend House 6000l., and that the plaintiff society had agreed to postpone the society's mortgages therein described to the security intended to be effected, the plaintiff society purported, at the request of House, to grant and convey, and House to convey and confirm to Barclay, Chambers, and Hale, the hereditaments comprised in a schedule thereunder written, being those comprised in the indenture of the 16th Feb. 1883, freed from the plaintiff society's mortgages, to secure 6000l., with interest at 6l. per cent. By a memorandum of the same 1st Dec. 1891, the plaintiff society deposited with Barclay, Chambers, and Hale the deeds therein mentioned, as collateral security for the loan of 6000l. At a meeting of the directors of the society, held on the same 1st Dec. 1891, the seal of the society was affixed to this deed. The solicitor of the society was also directed to negotiate for a further loan of 2500l. from the Imperial Company.

By an indenture dated the 12th Dec. 1891, made between the defendant, William Lowe, of the first part, the defendant, Robert Lowe, of the second part, the plaintiff society of the third part, and the defendants, Barclay, Chambers, and Hale, of the fourth part, after reciting the agreement for a loan of 2500l., and that the plaintiff society had agreed to postpone their mortgages upon the property therein mentioned, to the security intended to be thereby made, the plaintiff society, at the requests of the defendants, William and Robert Lowe, conveyed, and William and Robert Lowe conveyed and confirmed to the defendants, Barclay, Chambers, and Hale, the hereditaments comprised in the schedule thereunder mentioned, to secure the sum of 2500l. with interest at 6l. per cent. The costs of these transactions with House and the Lowes were borne by the plaintiff society. At a meeting of the directors of the society on the same 12th Dec. 1891, they authorised this postponement of Lowe's mortgage in favour of the Imperial Company, and the deed was executed. On the 14th Dec. 1891 the directors resolved to suspend payment, Resolutions for a voluntary liquidation were passed on the 9th Jan. 1892, and the plaintiffs, William Edmonds and W. F. J. Hunt, were subsequently appointed liquidators.

By a private Act of Parliament, various points arising in the matter of the society were referred to Lord Macnaghten as arbitrator, but the subject of this action was excepted. The plaintiffs claimed a declaration that the execution by the plaintiff society of the mortgage and memorandum of deposit of the 1st Dec. 1891, and of the mortgage of the 12th Dec. 1891, were *ultra vires* and void, and that they should be delivered up to be can-

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celled. Alternatively, that notwithstanding the said indentures, the plaintiff society had first mortgages on the hereditaments and premises comprised therein, and were not postponed to the mortgages purported to be effected by the said indentures in favour of Barclay, Chambers, and Hale. By their defence and a counterclaim against House and the Lowes, the defendants, Barclay, Chambers, and Hale, pleaded that the moneys advanced by them to House and the Lowes had been advanced in order to enable them to reduce the amounts owing by them to the plaintiff society, and they claimed a declaration of the validity of the mortgages. Alternatively a declaration that the indentures of the 1st and 12th Dec. 1891 operated as valid transfers by the plaintiff society to the Imperial Company of the principal sums of 6000*l.* and 2500*l.*, and ranked respectively *pari passu* with the respective balances of such mortgage debts. Personal payment was also asked by the counterclaim against the defendants House and the Lowes of the sums of 6000*l.* and 2500*l.* Defences were put in by House and the Lowes, but the latter did not appear at the trial.

Haldane, Q.C., *Carson*, Q.C., and *E. Ford* for the plaintiffs.—Assuming these transactions to be what they purported to be, they were *ultra vires*, inasmuch as the effect of them was to put the plaintiff society in the position of second mortgagees. That was contrary to rule 11. It was, in fact, a borrowing, and, as more than two-thirds had already been borrowed, that was a breach of rule 8. The effect of the transaction was to enable the company to raise more money. There was no power to borrow except for the purposes mentioned in the rules of the society. The deposit of deeds and the execution of the memorandum of deposit was all part of one transaction, and bad:

Moye v. *Sparrow*, 22 L. T. Rep. 154; 18 W. R. 400; *Murray* v. *Scott*, 51 L. T. Rep. 462; 9 App. Cas. 519.

[ROMER, J.—It does not appear to me to be a borrowing at all. The point is, Has a building society power to deal with its assets in order to induce a third person to lend money to a debtor of the society?] We submit they had not power to do so under their rules.

Cozens-Hardy, Q.C., and *Rowden* for the Imperial Life Assurance Company.—We do not rely upon the validity of the deposit of deeds and memorandum. If this was not a borrowing by the society then it was *intra vires*. There is nothing in the rules of the society which prevents it from exercising the ordinary rights of a mortgagee, and procuring the payment off of securities. The directors of the society were acting merely as mortgagees realising part of their security. It was not a creation of a new security. If they had assigned the mortgage it would have been perfectly valid. The society have got in their coffers the 6000*l.* and 2500*l.* and now seek to rank as first mortgagees, after postponing their security to the extent of the amount advanced. The Imperial Company must be held to be the assignees of the mortgage debts of 6000*l.* and 2500*l.* We submit that the society are entitled to exercise all the powers reasonably incident to their position as mortgagees. That was stated in the case of *Sheffield and South Yorkshire Permanent Building Society* v. *Aizlewood* (62 L. T. Rep. 678; 44 Ch. Div. 412, 465). [ROMER, J.—The question is whether there was a "potential necessity" for the society to place themselves in the position of second mortgagees.] We submit that rule 11 of the society is only directory, and an investment upon second mortgage by the directors of a building society is a risk which a business man of ordinary prudence might be willing to incur. Even if it was a technically irregular transaction by the directors, it may be, nevertheless, binding upon the society. If it be held that the Imperial Company have not a first charge and that the postponement was *ultra vires*, then we must at least have a *pari passu* charge with that of the society for the balance of the debt due to the society. But even if that is not so, we are placed in the position of those creditors of the society who were paid off by our 6000*l.* We stand in their shoes:

Cunliffe, Brooks, and Co., v. *Blackburn Benefit Building Society*, 52 L. T. Rep. 225; 9 App. Cas. 857.

Haldane, Q.C., in reply, referred to

Small v. *Smith*, 10 App. Cas. 119, 139.

The transactions here were not incidental to the realisation of the securities by the society.

ROMER, J.—The facts in this case are not in dispute. The directors of the plaintiff society, hereafter called the society, being in want of money, applied to the Imperial Insurance Company for a loan. It was found that the powers of borrowing of the society were exhausted, so no loan could validly be made. Arrangements were then come to between the directors of the society, the Imperial Company, and certain other persons to whom advances had been made by the society upon the security of freehold and leasehold property. These arrangements were similar in each case, and one only need be taken as an example. The defendant House was indebted to the society in a sum exceeding 6000*l.*, and it has been agreed that I am to deal with this action on the footing that the money had been advanced to him as a member of the society, and in pursuance of the objects and rules of the society in that behalf. It was arranged that House should borrow 6000*l.* of the Imperial on security of the property already mortgaged to the society, and that the society should join in the security to release its charge in favour of the trustees of the Imperial, so as to give the Imperial a first charge in respect of the 6000*l.*, and should further secure the Imperial by a deposit of the deeds and securities held by House. The 6000*l.* was to be paid by House, when received by him, to the society in part payment of the debt due by him to the society, leaving the balance of his debt to the society secured by a second charge upon the property. This arrangement was carried out, and the directors of the society paid out of its funds all the costs thereby incurred. The question is, whether the deed dated 1st Dec. 1891, by which the society purported to postpone its security in favour of the Imperial is binding on the society. It is admitted that the further security given by the society by deposit of deeds and memorandum of deposit dated 1st Dec. 1891, is not binding, and I need not further consider it. Now, in my opinion, the directors of the society were not authorised on its behalf to postpone its security as they purported to do by the deed of 1st Dec. 1891, and that deed is not binding on the society. It is, of course, clear that persons dealing with a building society are affected with notice of the

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limitation of authority of its directors, as established by its rules, and I, therefore, have to consider the rules in the present case. Now it is provided by rule 11 that in no case shall any property be deemed a sufficient security for moneys to be advanced by the society which shall be subject to previous mortgage otherwise than to the society. It is further provided by that rule that the directors may from time to time accept any other security by mortgage in manner thereinbefore mentioned in place of any existing security (by which I understand any other security that is sufficient as before defined, which would not include a second mortgage). It is also provided by the rule that the directors may direct the release of any portion of any mortgaged estate if they shall be satisfied that the remainder will be sufficient security. Now, so far as these rules go, not only do they not expressly authorise such a transaction as I am considering, but they, at any rate *primâ facie*, negative its validity. By the transaction in question the directors have accepted for the balance of the debt due from House an insufficient and improper security under the rules—namely, a second charge. And there are certainly no other rules which could possibly be said to expressly authorise the transaction. It follows that, to enable the trustees of the Imperial to uphold the deed in question as against the society, they must (since there is no express rule) establish that the directors of the society had implied authority to execute the deed. But I cannot see any sufficient ground on which to imply such authority. It certainly is not within the general powers of the directors which I can imply from the nature of the society and its objects. It is not one of the objects of this society to finance a member or outsider, even though he be a debtor to the society, or to assist him in borrowing either by guaranteeing the loan to him, or by giving security on the society's property for the loan; and the postponement by the society of a charge on the debtor's property is equivalent to giving security on the society's property. Nor can I say that the directors were authorised on the ground that they were only exercising the ordinary remedies of mortgagees, or only doing what was necessary to work out their legal rights or remedies as mortgagees. This transaction was not an ordinary remedy of a mortgagee, or necessary to work out any legal right or remedy. It is suggested that it was a species of realisation of security by the mortgagee, and, as such, justified; but in no strict or true sense can this be said to be a realisation of security, nor was it necessarily incidental to any realisation of security, or to the position of the directors as holders of security, and if the term "realisation of security" be employed in an extended sense to cover any unusual transactions with the society's securities by which money is obtained, then it by no means follows that the directors are authorised to enter into such transaction. To entitle them to enter into any such unusual transaction, the directors must show either express authority under the rules, or what was called in the case of *Small* v. *Smith*, 10 App. Cas. 119, a potential necessity for their adopting that course. I have pointed out already that in this case there is no express authority under the rules, and certainly no case of potential necessity has been or attempted to be made before me. On the contrary, the facts of the case negative the idea that the directors were driven to the course they adopted by any necessity for realising or dealing with their securities in that particular way, or by any necessity whatever apart from their general need to get money paid into their bank. So far as appears, they never contemplated or considered any course except the one they adopted, and that of borrowing, which could not legally be carried out. Under these circumstances it appears to me that I am obliged to hold that the society is not bound by the deed. The result of this is to put the Imperial in the position of second mortgagees. But it is said on their behalf that I ought not to leave them in that position; that I ought to impose some terms on the society before giving it any relief or making any declaration in its favour in this action, so as to prevent or mitigate the effects of such a result. But I cannot see how I can impose terms on the society before making a declaration in its favour. If the deed is not binding on the society, I ought so to declare, and I have no right to refuse to make a declaration to that effect if the society will not consent to terms which will deprive it of some of the beneficial results of necessity flowing from the declaration. The Imperial have acted with full knowledge of the powers of the directors of the society, and must take the consequences of their action. I cannot restore the parties to their old positions. The transactions as between House and the Imperial, and the mortgage deed executed by House in favour of the Imperial, are still binding as between those parties, and I cannot cancel them, nor, indeed, am I asked by either of these parties to do so. Neither can I cancel the transaction as between House and the society, by which House has been paid off and been discharged of part of his debt to the society. It is said that if the transaction had been one whereby the directors of the society had sold and transferred to the Imperial part of House's debt, that would have been within the powers of the directors, and that therefore I ought to treat the case before me as one in which that course had been adopted, and hold that the charge of the Imperial for 6000*l.* ranks *pari passu* with the charge of the society for the balance of the debt now owing to the society, But I do not see how I can do that, even assuming that the directors could validly have sold and transferred to the Imperial a part of House's debt. Apart from the considerations above mentioned, which prevent me imposing terms on the society, I may point out that, as a matter of fact, the directors of the society never did sell or transfer, or, so far as I can see, consider whether they should sell and transfer to the Imperial part of House's debt. That was not the transaction intended or carried out. If a transaction entered into on behalf of a building society is not binding on that society, what right has the court to turn it into another transaction merely because that happens to be somewhat similar in its results and might have been validly entered into. Besides, the 6000*l.* is not and cannot now be made part of the original debt due from House to the society. The rate of interest is different, and the incidents of the mortgage between House and the society differ in several other respects from those of the mortgage between House and the Imperial. Another suggestion of the Imperial was that I should direct the society

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to pay off the 6000*l.* now due to the Imperial and take a transfer of the Imperial's debt and charge. But I have no right to order the society to do this or to compel it to invest its present funds in any such purchase. Lastly, it was suggested that in some way the Imperial were entitled to be admitted as creditors of the society for so much of the 6000*l.* which House paid to the society as was applied in paying off creditors and depositors of the society. I cannot follow this. The suggestion appears to me to be made under a confusion of ideas. The 6000*l.* was not lent by the Imperial to the society. The 6000*l* received by the society from House was applied, as it was bound to be applied, in crediting House and discharging part of his debt, and I cannot undo that. The Imperial are creditors of House for the 6000*l.* they lent, and not creditors of the society. The society cannot at the same time be obliged to credit House with this 6000*l.* and be still liable for it or for part of it to the Imperial. The result is that, so far as concerns the transaction in which House was concerned, I must order the deeds and documents deposited to be handed over to the plaintiff society, and the memorandum of deposit of the 1st Dec. 1891 to be cancelled, and I must declare that the deed of mortgage of the 1st Dec. 1891 is not binding on the society, and that the society's charge is not postponed to but takes priority over that of the trustees of the Imperial. There will be similar orders and declarations in respect of the transactions in which the defendants William Lowe and Robert Lowe were concerned. Then I must order the defendants the trustees of the Imperial to pay the society's costs of the action. Having regard to the defences of House and Lowe, and the other circumstances of the case, I make no order as to the costs of these defendants to the action. With regard to the counter-claim of the Imperial, I must dismiss that, as against the society, with costs. There will be personal judgment, as against House and the Lowes, and they must pay the costs of the counter-claim, so far as it seeks relief on the personal covenant.

Solicitors for the plaintiffs, *Learoyd, James,* and *Mellor.*

Solicitors for the defendants, *Henry Kimber* and *Co.*; *A. W. Mills* for *King* and *Lapthorn,* Landport; *Chamberlayne* and *Short,* for *Hyde* and *Hobbs,* Portsmouth.

Tuesday, June 12.

(Before ROMER J.)

Re GODFREY; THORNE-GEORGE *v.* GODFREY. (*a*)

Practice—Costs as between solicitor and client—Married woman—Restraint on anticipation—Partial removal of—Married Women's Property Act 1893 (56 *&* 57 *Vict. c.* 63), *s.* 2.

A married woman who was entitled to certain moneys under a settlement and a will for her life with a restraint on anticipation, brought an action against the trustees of the will and settlement, claiming an account against them, and alleging breaches of trust. On her eventually submitting to a judgment,

Held, that she must pay the defendants' costs as between solicitor and client; and that the restraint on anticipation must be removed so far as was necessary to enable her to do so.

THE plaintiff, Georgina Frances Thorne-George, was a married woman, and was entitled under an indenture of settlement of the 8th Jan. 1877, and also under a will of one D. Godfrey, dated the 20th Nov. 1878, to an estate for life in certain moneys for her separate use, without power of anticipation. In 1885 the trustees of the settlement and the will apportioned the trust funds amongst the beneficiaries, and submitted the accounts in a book to each of them. On the 23rd July 1890 a memorandum was signed by the plaintiff's solicitor declaring that the trustees had set apart and held the various securities and cash mentioned in a schedule. The plaintiff now brought an action against the trustees of the settlement and will, namely the defendants, R. S. Godfrey, C. C. Godfrey, and J. T. Thornhill, claiming an account of the estate in the hands of the defendants as such trustees. Various breaches of trust were alleged against the defendants. The plaintiff claimed that the trust funds should be replaced, and that new trustees should be appointed. By their statement of defence the defendants denied the alleged breaches of trust, stated that they had properly accounted to the plaintiff for everything to which she was entitled, and pleaded the Trustee Act 1888, sect. 8. Ultimately the plaintiff submitted to have judgment given against her.

Haldane, Q.C. and *C. Rose-Innes* appeared for the plaintiff.

Neville, Q.C. and *J. F. Popham,* for the defendants, submitted that they were entitled to costs as between solicitor and client, and referred to

Andrews v. *Barnes,* 58 L. T. Rep. 748; 39 Ch. Div. 133.

ROMER, J.—No part of the costs of this litigation should be thrown upon the trust estate. I therefore order the plaintiff to pay the costs of the defendant as between solicitor and client, and the restraint on anticipation will be removed—as it can be now under the Married Women's Property Act 1893—so far as it is necessary, in order to enable her to make this payment.

Solicitors for the plaintiff, *A. L. Armitage.*

Solicitors for the defendants, *O. Vernède.*

QUEEN'S BENCH DIVISION.

May 23, 24, *and June* 6.

(Before CHARLES, J.)

SCHOLFIELD *v.* LONDESBOROUGH (EARL OF). (*a*)

Bill of exchange—Acceptance for accommodation of drawer—Acceptance upon higher stamp than necessary—Fraudulent alteration by drawer after acceptance—Liability of acceptor to holder in due course—Bills of Exchange Act 1882 (45 *&* 46 *Vict. c.* 61), *s.* 64 (1).

The defendant accepted a bill of exchange for 500*l. for the accommodation of the drawer upon paper bearing a stamp sufficient to cover* 4000*l. The bill was complete when the defendant signed it, and the drawer, having obtained the bill so signed, fraudulently altered the same by inserting the figure* 3 *before the figures* 500, *there being a space sufficiently wide for such interpolation*

(*a*) Reported by G. J. MACAN, Esq., Barrister-at-Law.

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

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between the sign £ and the figures following, and he also inserted the words "three thousand," the word "three" being at the end of the second line, and the word "thousand" being at the beginning of the third line, there being sufficient room in the bill as drawn for such interpolation. He thus altered the bill into one for 3500l., and in this state he negotiated it. When the defendant signed the bill there was nothing to call his attention to the amount of the stamp, and the bill appeared to be drawn in the ordinary form, though in such a shape as to make alteration possible without detection. In an action against the defendant, as acceptor, by a holder in good faith and for value:

Held, that the defendant was not liable for the amount of the altered bill, on the ground that he was not guilty of such negligence in accepting the bill, either as to the amount of the stamp or the form of the bill, as would render him liable for the subsequent forgery; but, that, as the alteration was "not apparent," he was, under sect. 64 (1) *of the Bills of Exchange Act* 1882, *liable to the extent of the amount for which the bill was originally drawn and accepted.*

Held also, that, as the bill had not been "issued" for stamp purposes at the time of its alteration, it did not become a new instrument requiring a fresh stamp.

ACTION tried by Charles, J. without a jury.

The facts and the nature of the arguments are sufficiently set out in the judgment.

Finlay, Q.C. and *E. Morten* for the plaintiff.

Jelf, Q.C., *A. T. Lawrence*, and *C. K. Francis* for the defendant.

Cur. adv. vult.

June 6.—The following judgment was read by

CHARLES, J.—In this case the plaintiff sought to recover from the defendant 3500l. on a bill of exchange drawn by one Francis Charles Sanders upon and accepted by the defendant Lord Londesborough. The plaintiff was admitted to be a holder in good faith and for value of the bill. It was further admitted that when the defendant accepted the bill it was a bill for 500l. only, and that afterwards, before endorsement, it had been fraudulently altered by the drawer into a bill for 3500l. The defendant pleaded this alteration as a defence to the whole action, but in the alternative, whilst denying all liability, paid 500l. into court. The plaintiff replied that the defendant "ought not to be admitted to say that the bill was altered in material particulars and thereby made void, because such alterations were made easy and every opportunity for them was given by the culpable negligence of the defendant in accepting the bill in the form in which he accepted it and on the bill stamp on which it was drawn, and that without the said negligence the alteration would not and could not have been made." The bill was dated London, Sept. 8th, 1890, and bore a stamp of an amount sufficient to cover a sum of 4000l. In the left-hand corner were at the time of the acceptance the figures "500," preceded by the sign for pounds—viz., £. Between the "£," however, and those figures was a space sufficiently wide to admit of another figure being interpolated. The figure "5" was made in a bold hand, and was somewhat larger than the two ciphers which followed it. The body of the bill was in three lines. On the first were the words—"three months after date;" on the second were the words "pay to me or my order the sum of;" and on the third were the words "five hundred pounds for value received." In the second line there was sufficient space left for the addition of another word; and before the word "five" in the third line there was also space for the addition of a word, without carrying the third line further to the left than the word "pay" in the second. Sanders having obtained the defendant's acceptance to the bill so drawn, inserted the figure "3" between the sign £ and the figures "500," and in the body of the document added the words "three thousand" between the word "of" in the second line, and the words "five hundred" in the third, writing the word "three" at the end of the second line, and "thousand" at the begining of the third line; and in that shape he had negotiated it. It was contended that under these circumstances the defendant was liable for the whole amount of the fraudulently altered bill, upon the principle of the case of *Young* v. *Grote* (4 Bing. 253). It was suggested by Brett, L.J. in *Baxendale* v. *Bennett* (40 L. T. Rep. 23; 3 Q. B. Div. 525), that the authority of that case had been shaken by the decision of the House of Lords in the *Bank of Ireland* v. *Evans's Trustees* (5 H. of L. Cas. 389). Upon reference, however, to the opinion of the judges in that case, delivered by Parke, B., and adopted by the House of Lords, it will, I think, be found that *Young* v. *Grote* (*ubi sup.*) was not in any way disapproved of, and it has been recognised in many subsequent cases. "Its authority," says Williams, J., in *Ex parte Swan* (7 C. B. N. S. 400), "cannot be disputed;" although, as he points out, it may be doubtful whether the liability of a man who signs a blank bill, note, or cheque be founded on the doctrine of estoppel or on a rule of the law merchant, that an actual authority is thereby conferred on the persons in whose hands the instrument is. In the *Bank of Ireland* v. *Evans's Trustees* (*ubi sup.*), the Lord Chancellor speaks of the case as having proceeded on the ground of estoppel by reason of negligence, and Erle, C.J. takes the same view of it in *Ex parte Swan* (*ubi sup.*), and so also does Blackburn, J. in his judgment in the Exchequer Chamber in *Swan* v. *North British Australasian Company* (2 H. & C. 175). It appears clear from these cases that a person who signs a negotiable instrument, with the intention that it shall be delivered to a series of holders, does incur a duty to those who take the bill, note, or cheque, not to be guilty of negligence with reference to the form of the instrument. If he signs it in blank he is responsible for any amount which the stamp on it will cover. If he signs it negligently in such a manner or shape as to render alteration a likely result, he is responsible on the altered instrument. I go on then to inquire whether in this case the defendant has been guilty of that sort of negligence in accepting the bill in question in the form in which it originally was drawn, which would make him liable for the subsequent forgery. This is a question, not of law, but of fact, and as such has always been dealt with in the various authorities: (see especially on this point *Société Générale* v. *Metropolitan Bank* (27 L. T. Rep. 849). Now it must not be forgotten that when the defendant gave this acceptance he had not the slightest reason to suspect the honesty of the drawer, or to suppose him likely to be guilty of a criminal act.

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The negligence charged has no reference to the character of the person in whose hands the defendant placed the bill, but rests entirely on its form. On the question of the defendant's alleged negligence, it was said in the first place that the defendant ought not to have accepted a bill for only 500*l.* on paper bearing a stamp sufficient to cover an amount of 4000*l.* But I think it would be pressing the doctrine of estoppel by negligence far beyond what is justifiable to hold that the mere fact that the document bore a higher stamp than it need have done estops the defendant from setting up the subsequent forgery. He did not, it must be remembered, sign the bill in blank. It was complete when he signed it, and there was nothing whatever to draw his attention to the amount of the stamp, and he was not, as far as I can see, guilty of any breach of duty in failing closely to scrutinise it. Next, the manner in which the words and figures in the body of the bill were written was relied on; and no doubt the bill was drawn in such a shape as to make an alteration possible without its being easily discoverable. But I do not think this is sufficient to impose liability on the defendant. It is not enough that he accepted a bill in a form facilitating forgery; he must negligently so accept it, and if, when he accepts it—although a forger can, owing to the arrangement of the words and figures, in fact alter it without detection — it appears to be in ordinary form, he is not, in my opinion, liable. In *Young* v. *Grote* (*ubi sup.*), the arbitrator who stated the special case found that the cheque had been filled up in a grossly negligent manner with the acquiescence of the plaintiff's agent. A glance at it would have satisfied any careful person that it was incomplete; that it was in a state in which alterations might reasonably be contemplated; in other words, in which alteration was not merely a possible, but a likely result. Here I cannot see anything to warrant such a finding. The unaltered bill was complete in form, and upon inspection would not, in my judgment, have excited suspicion in the mind of any reasonably prudent man. The defendant is not, therefore, in my opinion, liable to pay the plaintiff the amount of the altered bill. The question remains whether, having regard to the new law contained in the proviso to sub-sect. (1), sect. 64, of the Bills of Exchange Act 1882, the defendant is liable to the extent of 500*l.* That sub-section enacts that: "Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers: provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour." Now, in the present case I do not think the alteration was "apparent." It is not disputed that the plaintiff is a holder in due course, and although a careful scrutiny of it might have led to the conclusion that the "3" had been interpolated and the "three thousand" added, the alteration is so skilfully effected as not to be at all likely to attract attention. Unless, then, there is any stamp objection, payment of it can be enforced for 500*l.* It is, however, argued that the bill, as altered, became a new instrument, requiring a fresh stamp. The answer to that argument is that Sanders had altered the bill before it was delivered to any holder for value. Sanders had not given value. The defendant had accepted the bill for Sanders's accommodation. The bill had not, therefore, for stamp purposes been "issued" at the time when it was altered, and an alteration before issue does not avoid the bill: (*Downes* v. *Richardson* 5 B. & Ald. 674.) The definition of "issue" in sect. 2 of the Act of 1882, as "the first delivery of a bill or note complete in form to a person who takes it as a holder," does not, in my opinion, alter the law as to what for the purposes of the stamp laws constitutes the "issue" of a bill. In the result, I hold, for the reasons given, that the defendant is liable to pay the plaintiff 500*l.* and no more, but as the defendant had paid that amount into court, my judgment must be for the defendant with costs.

Solicitors for the plaintiff, *Smith, Fawdon,* and *Low,* for *Owen March,* Rochdale.

Solicitors for the defendant, *Saltwell, Tryon,* and *Saltwell.*

Monday, June 4.

(Before Charles, J.)

The Wardens and Governors of Sir Roger Cholmeley's School v. Sewell and others. (*a*)

Landlord and tenant — Lessee — Under-lessee — Forfeiture by lessee—Right of under-lessee to relief—Terms imposed on under-lessee—Conveyancing and Law of Property Act 1881 (44 & 45 *Vict. c.* 41), *s.* 14; *Conveyancing and Law of Property Act* 1892 (55 & 56 *Vict. c.* 13). *s.* 4.

Sect. 14 *of the Conveyancing and Law of Property Act* 1881 *gives the court power, upon terms, to grant relief to a lessee against forfeiture, but this power does not extend to (amongst other things) a forfeiture on the bankruptcy of the lessee; and sect.* 4 *of the Conveyancing and Law of Property Act* 1892 *gives the court a similar power to relieve under-lessees against forfeiture.*

Held, that the court had jurisdiction, under sect. 4 *of the Act of* 1892, *to grant relief to an under-lessee for an act of forfeiture committed by the lessee, although the forfeiture be such that the lessee himself would have been precluded from all relief under sect.* 14 *of the Act of* 1881.

Accordingly, where a lessee leased to an under-lessee and afterwards became bankrupt, thereby incurring a forfeiture under the original lease, it was held that, although the lessee by his bankruptcy would have been shut out from all relief, the court had power to give relief to the under-lessee, and it did so on the terms that he should personally enter into the same covenants with the lessor, and pay the same rent as the lessee, but that he should not be required to pay the increased rent which it was alleged the premises were worth.

Action for the recovery of premises.

The plaintiffs, the Wardens and Governors of the Free Grammar School, at Highgate, were the freeholders of certain premises which were originally leased by them on the 14th June 1878 to

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

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one Mr. Jones, for fifty years, at a rental of 720*l.* a year.

By divers mesne assignments these premises had passed from Jones into the hands of Mr. Sewell, one of the defendants in the present action.

It was the invariable practice of the plaintiffs, before giving their licence to assign, to require from the assignee a personal covenant with them to perform the covenants in the original lease. In accordance with this requirement each one of the assignees, who in succession had taken the premises (including the defendant Sewell), had entered into a personal covenant with the plaintiffs to perform the covenants in the original lease granted to Jones in 1878.

Sewell became the assignee of the lease by an assignment dated the 24th Sept. 1890, and this assignment was in the form insisted upon by the plaintiffs, and by it Sewell bound himself personally to perform the covenants in the original lease.

On the same day, namely, the 24th Sept. 1890, Sewell mortgaged the property by way of underlease for the whole term less one day to the Messrs. Nicholson, who are now the only effective defendants in the present action. The Messrs. Nicholson had been mortgagees of the preceding assignee, and they now assumed the position of under-lessees from Sewell.

On the 19th July 1892 Sewell became bankrupt, and a trustee was appointed.

According to the conditions in the lease this bankruptcy was a forfeiture, and in consequence a right of re-entry accrued to the plaintiffs upon Sewell being adjudged bankrupt.

On the 31st May 1892 the Messrs. Nicholson had taken possession of the premises, and afterwards paid some rent. After the bankruptcy of Sewell negotiations took place between the plaintiffs and the Messrs. Nicholson as to the terms upon which the plaintiffs would allow possession by the Messrs. Nicholson to continue, as at this time Messrs. Nicholson had no right to the premises by reason of Sewell's interest in the property having terminated by his bankruptcy.

No conclusion was come to, and in Dec. 1892 the writ in this action was issued, claiming a declaration that the plaintiffs are entitled to possession of the premises, and claiming possession, and rent, or mesne profits, up to the time of possession being delivered over.

Judgment was recovered in this action against Mr. Sewell and his trustee in bankruptcy, and no question now arises with regard to them, but the defendants, the Messrs. Nicholson, defended the action, and delivered a defence and counter-claim, claiming relief against the forfeiture. Upon the present trial, therefore, the only persons before the court were the plaintiffs, the original lessors, on the one hand, and the defendants, the Messrs. Nicholson, the under-lessees of Sewell, on the other, and the question now was whether the Messrs. Nicholson, as under-lessees of Sewell, were, under the provisions of sect. 4 of the Conveyancing and Law of Property Act 1892, entitled to relief against the forfeiture caused by Sewell's bankruptcy, although it was admitted that Sewell himself would not have been entitled to any relief under sect. 14 of the Conveyancing and Law of Property Act 1881, the forfeiture being caused by his own bankruptcy.

Fischer, Q.C. and *W. Graham* for the plaintiffs.

Whitehorne, Q.C. and *Bremner* for the defendants.

The sections of the Acts and the nature of the arguments appear sufficiently in the judgment.

Charles, J. (after stating the above facts proceeded):—There is no question made with regard to the liability of the Messrs. Nicholson to pay the apportioned rent or mesne profits up to this time. On the 11th April of this year they paid, without prejudice to their rights, the sum of 1268*l.* 5*s.*, under the denomination either of rent or mesne profits, and no doubt they are liable to pay compensation assessed upon the same principle, to the plaintiffs until they (the plaintiffs) obtain possession of the premises. That is not the difficulty which arises in this case. The difficulty is as to whether I am, or am not, to give the plaintiffs judgment for possession of these premises, and to shut out the defendants from the relief which they ask in their defence and counter-claim. They submit that they are entitled, as under-lessees of these premises, to have relief from the alleged right to enter, in accordance with the provisions of the Conveyancing and Law of Property Act 1892, and further, by way of counter-claim, they ask for the relief prescribed by sect. 4 of that Act upon such conditions as I may think fit. No doubt this case raises a very important and interesting question as to what is the true effect of the 4th section of the Act of 1892. Before I consider that question I should state that no application has been made in this case to the Court of Bankruptcy to make any vesting order with respect to these premises, and before dealing with the 4th section I ought to state what happened with regard to the Bankruptcy Court. On the 12th May the trustee gave notice of his intention to disclaim the property—there being of course a reversion in the bankrupt. On the 5th June there was an actual disclaimer, and notice of the disclaimer was duly given, but nothing was done in the Court of Bankruptcy. It seems to me that the Messrs. Nicholson might have applied in the Court of Bankruptcy for a vesting order upon some terms or other. Had the Bankruptcy Act of 1883 remained unamended they could not have got a vesting order from the Court of Bankruptcy, except upon the terms of their coming under the same obligations to the landlords that Mr. Sewell had formerly been under. But, in consequence of the provisions of sect. 13 of the Bankruptcy Act 1890, the Court of Bankruptcy has power, if it thinks fit, to make the person in whose favour it makes a vesting order subject only to the same liabilities and obligations as if the lease of the bankrupt had been assigned to him. So that, if that application had been made to the Court of Bankruptcy, it seems to me that Messrs. Nicholson might have taken up the position—whether successfully or not I do not say—that they were entitled to come and ask the Court of Bankruptcy for a vesting order upon the terms that they should accept the responsibilities of a mere assignee, and not the whole responsibilities of Mr. Sewell. However that may be, they did not do so. Therefore, so far as any application to the Court of Bankruptcy is concerned, no doubt they are excluded from any advantages which they might have obtained in that court. But I do

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not see that that affects or ought to affect my decision in this case. This action was commenced, and the defence and counter-claim delivered, long before any disclaimer on the part of the trustee, and I am bound to hear and decide this action quite irrespective of what took place in the Court of Bankruptcy. I do not think that the defendants were bound to go there, or that by not having gone there they have excluded themselves from the benefit of sect. 4 of the Conveyancing and Law of Property Act 1892, if that section applies to their case. I come now to the question whether the defendants, Messrs. Nicholson, are entitled to the benefit of the 4th section. I have been reminded during the argument of what the history of the law of forfeiture is, and what the principles are upon which the Court of Equity formerly gave relief against penalties and forfeitures. There can be no doubt, I suppose, that of old, as between landlord and tenant, forfeiture could not be relieved against in the sense in which those words are now used, although from a very early period the Court of Equity, quite apart from statute, was in the habit of giving relief by the form of ordering a new lease to be executed between the parties. But as long ago as the 4 Geo. 2, c. 28, a statutory power of giving relief was conferred upon the court, and the statutory power was, as between landlord and tenant, conditional, undoubtedly, upon the payment of the rent in respect of which the forfeiture had accrued. As time went on relief was given upon terms for other breaches of covenant, such as relief for a breach of covenant to insure under the Real Property Amendment Act 1859 (22 & 23 Vict. c. 35), and relief in certain specified cases under Lord Cranworth's Act 1860 (23 & 24 Vict. c. 145). That becomes unimportant, however, in consequence of the passing of the statute—the Conveyancing and Law of Property Act 1881 (44 & 45 Vict. c. 41), for, by sect. 14, sub-sect. 2, of that Act, a very extended right to grant relief is given to the court. It is thereby enacted that: "Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit." By the 1st sub-section considerable restriction is placed upon the lessor's right of re-entry, and by the 2nd sub-section the power of the court to give relief, where the lessor is proceeding upon a right of re-entry, is given, and is a very extensive power, and one largely in excess of anything which the court had done up to the passing of that Act. It shows also that the history of this legislation is a progressive history, and that from relief being confined first of all to the case of a breach of a covenant to pay rent, it was afterwards extended to other cases, and now, by the 2nd sub-section of sect. 14 of the Act of 1881 it is extended, where the court may think a lessor is proceeding to enforce his right of re-entry, to any case in which the court may think fit to grant or refuse relief. Then comes sub-sect. 6 which provides: "This section does not extend—(1) To a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest." Now in the case before me, sub-sect. 6 applies, and the lessee, Mr. Sewell, could not obtain relief under sect. 14 from the forfeiture he had incurred, inasmuch as the whole of the section is rendered, by sub-sect. 6, applicable to a case where the cause of the forfeiture is bankruptcy. It had been discussed after the passing of the Act of 1881, whether or not sect. 14 applied to an under-lessee as well as to a lessee, and the discussion was raised, no doubt, owing to the language of sub-sect. 3 of sect. 14, which prescribes what, for the purpose of the section, a lease is to be considered to include: "For the purposes of this section, a lease includes an original or derivative underlease . . . and a lessee includes an original or derivative under-lessee." But it had been decided in two cases, the cases of *Burt* v. *Gray* (65 L. T. Rep. 229; (1891) 2 Q. B. 98), and *Creswell* v. *Davidson* (56 L. T. Rep. 811), that the benefit of this section could not be claimed by an under-lessee. It is true that in these cases the under-lessee was under-lessee of part of the premises only; but in the recent case of *Nind* v. *Nineteenth Century Building Society* (70 L. T. Rep. 316; (1894) 1 Q. B. 472) it has now been decided that sect. 14 does not apply to the case of an under-lessee of the whole of the premises. That left an under-lessee in an unprotected position, and he was no better off than he had been in consequence of the passing of the Act of 1881, and I have very little doubt that the decisions in *Burt* v. *Gray* (*ubi sup.*) and *Creswell* v. *Davidson* (*ubi sup.*) had something to do with the passing of the Act of 1892. In dealing with the present case we must read sect. 2 of the Act of 1892, and we must read the Act of 1881, the Conveyancing Act 1882, and the Act of 1892, as forming portions of a continuous code, and doing so, we must first of all ask what is the true construction of the words used in sect. 4 of the Act of 1892; and, secondly, if the true construction of those words is actually repugnant or contradictory to any other part of the statute, we must apply the principles laid down in the case of *Ebbs* v. *Boulnois* (32 L. T. Rep. 650; L. Rep. 10 Ch. 479), and give the best interpretation to the Act we can, and we must not allow the section of the latter Act to induce us to give a larger construction than it ought to bear, having regard to the section contained in the earlier Act. No doubt there is a considerable difficulty about the matter, for, if the construction contended for on behalf of the defendants be a good one, the Legislature has said that an under-lessee shall now have a better right in one sense than the lessee himself, because it has used language which is, upon that interpretation of it, capable of including his case in a set of circumstances in which the lessee himself would be unable to apply for relief. The case before me is just one of those cases, as Mr. Sewell could not apply for relief, because he is excluded from the benefit of the 14th section by sub-sect. 6, as his forfeiture is incurred in consequence of his bankruptcy. But

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Messrs. Nicholson are plainly within the words of sect. 4. That section does not say that the sub-lessee is to have relief, if he thinks fit to apply for it, in all those cases in which the head lessee would be entitled to claim relief under sect. 14. The section is not framed in that manner, but it is framed in an unqualified manner, and applies to cases where the lessor is proceeding for re-entry or forfeiture under any covenant in a lease. In such case, the section says: "The court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's action, if any, or in any action brought by such person for that purpose, make an order vesting for the whole term of the lease, or any less term, the property comprised in the lease or any part thereof in any person entitled as under-lessee to any estate or interest in such property, upon such conditions as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the court in the circumstances of each case shall think fit." Is there any reason either in principle or in the history of the matter that I should restrict these very plain words? I can see none, and I look at the matter as though sect. 4 had followed sect. 14 in the Act of 1881. Reading these two sections together, I cannot see that there is anything which necessarily should induce me to put the limited construction on sect. 4 which is contended for on behalf of the plaintiffs. On the other hand, having regard to the history of the matter, I see many reasons why I should not do so, and I can easily conceive that there are cases in which it would be inequitable, and in which the Legislature might think it inequitable, to allow a head lessee to apply for relief, though they might think it quite equitable to allow a sub-lessee to apply for relief, and it seems to me that this is such a case. It would not be right to allow a lessee who had managed his affairs so badly as to become a bankrupt, to apply for relief under any conditions whatever; but, although the Legislature has excluded him, it seems to me perfectly consistent with their exclusion of such a lessee, that they should allow the under-lessee, to apply for relief if he be a person who has shown himself deserving of relief. I feel a difficulty in varying the plain language of an Act of Parliament in compliance with any supposed scheme which the Legislature may have had in view. Interpreting the sections together, I must still give to each section its full weight. There is no necessary repugnancy or inconsistency between the two sections, and I am not obliged to make a choice between them. But, as it seems to me, I can with perfect sense read the two sections together, and I find that the under-lessee may become entitled, and I think the Legislature meant that he should become entitled, to a right which it is possible the lessee himself could not be entitled to. It is said this is a very strange result. But the whole of these empowering sections with reference to giving relief as between landlord and tenant are strange, and would have been very strange to those who lived a century ago. This interference with the contractual rights between landlord and tenant is comparatively modern, certainly with respect to all other covenants than a covenant to pay rent, which stands upon a different footing from a covenant to make a mere money payment. Therefore, although I feel that I am giving these under-lessees a right which Mr. Sewell himself would not have had, still I hold in their favour that I have jurisdiction under sect. 4 to give them some relief from forfeiture, which undoubtedly had been incurred. The question then arises upon what terms I ought to give them the relief which they ask. They ask these terms, that I should vest these premises in them upon the terms of their becoming assignee of them, and that they should take up and assume the liabilities of Mr. Sewell as assignee and not otherwise. On the other hand, it has been contended for the plaintiffs, that there are two matters with reference to which I ought not to grant them relief upon any such terms. First, it is said that in the interval since the lease was granted the property has become more valuable, and that the rent, instead of being 720*l.*, ought to be 850*l.* I will assume in favour of the plaintiffs—I did not hear evidence on the point—that 850*l.* is the rental which might be commanded. I do not feel able to raise the rent upon these under-lessees, and I very much doubt if I have any jurisdiction to do so. This 4th section goes on to say that I may impose any condition as to payment of rent, or otherwise, upon an under-lessee, but I very much doubt that that means to authorise me to impose, as one of the conditions of making a vesting order vesting the property in them, an increase—not of the rent which they are paying to their own lessor—but of the head rent upon the premises. Whether I have jurisdiction to do so I do not feel certain, but I do not feel disposed to do so, or to make it a condition of giving this vesting order that the under-lessees should pay any rent higher than the head rent which Sewell is liable to pay. So much with regard to the rent. Now with regard to the covenants into which they are to enter. The defendants contend that they can only be such covenants as Mr. Sewell would be liable to as assignee of the lease. The plaintiffs say, "No, you must make them enter into covenants the same in all respects as those into which Mr. Sewell had entered, and it is the practice of the plaintiffs always to insist upon their successive assignees entering into personal covenants with them for the performance of the covenants in the original lease." Sewell is not a mere assignee; he is an assignee with this right imposed upon him, and it is part of the terms upon which the plaintiffs granted to him the assignment. I think I must impose those terms upon Messrs. Nicholson. The argument for the defendants, if pressed to its logical conclusion, would lead to this, that I ought to make a vesting order vesting the property in these under-lessees, upon the terms of their performing all the covenants that they come under towards Sewell, as, for instance, there might be a smaller rent in consideration of a premium paid. That cannot be right, and I do not think it would be equitable that any such vesting order should be made. Then it is said for the defendants, "We are quite ready to accept the position of an assignee, and to accept Sewell's responsibility for rent as long as we are assignees." But I think that that is not sufficient, and that, if they are to accept Sewell's responsibility and liabilities, they must accept them upon the same terms as Sewell accepted them, and as the plaintiffs were induced to grant them. Therefore I must declare that the

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plaintiffs are entitled to the possession of these premises—I do not give them judgment for possession, but I grant a vesting order vesting them in the defendants, the Messrs. Nicholson, for the whole of their term upon payment by them of all the rent due, if any, and upon their executing a deed containing the same covenants with reference to these premises, and as far as their term is concerned, as Sewell was under with respect to his term; and, as I have decided the conditions of relief in favour of the plaintiffs, the defendants must pay the costs of this action. (a)

Solicitors for the plaintiffs, *Wilmer* and *Reeves*.

Solicitors for the defendants, *Nash*, *Field*, and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

June 19 *and July* 6.

(Before BRUCE, J.)

WILLIAMS, TORREY, AND FIELD LIMITED v. KNIGHT.

THE LORD OF THE ISLES. (b)

Marine insurance—Hire of tug—Contract of indemnity—Collision—Running-down clause—Duty to enforce policy.

In an agreement by which a tug-owner agreed to let his tug, it was provided that the owner would fully insure and keep insured the tug against certain specified risks, including risk of collision causing damage to the tug or other craft; and, further, that if at any time during the continuance of the agreement any of the risks covered should happen, the tug-owner would indemnify the hirers in respect of all such damage to the extent of all moneys received by him under the insurance. The owner effected policies to cover the specified risk for 2000*l.*, *leaving* 800*l.*, *the balance of the agreed value of the tug, uninsured. A barge employed by the hirers of the tug coming into collision, whilst in tow of the tug, with a steamship at anchor, an action was brought by the owners of the steamship against the hirers of the tug. The latter admitted liability, and the damages were assessed by the registrar. The tug-owner sent in a claim to the underwriters, who refused to pay. In anaction by the hirers against the owner of the tug for repayment to them under the contract of the amount of damages paid and costs incurred by them in consequence of the proceedings by the owners of the colliding steamship, or, in the alternative, for such amount as damages for breach of the contract:*

Held, that the defendant, the tug-owner, was only liable to indemnify the hirers to the extent of any moneys received by him under the policies, that he was under no obligation to sue the underwriters, and that as he had received no moneys he was under no liability to the hirers.

THIS was an action under an alleged contract of indemnity, or, in the alternative, for damages for breach of the contract.

The plaintiffs were engaged in transport business on the Thames, and for this purpose owned and used barges and other craft. The defendant was a tug-owner carrying on business as the "Kaiser Steam Tug Company." On the 10th June 1892, the plaintiffs and defendant entered into a written agreement, by which the defendant, *inter alia*, agreed to let, and the plaintiffs agreed to hire, the steam tug *Kaiser* for four weeks from the 8th June 1892, and thence from week to week until the agreement should be determined in manner provided. The 6th clause of the agreement was as follows:

> The said J. P. Knight (the defendant) will fully insure and keep fully insured the said tug against all risks (including collision risk and risk of damage to or by craft or vessels in tow of the said tug or such vessels or craft colliding with others) during the continuance of this agreement, and will forthwith furnish to the hirers an abstract of the policy or policies effected in respect of the said tug. Provided always, that if at any time during the continuance of this agreement the said tug shall be damaged by or shall occasion damage to craft or vessels in tow of the said tug, and that the said tug or any craft or vessels that she may be towing shall be damaged by or shall occasion damage to any craft or vessels or otherwise, which shall be covered by the insurance to be effected by the said J. P. Knight, as hereinbefore provided, then the said J. P. Knight will indemnify the hirers in respect of all such damage to the extent of all moneys received by him under such insurance.

The defendant, purporting to act under the agreement, effected a policy upon the tug for 2000*l.*, upon a valuation of 2800*l.*, but did not insure the balance. The defendant alleged that he was not able to induce the underwriters to fully insure the tug against the risks specified in the agreement, but this the plaintiffs refused to admit. To the extent that the defendant so failed to fully insure and keep insured the tug, he admitted that he became the insurer thereof, and brought into court the sum of 165*l.* in respect thereof. The abstract of the policy as provided by the above clause was not furnished to the plaintiffs, who did not, however, apply for it.

On the 26th June 1892, a barge employed by the plaintiffs, whilst in tow of the tug, collided with and damaged the passenger steamer *Lord of the Isles*, which was lying at anchor immediately above London Bridge. The owners of the steamer made a claim for the damage sustained, and on 11th April 1893 commenced an action against the plaintiffs. On the 28th June the liability of the plaintiffs to the owners of the *Lord of the Isles* was admitted by the plaintiffs, and the claim thereunder was referred to the registrar to assess the amount. Such claim amounted to 366*l.* 7*s.* 1*d.*, but on the 12th Aug. the registrar reported that 335*l.* 10*s.* was due from the plaintiffs to the owners of the steamer, with interest, and that the owners were entitled to the costs of the reference. The plaintiffs were liable to pay such sum of 335*l.* 10*s.*, and alleged, but this was not admitted by the defendant, that they had paid two further sums, being the amount of the taxed costs of the owners of the *Lord of the Isles* and the plaintiffs' costs of such action and reference. The defendant did not endeavour to collect, and did not receive any moneys under the insurances. Upon receipt of

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(a) The learned judge refused to make it a condition of the relief given to the defendants that they should pay interest on the rent which had been so long unpaid, or the costs of the action as between solicitor and client, or the fees of a surveyor who had made a survey of the premises with a view to ascertain the present letting value.

(b) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

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the plaintiffs' claim, the defendant sent in a claim to the underwriters under the policies, but the underwriters refused to make any payments, and the defendant received nothing under them.

The plaintiffs having called upon the defendant to indemnify them under clause 6 of the agreement, and to collect the insurance moneys payable under the policies, the defendant alleged that he had effected insurances, and contended that he had thereby fulfilled his obligations under the agreement, and that he was under no obligation to sue the underwriters. The defendant admitted that he was responsible to the plaintiffs in the above-mentioned sum of 165*l* 1*s*., which he paid into court in full satisfaction of all claims made by the plaintiffs in the action.

The plaintiffs contended, and, save as aforesaid, the defendant denied, that under these circumstances they were entitled to recover from the defendant the amounts sued for in the action.

Pyke, Q.C. and *Hurst* for the plaintiffs, contended, first, on the construction of the agreement that the defendant had himself undertaken to indemnify the plaintiffs against the risk which had happened, and that he was therefore liable on his contract of indemnity; secondly, that he had undertaken to collect the moneys which might become payable under the insurances which he had contracted to effect, and that as it was agreed that he had not endeavoured to collect them he was liable for their amount as for breach of contract; and thirdly, that the policies taken out by the defendant in professed performance of his contract were not such as the plaintiffs themselves could have sued the underwriters upon, such policies being in a form in which the defendant only could sue, and being upon the tug in which he alone was interested. Further, if the defendant failed to insure in such a form that neither he nor the plaintiffs could sue on the policies, the defendant was liable for the whole amount, as he practically admitted by his payment into court in respect of the proportion which he did not insure. If he insured he was, under the contract, the person to collect. As to costs, the defendant was liable under his contract of indemnity:

Leake on Contracts, p. 1078;
Lindley on Partnership, 6th edit;
Smith v. *Howell*, 6 Ex. 730; 20 L. J. 377, Ex.;
Blyth v. *Smith*, 5 M. & G. 405;
Garrard v. *Cottrell*, 10 Q. B. 679.

Aspinall, Q.C. and *Butler Aspinall*, for the defendant, contended that the plaintiffs were really seeking to make the defendant bring an action against the underwriters. There was no such obligation expressly provided for by the contract, and it ought not to be implied. Under clause 6 the defendant's obligation was completed upon proper insurances being made, and upon his handing over any insurance moneys which might come into his hands. There was no obligation to take steps to procure the insurance moneys. The contract was in such a form that the plaintiffs could recover directly from the underwriters for any loss in which they were interested. The letting of the tug to the plaintiffs under the contract was a demise, so that the crew of the tug were the servants of the plaintiffs; and, so far as any present action was concerned, the defendant could not have been made liable for any damage done to the *Lord of the Isles*. It was now clear that, in spite of *The Lemington* (32 L. T. Rep. 69; 2 Asp. Mar. Law Cas. 475), the liability *in personam* and *in rem* for negligence were convertible terms:

The Tasmania, 59 L. T. Rep. 263; 6 Asp. Mar. Law Cas. 305; 13 P. Div. 110; 57 L. J. 49, Ad.

By the 4th clause of the agreement the plaintiffs were bound to make good any damage done, and, as before stated, they were personally liable for any damage done by the negligence of their servants. Thus they had an insurable interest in the tug, and the policies effected were in such words that they covered the interest of all concerned, including the plaintiffs. And as they were effected for the express purpose of covering that interest, the plaintiffs had the requisite insurable interest to entitle them to sue under the policy. Their interest, being an interest for the time being in the tug itself, was sufficiently stated to enable them to sue:

Sutherland v. *Pratt*, 12 M. & W. 16;
Arnould on Marine Insurance, 6th ed., pp. 60, 61.

It might be that there was a concurrent interest so that the defendant could recover for whatever damage affected him, as, for instance, any damage to the hull of the tug itself, whilst the plaintiffs could recover for any damage which they might sustain personally whilst they had the tug. In this case the plaintiffs were sued *in personam* by the owners of the *Lord of the Isles*, and had paid because the negligence was the negligence of their servants. No damage had been occasioned by any person for whom the defendant was responsible, and hence he had no interest *quâ* the damage in the subject-matter of the insurance, and could not maintain an action against the underwriters. The words of the agreement implied no obligation to collect or even to receive, and if the plaintiffs could sue, no such obligation should be imposed upon the defendant. If there was any fear as to parties, there was no reason why the action should not be brought in the joint names of the plaintiffs and the defendant. As to costs, in any event these could not be recovered, because they were not damages, as being the natural and probable cause of the defendant's act. The only case in which costs could be recovered as damages was where there existed an express or implied undertaking to indemnify, and there was no such undertaking here.

Pyke, Q.C. in reply.

Cur. adv. vult.

July 6.—BRUCE, J.—[Having stated the facts:] The question in dispute resolves itself practically into this: Upon whom does the burden rest of compelling the underwriters to pay the amount of the loss insured by the defendant? The defendant agreed to insure, and I think it must be taken that the insurance was entered into to cover the plaintiffs' interest. It may be that the policy covered the defendant's interest also, and that in the case of a total loss of the tug by perils of the sea, the defendant would, in certain events, be entitled to recover under the policy. But in the event which has happened, which has resulted in a loss to the plaintiffs, I do not doubt that the policy must be regarded as having been effected for the plaintiffs, and that any money recovered under the policy in respect of the loss now in question would enure for the benefit of the plaintiffs. It is contended

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that, as the policy was effected by the defendant for the plaintiffs' benefit, he was their agent to effect the policy on their behalf, and it was therefore his duty to enforce the policy and to take proceedings against the underwriters to recover the money due under the policy. It appears from the defendant's letter of the 26th April 1893, that he did apply to the underwriters to pay the claim, and that they referred him to their solicitors, and by letter dated the 3rd Jan. 1893, the defendant offered to hand over the policies to the plaintiffs. But the plaintiffs insist that the defendant must do more, and that he must, without an offer of indemnity from them, at his own cost and risk take legal proceedings against the underwriters. I can find no authority in favour of this contention. No doubt where an agent effects a policy on behalf of a principal, and retains the policy with the consent of the principal, it becomes his duty to use reasonable diligence to enforce the rights and protect the interests of his principal in all matters arising out of the contract. By his negligence in the discharge of these duties the agent may render himself personally liable: (*Bousfield* v. *Cresswell*, 2 Camp. 545.) But where he does all that is necessary to preserve the rights of his principal, and demands the amount claimed on the policy from the underwriters, I think he does all that he can be reasonably expected to do. He is not bound to indemnify his principal against the trouble or expense of proving the justice of his claim. It is the principal who can alone, in most cases, furnish the proofs and documents by which the claim can be sustained. In the present case I understand that the underwriters deny that the barge that did the damage was at the time in tow of the steam tug. That is a fact which the underwriters are entitled to have proved. It is not reasonable that an agent should be exposed to the hazard and expense of litigato which he is a stranger. These are the rules which are laid down in Duer on Insurance, in the 12th chapter "Of the extent of the liability of the agent." In the absence of judicial decision, I do not know of any higher authority. Even in the case of a *del credere* agent, that learned author observes: "Where the liability of the principal debtor, as in the case of the underwriter, is not absolute, but contingent; where it depends upon facts, the evidence of which it is the province and the duty of the assured to furnish, until that evidence has been given and has proved conclusive, it seems to be clear that the *del credere* agent ought not to be held responsible; for until then there is no certainty that a debt exists to which this guarantee was meant to apply" (Duer on Marine Insurance, ed. 1846, vol. 2, lecture 12, p. 333.) In the present case the defendant did not guarantee the solvency of the underwriters, and it seems to me to be unreasonable to fix upon him a higher obligation than would attach to him if he had given such a guarantee. These principles are, I think, in accordance with the general law. If an agent has, at the express or implied request of his principal, necessarily incurred expenses in carrying on litigation on behalf of his principal, these expenses must be borne by the principal, and the agent will be entitled to recover them from the principal: (see *Howes* v. *Martin*, 1 Esp. 161; and *Curtis* v. *Barclay*, 5 B. & C. 141.) I think it follows that the agent may, in cases where communication with the principal is possible, demand an indemnity before commencing litigation: (see *Lacey* v. *Hill*. L. Rep. 18 Eq. 182.) See also as to the liability of a trustee where there is a covenant to insure against fire, *Tudball* v. *Meddlicott* (36 W. R. 886.) For the reasons I have given I have come to the conlusion that the defendant has not been guilty of any breach of his contract. It does not appear that he has not been ready and willing to do everything that he was bound to do to enable the plaintiffs to obtain the benefit of the policies effected on their behalf. I have not thought it necessary to consider the question whether the action on the policy should be brought in the name of the plaintiffs or the defendant, because it has not been shown that the defendant has been unwilling to allow the plaintiffs to use his name on a proper indemnity being given: (see *Ex parte Kearsley*, 17 Q. B. Div. 1.) In the result, I must give judgment for the defendant. The plaintiffs are, I think, entitled to costs up to date of the payment into court, and the defendant is entitled to the costs since that date.

Solicitors: for the plaintiffs, *Pritchard* and *Sons*; for the defendant, *Jennings* and *Sons*.

House of Lords.

April 27, May 4 and 7.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, MORRIS, and SHAND.)

HEWLETT v. ALLEN. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Master and servant—Wages—Deductions for sick and accident fund—Illegality of deductions—Truck Act 1831 (1 & 2 *Will.* 4. *c.* 37), *ss.* 1, 2, 24 —*Truck Amendment Act* 1887 (50 & 51 *Vict. c.* 46).

The appellant had been for some time in the employment of the respondent, and, as a condition of her employment, signed an agreement to become a member of a sick and accident club, and to subscribe a weekly sum to the funds in proportion to her wages. Such sums were deducted weekly from her wages and paid to the treasurer of the club. The appellant was informed of the amount of such deduction when her wages were paid.

Held, that the payments to the sick and accident fund must be taken to have been made with the assent of the appellant, and that she could not recover the amounts so deducted from her wages as being deductions made illegal by the Truck Act 1831.

Judgment of the Court of Appeal affirmed for different reasons.

Ex parte Cooper; Re Morris (51 *L. T. Rep.* 374; 21 *Ch. Div.* 693) *distinguished: Dicta of Lord Selborne, L.C. and Cotton, L.J., in that case, approved.*

THIS was an appeal *in formâ pauperis* from a judgment of the Court of Appeal (Lord Esher, M.R., Bowen and Kay, L.JJ.) reported in 67 L. T. Rep. 457; (1892) 2 Q. B. 662; who had affirmed a judgment of the Divisional Court (Day and Charles, JJ.), on appeal from a County Court.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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The action was brought by the appellant, a confectionery-worker, against the respondent, who is the proprietor of large confectionery works, to recover 1*l.* 13*s.* 7*d.* as arrears of wages, being the amount of certain small deductions made each week by the respondent from the wages of the appellant whilst she was in his employment as contributions to a sick and benefit club, the recovery of that sum being claimed on the ground that such deductions were illegal under the Truck Acts. The appellant, who had been in the respondent's employment on two previous occasions, was employed on the terms of a written agreement, dated the 29th Oct. 1890, and she was dismissed in December 1891. By the agreement it was expressed that the appellant should conform to the rules and regulations of the respondent's works. Rule 28 was as follows:

All *employés* will have to become members of the sick and accident club.

During the continuance of the employment the respondent deducted from the appellant's wages the sum of 2½*d.* or 3*d.* a week as the amount of her contribution to the club. It was proved at the trial, and it was not disputed on the part of the respondent, that the appellant had never received any sick pay or medical attendance or other relief from the club, that she never had any notice or knowledge of any proposal or election of the members of the committee of the club and never heard of such election, and that the annual balance-sheets of the club were never seen by her and that she had no knowledge of them. The learned judge of the County Court held that the deductions from the appellant's wages since the Truck Act of 1887 came into operation were illegal, and gave judgment for the appellant for 1*l.* 6*s.* 10*d.* with leave to the respondent to appeal. The respondent having appealed, the Queen's Bench Division reversed the decision of the learned judge of the County Court, and ordered judgment to be entered for the respondent with costs.

Robson, Q.C., *Corrie Grant*, and *Compton Smith* appeared for the appellant.

Finlay, Q.C. and *Crispe* for the respondent.

The arguments appear sufficiently from the judgment of the Lord Chancellor.

At the conclusion of the arguments their Lordships took time to consider their judgment.

May 7.—Their Lordships gave judgment as follows:

The LORD CHANCELLOR (Herschell).—My Lords: The facts of this case are very simple, and may be shortly stated, but the point raised is one by no means free from difficulty. The appellant, who was plaintiff in the action below, entered several times into the service of the defendants, who are the respondents at the bar; first in the year 1886, again in the year 1888, and again in the year 1890. On each occasion the appellant entered into an agreement with her employers, which was signed by her, "to conform to all the rules and regulations of Messrs. F. Allen and Son's works, and to submit to the penalties for breach of the same, a copy of which rules and regulations was given me at the time of signing this." Then follows the signature of the appellant. One of the rules to which she so agreed to conform was in these words: "All *employés* will have to become members of the Sick and Accident Clubs." It appears that there was a sick and benefit society established in connection with the employment for the benefit of *employés* at Messrs. Allen and Son's works. The rules of that society provided that the contributors to the fund were to "consist of all employed in the works who" were to be divided into five classes, and according to the class was the amount of weekly subscription, varying from 5*d.* down to 1½*d.*, and also the amount of "weekly relief in case of sickness or accident," varying from 12*s.* down to 3*s.*, and "death money" varying from eight guineas down to two guineas. The subscription was to "include doctor's attendance free within three miles, unless members" were "able to call at his surgery." By another rule, "a member of the firm" was "to act as treasurer, and the club" was to "have its own committee of management of twenty members," who were to "conduct all the business of the club, their services rendered being gratuitous." In accordance with these rules it was the practice for a weekly payment to be made to the treasurer of the fund, and the sums received by him were paid from time to time to a separate account which was kept at the bank, and in case of sickness, or the other cases referred to, the members received relief from the fund so established. There was deducted from the plaintiff's wages (in the manner which I will refer to in a moment) weekly the sum of, at one time 2½*d.*, and at another 3*d.* a week; that is to say, the subscription of the fourth class and the third class. It appears that each week the appellant received a ticket, of which one was produced to your Lordships, showing the gross amount of wages due, and there was in this particular case 15*s.* 9*d.*, from which was deducted, "fines 2*d.*, sick club 2½*d.*"; so that each week at the time when the appellant received the balance she was made aware that there was being paid by the firm to the treasurer of the sick club this amount of 2½*d.* or 3*d.*, as the case might be, and that payment was made without objection during the whole time that she was in the employ of the respondents. When she left she received the sum of 3*s.* from the fund, which it appears was the amount to which any member was entitled on ceasing to be in the employ of the employers. Of course during the whole time she was in their employment she received the advantages of being a member of this sick and benefit club. It was suggested on behalf of the appellant that she had received nothing from the fund except the 3*s.* on leaving it, that that was the only benefit she had derived. I cannot at all concur in that view. Although she in point of fact did not fall ill during the time that she was in their employ, she received the benefit of having secured to her, in case she fell ill, a considerable weekly payment out of the sick fund. After her employment ceased the present action was brought, and she claimed a right to recover, less certain deductions with which I need not trouble your Lordships, the total amount that had been in this way weekly paid to the sick club, and, in the manner that I have described, deducted from the sum which she otherwise would have received from the employers. If it had not been for the provisions of the Truck Act, I do not think it can be doubted for a moment that the plaintiff would have had no possible claim. The fact that she had become a member of this sick club, and that week by week to her knowledge

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and with her assent a sum had been paid by the employers on her behalf to the sick fund, which gave her a right to all its advantages would be a complete answer to any such action. I do not think that was really disputed at the bar, but the plaintiff's case rested entirely upon the provisions of the Truck Act. It was alleged that she had not received the whole of her wages in the manner in which that Act entitled her to demand them, and that not having received the whole of her wages the balance now fell to be paid by her employers. I should state that, during a portion of the time when she was first in the service of the employers, the character of the employment was not one within the Truck Act. It only came within the Truck Act by reason of the amending Act of 1887, which brought that particular occupation within it. The Act (1 & 2 Will. 4, c. 37) is intituled, "An Act to prohibit the payment in certain trades of wages in goods or otherwise than in the current coin of the realm." And the 3rd section enacts: "That the entire amount of the wages earned by or payable to any artificer in any of the trades hereinafter enumerated, in respect of any labour by him done in any such trade, shall be actually paid to such artificer in the current coin of this realm, and not otherwise; and every payment made to any such artificer by his employer, of or in respect of any such wages, by the delivering to him of goods, or otherwise than in the current coin aforesaid, except as hereinafter mentioned, shall be and is hereby declared illegal, null, and void." The 4th section enacts: "That every artificer in any of the trades hereinafter enumerated shall be entitled to recover from his employer in any such trade, in the manner by law provided for the recovery of servants' wages, or by any other lawful ways and means, the whole or so much of the wages earned by such artificer in such trade as shall not have been actually paid to him by such his employer in the current coin of this realm." It is on those two clauses that in the first place the plaintiff founds her action. She alleges that she has not been paid in the current coin of the realm the wages to which she was entitled. I do not think it can be doubted that the object of this enactment was to strike at the practice which had grown up of employers making their payment in part by the supply of goods in the sale of which they were interested—a practice which it was thought would place the person employed at an unfair disadvantage, and one which it was thought was calculated to result in the person employed obtaining something less than the agreed remuneration for services. The contrast in those sections is between payment in current coin of the realm and payment in some other fashion, and I can myself entertain no doubt that a payment made by an employer at the instance of a person employed to discharge some obligation of the person employed, or to place the money in the hands of some person in whose hands the person employed desires it to be placed, is in the sense and meaning of those sections a payment to the person employed as much as if the current coin of the realm had been placed in his or her hands. It is said that money paid in that way would not be a payment of the debt—that it could not have been pleaded as payment; that the defence must have been one of set-off. Whether that be so or not, in accordance with the system of pleading which previously prevailed, I do not think it at all necessary to inquire. The distinction between payment and set-off was often a very fine one in old days. But however that may be as a matter of pleading, I cannot myself doubt that, looking at the purpose and object as well as the words of this statute, a payment made in that fashion would be a payment in the current coin of the realm, and not otherwise, within the meaning of the Truck Act. The case obviously would not be in the slightest degree within the mischief against which that statute was directed. I ought also to call attention to the fact that the 5th clause of the statute does prohibit set-off in particular cases. The employer in any action commenced by an artificer for the recovery of wages is not to be allowed a set-off, "nor to claim any reduction of the plaintiff's demand by reason . . . of any goods, wares, or merchandise, had or received by the plaintiff as, or on account of, his wages . . . or by reason of any goods, wares, or merchandise sold, delivered, or supplied to such artificer at any shop or warehouse kept by or belonging to such employer, or in the profits of which such employer shall have any share or interest." The object of that enactment is obvious, but it does not touch a case of set-off (if it be a case of set-off) of money paid for the person employed at his or her request. But then, it is said that the 2nd clause of the statute enacts: "That if, in any contract hereinafter to be made between any artificer in any of the trades hereinafter enumerated and his employer, any provision shall be made directly or indirectly respecting the place where, or the manner in which, or the person or persons with whom, the whole or any part of the wages due or to become due to any such artificer, shall be laid out or expended, such contract shall be, and is hereby declared illegal, null, and void." The words relied on in that clause by the appellant are these, that any provision made directly or indirectly respecting the manner in which, or the person with whom, any of the moneys to become due shall be laid out or expended is rendered illegal, null, and void. Now the contention on behalf of the appellant is this: The appellant, by a provision in the contract between her and her employers agreed to become a member of the sick and accident club; that although the agreement did not in terms provide that the subscriptions to that club were to be paid out of her wages, yet, nevertheless, that must have been in the contemplation of the parties, and that therefore the stipulation in the agreement was illegal within the Truck Act, and null and void, because it was an agreement as to the mode in which week by week a portion of her wages was to be expended. The question raised by that contention is certainly one of very considerable importance, and also one of very considerable difficulty. Various cases were put at the bar, in which it would be strange to suppose the Legislature had prohibited the agreements suggested; as, for example, if the agreement contained a provision that the person employed should enter into a fidelity insurance contract, and keep up that policy so as to make a provision against any default on his or her part towards the employers. Such a provision for the protection of the employers, it was said, would be not in the slightest degree within the mischief against which the Truck Act was directed; it would be a reasonable and proper agreement to

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come to, and it cannot be supposed that the Legislature intended to prohibit it by the general words which have been used in the 2nd clause of the Truck Act. Here, it was said, that in the provisions in this case nothing was stipulated with regard to payment out of the wages, or that the subscription was to be kept up by payment from the wages. It was merely a general contract that she would in the present case join this sick fund, no doubt implying that she would make the payments which were requisite to secure such membership. There is, no doubt, very great force in that argument; but, on the other hand, it would be, I think, very dangerous to hold that any contract made by a person employed which involved expenditure of money from time to time was not within the clause merely because it did not provide that the money should be paid out of wages. So to hold would be, in some cases, undoubtedly to enable the purpose and object of that 2nd clause to be evaded. I find it very difficult indeed to say where the line should be drawn, if a line is to be drawn, between cases such as these, which would be the one class within and the other without the scope and intention of the Truck Act. It may be that it is impossible to draw any such line, and that each case must be dealt with upon a consideration of its own circumstances, and a determination whether it is, or is not, within the 2nd clause. In the present case it does not seem to me to be necessary to determine this question. For the purpose of my decision I will assume that the case is within the 2nd section of the Truck Act, though I must not be understood as in any way indicating an opinion that it is so. But, assuming it to be within the 2nd section of the Truck Act, what is the effect of that section? It makes that provision illegal, null, and void. As regards its illegality, of course, if it be within the section, it would render the employer liable to the penalty provided by the Truck Act. But, in addition to that, it is made null and void. Now, it is to be observed that the becoming a member of this sick and accident club is certainly not made illegal or null and void. It is the contract to become so and to pay the subscriptions which alone can be said to be made null and void; that is to say, that the employer, it being null and void, could not as against the *employé*, enforce that provision. That, and nothing more than that, seems to me to be the result of the application of the 2nd clause, supposing it to apply to such a case as the present, that the employed might at any time have said, I will not join, or I will not continue a member of the sick club, and by so saying would not have committed any breach of contract as against the employers, because the contract was null and void. But supposing in, that sense (and that seems to me the only sense in which the section could be operative), the contract to become a member was null and void, the question which has to be considered in the present case is what is the position of the employed as regards the employers, supposing that, with her assent, the employers have made a payment week by week on her behalf to the treasurer of a society to which she has consented to belong, and has belonged, during the time she was in their service. I can find nothing in the Truck Act, under such circumstances, to prevent the employer, when sued, relying on the fact of such payments as the discharge of his obligations towards his *employé* in respect of such sums of money as he has not personally handed over to her. I will not repeat again the observations I have made about the only set-off or reduction of demand which is prohibited by the Act. The question, then, is whether in the present case it is established that the total wages of the plaintiff have been paid, either by handing to her in the current coin of the realm or by making, on her behalf, payments which she has authorised. I cannot doubt that, on the true view of the circumstances of this case, it has been established that the employer has thus discharged himself, and unless there are provisions in the Truck Act which prevent the inferences being drawn, which otherwise would be drawn, the conclusion is absolutely irresistible. I find that, in the case of *Ex parte Cooper*; *Re Morris* (51 L. T. Rep. 374; 26 Ch. Div., 693), circumstances which were very similar to the present were considered by the Court of Appeal. In that case deductions were made from the wages when payment was made to the person employed, and on the back of the ticket which was given to each workman when he received his wages were printed some terms and regulations, amongst which were regulations as to the payment to the doctor's fund of so much a month according to the wages which he received, and payments to the reading-room fund of "4*d*. per month, payable by all men and boys over sixteen years of age. These payments will be deducted from the wages." That had gone on for a considerable time, and deductions to a substantial amount had been made in that way from the wages for the purpose of being paid to the treasurer of the reading-room fund and to the doctor, but the firm in fact had not paid either the doctor or the treasurer of the reading-room fund. Under those circumstances steps were taken by the persons employed to recover the money which had been so deducted from their wages. Of course that case differed from the present inasmuch as there remained in the hands of the firm the moneys which they had deducted, and the defence suggested in the present case did not arise of course there. The court so held, but Lord Selborne, L.C., in delivering judgment, said: "It was suggested that certain sums were payable by the workmen under contracts, which were in substance their contracts, to the doctor and for the purposes of the reading-room, and that by arrangement with the employers those sums were to be paid out of that part of the wages which had not been paid to the men. If that had been actually done and a settlement upon that footing had taken place, I am not, as at present advised, prepared to say that such a settlement could have been treated as a nullity by reason of the Truck Act." That is, of course, an expression of opinion on the very point now under consideration; because I can see not the slightest distinction between a payment to the treasurer of that reading-room fund and a payment to the treasurer of this sick and accident club. Cotton, L.J., in that case, said: "We do not in any way encourage the idea that our decision would apply (I desire to guard myself in this way, and I understand that the Lord Chancellor intended to do so) to any deduction made from the wages, and in fact applied by the employers by the direction of the workmen, or in pursuance of an arrangement made with them, in discharge of a debt for which they were liable." Therefore, we have a very

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distinct expression of opinion by those eminent judges, Lord Selborne and the late Cotton, L.J., in favour of the view which in substance has been taken by the court below, and which I am prepared to recommend your Lordships to adopt. For these reasons I move that the judgment appealed from be affirmed and the appeal dismissed.

Lord WATSON.—My Lords: In my opinion, the stipulation in her contract of employment that she should become a member of the sick and accident club, when taken by itself, imposed a perfectly lawful condition upon the appellant. I am also of opinion that the course of dealing, by which the respondent firm paid her contributions to the club, and deducted the amount at the weekly settlement of her wages, had all along the tacit assent of the appellant, and that the case must be disposed of on the same footing as if each contribution had been advanced by them under express authority from the appellant. After the exhaustive observations which have been made by my noble and learned friend, I need not recapitulate the sections of 1 & 2 Will. 4, c. 37, which bear upon the question before us, or criticise their enactments in detail. For the reasons which the Lord Chancellor has assigned, I think that, whilst the case is one of nicety, your Lordships ought to accept the opinions expressed by the Earl of Selborne, L.C. and Cotton, L.J. in *Ex parte Cooper*; *Re Morris* (51 L. T. Rep. 374; 26 Ch. Div. 693), and to hold that the contributions advanced by the respondent firm, on behalf of the appellant, were substantially equivalent to payments made by them to the appellant herself, in current coin, within the meaning of the Act. I am personally inclined to hold that the inference thus derived from the earlier clauses of the Act is supported by the terms of sect. 24, which (*inter alia*) enacts "that nothing herein contained shall extend, or be construed to extend, to prevent any such employer from advancing to any such artificer any money to be by him contributed to any friendly society or bank for savings duly established according to law." Apart from the statute, advancing the artificer's contributions to a friendly society, established according to law, and advancing his contributions to a domestic club, having the same objects in view, appear to me to stand *in pari casu*. If sect. 24 had been expressed in terms which clearly established an exception from preceding clauses, it would, in my opinion, have afforded an argument in favour of the appellant, because such an exception would have indicated an intention of the Legislature that advances of that kind were within the intendment of the Act, and were not to be permitted unless in the cases specially referred to. But, on consideration, I am of opinion that the clause does not create a proper exception, and that it must be taken as indicating that the previous enactments were not intended to include and prohibit advances identical in principle with those mentioned. I therefore concur in the judgment proposed by the Lord Chancellor.

Lord MORRIS.—My Lords: I entirely concur in the judgment which has been so fully expressed by the Lord Chancellor; but, having a strong opinion on the 2nd section of the Truck Act as affecting the present case, I consider that I am bound to state it. In my opinion the contract in question is not one which is either aimed at or struck by the 2nd section of the Truck Act. If we look at the contract itself as contained in the written document, it is merely to the effect that all *employés* shall become members of the sick and accident club. There is nothing in the contract, so far as the writing is concerned, that is at all within the purview of the Truck Act. But then, it is said that we must, upon the facts of the case, come to the conclusion that there was some understanding or agreement that a portion of the wages of an *employé* was to be deducted and paid to this benefit society, and that consequently that contract becomes illegal under sect. 2. I cannot come to the conclusion, as I have said, in the first place that it is a portion of the contract. But, even if it was, it does not appear to me to be a matter aimed at by sect. 2, which was passed entirely, as the preamble of the Act states, and as is stated in its title, in order to get rid of the payment of wages by goods. The words are that "if any provision shall be made directly or indirectly respecting the place where, or the manner in which, or the person or persons with whom, the whole or any part of the wages due or to become due to any such artificer shall be laid out or expended, such contract shall be, and is hereby declared illegal, null, and void." In my opinion the contract in question, even if there was this understanding, certainly does not come within the spirit of the Act; in my opinion it does not come within the letter of the section, as a payment made to the benefit society was not a laying out or expending of the wages of the artificer within the meaning of sect. 2, but was merely an allocation of part of the wages of the *employée*, at the request of the *employée*, and therefore, in my opinion, it does not come within the section.

Lord SHAND.—My Lords: I confess that it is satisfactory to me that your Lordships have come to the conclusion that this appeal should not be allowed, for I have felt throughout the argument that, whether it might or might not be possible to bring the case within the letter of the provisions of the Truck Act, it was not substantially within the mischief which that Act was intended to remedy, or within the spirit of the statute as striking against the evil which had been in existence at the time when it was passed. The grounds upon which your Lordships have proceeded, in which I entirely concur, are materially different from those which are the basis of the judgment of the learned judges of the Court of Appeal. Those learned judges have held expressly that the contract in this case was struck at by the provisions of the statute. Upon that question I shall only say that, while I shall not express myself so strongly as Lord Morris, I am certainly not satisfied that the contract in this case is one in violation of the provisions of the statute. If one looks at these various provisions it appears plainly enough that the mischief to be remedied was, as has been already mentioned by the Lord Chancellor, that goods were given instead of or in part payment of wages to the persons employed, and that the employers, besides getting a benefit from the proper work done by their servants, were obtaining a second benefit by the supply of goods in the sale of which they were presumably interested; there was a double benefit to them. You see from the provisions of the

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statute that the two things which are strongly brought out in many of its various provisions and in the schedules attached to the Act, and which it was intended to prohibit, are these: payment in goods, and an advantage thereby gained by the employers. In the present case neither of those elements is present. The contract has nothing to do with goods, and it cannot be suggested, indeed it has not been suggested in the argument, that the employer was to obtain any benefit whatever. But further than this, I participate in the view expressed by Lord Morris that it is an important circumstance here that there was no stipulation for the payment to be made out of wages at all. Apart from the acts of the parties, I find nothing in the contract which can be said to be struck at by the statute. I think an employer may fairly say, "I shall not employ or retain a servant in my employment unless he contributes to a sick and benefit fund, and thus makes a provision for a time of illness from accident or otherwise, or it may be death." As an employer he may say that he requires security from certain classes of servants, and will not employ these unless they contribute to one of the fidelity associations, or that he will only employ persons who belong and contribute to some temperance society, or something of that kind. There can be no doubt that the contract would have been fully implemented if the appellant, having obtained her wages week after week, had herself gone and contributed, out of the moneys which she had received, or other moneys, to the payment of any premium she required to pay, or the payments might have been made for her by other persons altogether. In short, so far as the contract itself is concerned, I do not read into it that it was necessary that the payments should be made out of her wages, nor should be deducted from each term's wages, which is essential to make the statute apply. I certainly feel the difficulty which the Lord Chancellor has expressed in saying that, if there had been a provision that goods should be purchased at a particular store, it might perhaps be successfully contended that this would have been struck at by the Act, although it were not expressly stipulated that payment was to be made out of wages. I do not say how that might be, but the element that there is no personal advantage gained, or which might be presumed to be gained, by the employer (in a case like this) would weigh very much with me in considering whether upon the construction of such a contract it was struck at by the Act at all. Having expressed these views, differing from what has been indicated as the basis of the judgment in the court below, I entirely agree on the particular ground on which the Lord Chancellor has put the judgment which he has proposed in this case. I mean that there is clear evidence, or at all events evidence sufficient, to show that there was such an authority given by this appellant, week by week, for the payment of a contribution towards this sick and benefit fund as precludes her from now challenging those payments. The payment was made to the treasurer acting for this association, and I think that a payment made, presumably as when wages have become due, at the request or on the mandate of one of the persons employed, to meet an obligation or for a purpose which he or she desires to fulfil, is a payment which is not invalid as being struck at by the requirements of the statute. Upon these grounds I concur with your Lordships in thinking that this appeal should be dismissed.

Order appealed from confirmed and appeal dismissed.

Solicitors: for appellant, *Shaen, Roscoe, Massey, and Co.*; for respondent, *M. Jutsum.*

Judicial Committee of the Privy Council.

April 27 and June 9.

(Present: The Right Hons. Lords HOBHOUSE, ASHBOURNE, and MACNAGHTEN, and Sir R. COUCH.)

MOHAMADU MOHIDEEN HADJIAR v. PITCHEY. (a)

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Executor—Probate of will—Action by creditor.

The rule laid down in the case of Douglas v. Forrest (4 *Bing.* 686), *that the creditor of a deceased debtor cannot sue the executor named in the will unless he has either administered or proved the will, refers to a grant of probate in due form by the proper court; and an action will not lie at the suit of a creditor against a person named as executor who has only applied for probate, and has proceeded no further in the matter, though the court has made an order that probate should be granted to him on his taking the usual oath of office.*

Judgment of the court below reversed.

THIS was an appeal from a judgment of the Supreme Court of Ceylon (Burnside, C.J. and Dias, J., Clarence, J. dissenting), who had affirmed a judgment of the district judge (Morgan, J.). The facts, which were not in dispute, appear from the judgment of their Lordships.

Cozens-Hardy, Q.C. and *Cowell* for the appellant.

Finlay, Q.C. and *Doyne* for the respondent.

At the conclusion of the arguments their Lordships took time to consider their judgment.

June 9. — Their Lordships' judgment was delivered by

Lord MACNAGHTEN.—The question raised on this appeal relates to the title to certain houses assessment Nos. 54 and 55 (formerly No. 55) situated in Bankshall-street, Colombo, which the appellant seeks to recover from the respondent who is in possession and has been in possession for some years. The premises in dispute formed part of the common matrimonial estate of Pasqual Fernando Anthony Pullé and Ana Selembrem his wife, who married in community of goods. On the 28th Nov. 1881 the husband and the wife duly made a joint will disposing of their property and nominating seven persons to be executors. The husband died on the 11th Sept. 1882. On the 27th Nov. 1882 the widow by deed repudiated the will and elected to take her moiety of the common estate in her own right. On the 5th Dec. 1882 Susy Fernando Bastian Appu, one of the executors named in the will, applied for probate. Affidavits were produced deposing to the due execution of the will together with an affidavit by

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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the applicant himself deposing to the death of the testator and to the value of the estate. A motion was made that probate might be granted to the applicant on his taking the usual oath of office, and an order to that effect was pronounced by the district judge. On the 13th Feb. 1883 the widow's deed of renunciation was filed in the district court. Susy Fernando Bastain Appu did not take the oath of office or proceed further with his application for probate. It is not suggested that he ever intermeddled with the testator's estate. The other persons named as executors in the will did not intermeddle with the estate or apply for probate. On the 22nd Feb. 1883 Mrs. Savanna Fernando brought a suit in the district court upon a promissory note for Rs. 500 made by the testator and dated the 6th Sept. 1882 against Susy Fernando Bastian Appu as executor, alleging that he had proved the will "and duly obtained probate thereof." The defendant did not enter an appearance, and a decree was made to the effect that the plaintiff should recover from the defendant Rs. 500 with interest at 9 per cent. per annum from the date of the note and the costs of the suit. According to the law in force in Ceylon an executor there has, it appears, the same power over his testator's real estate as an executor in this country has over his testator's personal estate. Under an execution upon the judgment against Susy Fernando Bastian Appu, the fiscal seized the premises which are the subject of this suit. On the 31st Aug. 1883 he put up for sale and sold the right, title, and interest of Susy Fernando Bastian Appu therein, and they were bought by the respondent's predecessor in title. On the 21st Dec. 1887 Susy Fernando Bastian Appu died. On the 11th Sept. 1888 letters of administration to the estate of the testator with the will annexed were granted to John William Mack, the secretary of the district court, who applied for such administration at the request of the commissioners of the Loan Board who were creditors of the estate. On the 14th Dec. 1888 Mr. Mack, as such administrator, applied for and obtained the authority of the district court to sell the premises, 54 and 55 Bankshall-street. They were accordingly put up for sale by auction. They were bought by the appellant, to whom they were conveyed by deed dated the 12th July 1889 duly executed by Mr. Mack the administrator, and by Ana Selembrem the widow of the testator and her then husband. The appellant thereupon brought this suit to recover the premises. The respondent resisted the claim, founding his title on the fiscal's sale in Aug. 1883. The sole question on the appeal was, whether the sale by the fiscal bound the estate of the testator. It was admitted that, in the event of its being held that the estate was not bound by the sale, it would not be material to consider whether the widow's deed of renunciation was valid or not. Nor was it disputed before their Lordships that the letters of administration must be treated as valid until revoked, although they were held to be "void" and "unlawful" by the learned judges in the courts below, who seem to have been under the impression that Susy Fernando Bastian Appu was still living, and the duly constituted legal representative of the testator. The acting district judge held that there could be no doubt that Susy Fernando Bastian Appu did not take out probate, but that it was "equally clear that he duly proved the will," that consequently he was properly sued as representing the testator's estate, and that the fiscal's sale was therefore a good and valid sale. On appeal the Supreme Court (Clarence, J. dissenting) upheld the judgment of the district court upon the same grounds, except that they held, contrary to the opinion of the district judge, that the will took effect only as to one-half of the common estate. Their Lordships are unable to concur with the Court of Appeal. A creditor of a deceased debtor cannot sue a person named as executor in the will of the deceased unless he has either administered, that is intermeddled with the estate, or proved the will. The proposition is laid down in the very case of *Douglas* v. *Forrest* (4 Bing. 686), to which Dias, J. in the Supreme Court as well as the district judge referred. The learned judges who formed the majority of the Court of Appeal, and the district judge, appear to have thought that a will is proved within the meaning of the language used by Best, C.J. in *Douglas* v. *Forrest*, as soon as an affidavit deposing to the due execution of the will is submitted to the Court of Probate and accepted as evidence by the court. It is, however, obvious that the expression in question is merely a compendious form of language, signifying that the will has been proved in due form, and that probate has been granted by the proper court. That is the proper and legal meaning of the phrase. For example, if one turns to Stephen's Commentaries, a text-book of authority, it will be found stated among the duties of executors, that the executor must "prove the will of the deceased, or (as it is otherwise expressed) take out probate:" (Bk. 2, pt. 2, ch. 7.) It is perfectly clear that Susy Fernando Bastian Appu, not having obtained a grant of probate, did not represent the estate of the deceased in the creditor's action, and that consequently the seizure and sale of part of the testator's assets under an execution founded upon a judgment in a suit so constituted was ineffectual to bind the testator's estate. It would certainly be a most dangerous doctrine to hold that creditors could tear an estate to pieces on going through the form of an action against a person who had neither intermeddled with the assets nor duly clothed himself with a representative character so as to become responsible for his acts and defaults to the beneficiaries under the will. It has been held that an executor, even after taking the oath of office, may renounce before probate is actually granted. The suggestion which was thrown out, that an executor by applying for probate has conclusively accepted the trusts of the will, does not seem to merit serious consideration. Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be allowed, that the judgments of the courts below ought to be discharged, and that judgment ought to be entered for the appellant with costs. The respondent will pay the costs of the appeal to the Supreme Court and of this appeal.

Solicitors for the appellant, *Parker, Garrett, and Parker.*

Solicitor for the respondent, *S. Spofforth.*

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June 26, 27, *and July* 14.

(Present: Lords WATSON and MORRIS and Sir RICHARD COUCH (with Assessors.)

SBUTEGA v. ATTWOOL; THE CLIEVEDEN; THE DIANA. (a)

ON APPEAL FROM HER BRITANNIC MAJESTY'S SUPREME CONSULAR COURT AT CONSTANTINOPLE.

Collision—River Danube—Ascending and descending ships—Art. 32 *of the Regulations for the Navigation of the Lower Danube.*

Under art. 32 *of the Regulations applicable to the Navigation of the Lower Danube, directing that, "when a vessel ascending the river finds itself exposed to meeting a vessel descending at a point which does not afford sufficient breadth, she must stop below the passage till the other vessel has cleared it; and if the ascending vessel should be actually in the passage as the other approaches it the descending vessel must stop above until the passage is clear;" an ascending ship must stop below the passage until a descending ship has cleared it whenever the ascending ship has notice that if she proceeds she will be exposed to the risk of meeting the descending ship at or near that point; and the descending vessel must stop above the passage when the ascending ship has reached such point and has actually begun to navigate the contracted passage before notice is conveyed to her that if she proceeds she will be exposed to the risk of meeting the descending ship at or near the point.*

Where the ascending ship neglects to stop below the passage it is the duty of the descending ship to refrain from any attempt to exercise her right of precedence when the intention of the ascending steamer to violate the regulations becomes reasonably apparent.

Semble: *The channel at the lower part of the Sulina Cut is not within the scope of art.* 32 *of the Danube Regulations.*

THIS was an appeal by the master of the Austrian steamship *Diana* from the decision of the Supreme Consular Court at Constantinople (in Vice-Admiralty), holding the *Diana* alone to blame for a collision in the Danube with the English steamship *Clieveden*, and dismissing the petition of the appellants in the action; and, in a cross-action brought by the respondent, ordering judgment to be entered for the respondent.

The collision occurred at the entrance to the cut where the Sulina arm of the Danube diverges from the St. George's arm.

The case on behalf of the appellants was, that the *Diana*, a steamship of 1036 tons register, belonging to the Austrian Lloyd Company, left Galatz at 8 a.m. on the 19th Oct. 1892, and proceeded down the Danube with a general cargo for Sulina and Constantinople. At about 12.20 p.m. the *Diana* reached the 46th mile post, and was on the south side of the channel when a steam-tug, towing some barges, was sighted about a mile and a half off in the Sulina arm of the river, coming up on the north side, the *Clieveden* being at the same time sighted following the tug, but about a mile behind her. The *Diana* reduced her speed as a measure of precaution and passed the tug port side to port side a little above the 45th mile post. The whistle of the *Diana* was then blown a single blast, which was answered by a single blast from the *Clieveden*, and the *Diana* slowly continued her course. The *Clieveden* advanced at a high rate of speed, and when at a short distance from the *Diana* suddenly starboarded and rendered a collision inevitable. The engines of the *Diana* were put full speed astern, but the *Clieveden* with her port bow struck the *Diana*, doing her considerable damage.

The case on behalf of the respondent was, that the *Clieveden*, a British steamer of 1038 tons net register, was on the day in question navigating up the Danube, laden with a cargo of coals from Cardiff for Galatz. When she had ascended to about the 43rd mile post she saw the *Diana* at about the 48th mile post, and shortly afterwards the *Clieveden's* engines were put at half-speed in order to avoid overtaking a tug and her tows in the narrow waters. When the *Clieveden* had got to about one-third of a mile from Tchatal Point, at the exit of the cut, the engines were put to slow, and the *Clieveden* approached the point, her speed being then about one knot over the ground, the helm was ported and kept a little to port to keep her in the channel, and one blast was blown on her whistle as a signal to the *Diana*. The *Diana* was at this time in the broad river, a short distance above the 45th mile post, and bore about ahead, but on the starboard bow withal of the *Clieveden*, and the *Diana* was approaching the *Clieveden* as if intending to pass between the *Clieveden* and the north bank of the river. Very shortly afterwards the *Diana* was observed to be approaching as if under a port helm, but it was then too late to safely execute that manœuvre, and notwithstanding that the engines of the *Clieveden* were at once reversed full speed astern, the *Diana* coming on at a high rate of speed with her port bow struck the port bow of the *Clieveden* a very heavy blow.

On the 4th Sept. 1893 the Supreme Consular Court at Constantinople delivered judgment, finding the *Diana* alone to blame for negligent navigation, and also held the part of the cutting in question to be a place to which, with reference to the vessels concerned, art. 32 was applicable, and that the *Diana* had violated its provisions. Art. 32 of the Danube Regulations, so far as it is material to the case, is as follows:

> When a vessel ascending the river finds itself exposed to meeting a vessel descending at a point which does not afford sufficient breadth, she must stop below the passage till the other vessel has cleared it; and, if the ascending vessel should be actually in the passage as the other approaches it, the descending vessel must stop above until the passage is clear.

The *Diana* appealed from the above decision, and submitted that it should be reversed or varied, and the *Clieveden* should be pronounced alone to blame, for the following among other reasons: 1. Because the learned judge was wrong in law in his decision as to the regulation or regulations applicable to the navigation both of the *Clieveden* and the *Diana* in the circumstances. 2. Because the *Clieveden* should have been held in fault for not bearing towards her starboard side of the channel in obedience to art. 34 of the Danube Regulations. 3. Because, if art. 32 of the Danube Regulations applies, the *Clieveden* was in fault for not waiting below Tchatal Point until the *Diana* had cleared it. 4. Because art. 35 of the Danube Regulation applies. 5. Because the

(a) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

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Clieveden was, in the circumstances, being navigated at an improper and excessive rate of speed. 6. Because the *Clieveden* neglected to slacken speed, or stop and reverse her engines in due time. 7. Because it appears by the evidence that the collision and damage consequent thereon are imputable solely to the negligent and improper navigation of the *Clieveden*.

The respondents submitted that the decision was in all respects correct, and ought to be affirmed for the following among other reasons: 1. Because the collision was not caused or contributed to by any act or omission of those on board the *Clieveden*. 2. Because, notwithstanding any act or omission of the *Clieveden* which may have contributed to the collision, the *Diana* might have avoided the accident by the exercise of ordinary care and diligence. 3. Because the collision was caused by the fault or default of the *Diana*: (1) in not keeping a proper look-out; (2) in not duly or in due time easing or stopping and reversing her engines; (3) in improperly neglecting to keep clear of and away from the entrance to the Bras de Sulina, whilst the *Clieveden* was coming up and out of the said narrow passage; (4) in improperly attempting to pass the *Clieveden* at a point where there was not sufficient breadth. 4. Because the evidence adduced by the appellant is unsatisfactory, and on material points is unreliable.

Sir *Walter Phillimore* and *Stubbs* for the appellants.—The ascending vessel must, rule or no rule, give way here as in other rivers. In the Thames and Tyne, for instance, this is provided for by the rules; in other rivers, such as the Elbe and Scheldt, it is the recognised practice of navigation. The failure on the part of the *Clieveden* to stop and reverse earlier was wrong, for those in charge of her were bound to know that the vessels would meet at a dangerous place, such as is contemplated by art. 32 of the Danube Regulations.

Bucknill, Q.C., *Safford*, and *Holman* for the respondent.—The place of collision was an unsafe place for the vessels to pass each other. The *Clieveden* being there properly she was entitled to be free from interference, and, in accordance with the latter half of art. 32, it was the duty of a descending vessel outside the passage to stop above. The *Diana* ought to have seen the *Clieveden* coming through the cut in plenty of time to have stopped above the cut.

Cur. adv. vult.

July 14.—Their Lordships' judgment was delivered by

Lord WATSON.—Shortly after mid-day on the 19th Oct. 1892, and in clear weather, the Austrian steamship *Diana* and the British steamship *Clieveden* met and collided in the river Danube, at or near the point where the Sulina arm diverges from the St. George's arm of the river. The Sulina arm, which runs a separate course eastward from that point until it reaches the Black Sea, branches off from the north side of the St. George's arm, and commences with an artificial cut more than three-quarters of a mile in length, and above 400 feet in width, measuring from bank to bank. Throughout the upper half of its length the water of the cut in question is much deeper to the south of mid-channel than to the north of that line, where it gradually shoals out until it reaches a mud bank; and the breadth of available waterway depends upon the draught of the vessels navigating it. The length of the *Diana* was 270 feet, and her breadth of beam 35 feet; whilst the *Clieveden* was 250 feet long, and 37 feet across her beam. Each vessel was a little over 1000 tons burthen, and was drawing 16½ feet of water. For ships of that draught, the waterway of the upper half of the cut, during average low water, did not exceed from 180 to 200 feet in width, and was confined to the south of the mid-channel line. At one point, about 250 feet below its divergence from the St. George's arm, the available waterway of the cut is, for a very short distance, greatly reduced in width by shoal water on the north. For vessels with a draught of 16½ feet it is not wider, during average low water, than 120 feet at that point. The evidence shows that on the day of the collision the water of the Danube was exceptionally low, and, although there are not sufficient data for a precise calculation, it must, in the opinion of their Lordships, be assumed that the width of the navigable channel at the point in question was, at that time, appreciably less than 120 feet. It is also established by the evidence that at the upper end of the cut, and for some distance above it, there is a cross current from north to south, which makes it impossible to keep the head of an ascending steamship steady without the aid of a port helm. The *Diana* was on her way down the river with a two-knot per hour current in her favour, and with the intention of descending the Sulina arm. The *Clieveden* was ascending that arm against the same current, on her way to a port above. The two ships appear to have first sighted each other, across the land, when they were about three miles apart; and, from that time until the collision occurred, they continued in sight, although, owing to a curve in the river, their hulls did not become mutually visible until the distance between them was considerably less than a mile. The proper course for two steamships approaching each other under such circumstances, in any part of the channel where there is room for them to pass, is to meet port to port, the descending vessel keeping on the south, and the ascending vessel on the north, of the channel. The evidence from both ships makes it apparent that, from the time when they first came in sight, it was the deliberate purpose of each to pursue her course without stopping until she met and passed the other. At the time when the *Diana* and the *Clieveden* first came in sight of each other a tug, with four craft in tow, was slowly ascending the Sulina arm about a mile ahead of the *Clieveden*. She moderated her speed in order to allow the tug and her tows to get clear of the cut before she overtook them. The *Diana* also saw the position of the tug, and slowed, so as to permit the tug to pass her before she entered the cut. The tug accordingly met and passed the *Diana* in the St. George's arm, at a point somewhat less than half a mile above the entrance to the cut; and at that moment, the evidence appears to their Lordships to show, the *Clieveden* must have reached a point somewhat more than one-third of a mile below the entrance to the cut. From these points the two vessels went on their way, with the result that they came into collision at the entrance to the cut, immediately after the stern of the *Clieveden* had cleared the narrow passage already

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described, her stem striking the port side of the *Diana* nearly at right angles. At the instant of collision the *Diana* was heading to the south-east, and somewhat across the stream, that position being apparently due to her having turned her engines astern. Amid much uncertainty, two things appear to their Lordships to be tolerably certain. The first of these is, that at the time when the tug passed the *Diana* it must have been clear to both vessels that, if they both continued to advance, they would meet near or in the narrow passage; and the second, that, at the time when the *Clieveden* struck her, the *Diana* was on the south side of the channel, and in the water which she was entitled to occupy if she was justified in pursuing her course. The *Clieveden* maintains that the collision was wholly attributable to the fault of the *Diana*, upon these two grounds: In the first place, she contends that it was the duty of the *Diana* to stop and wait above the entrance to the Sulina cut until the *Clieveden* had passed through it. In the second place, she alleges that the *Diana*, when two or three ship's lengths above the entrance to the cut, executed a wrong manœuvre, by first starboarding her helm, and thereby opening her starboard bow to the *Clieveden*, so as to indicate that she meant to cross the bows of the *Clieveden*, and to pass down between that vessel and the north bank; and then suddenly changing her course, and sheering back to the south. The *Diana*, on the other hand, maintains that the *Clieveden* was solely to blame for the disaster. She attributes the collision (1) to the failure of the *Clieveden* to stop and wait below the narrow neck of navigable water near to the top of the cut until the *Diana* had cleared it; and (2) to the *Clieveden* having, just before the collision, rendered it inevitable by changing her course from the north to the south side of the channel. The case thus presented in argument involves two separate questions. The first of these is, whether it was the duty of one of these ships to stop and wait until the other passed; and, if so, upon which of them that duty was incumbent? The second relates to their mutual charges of faulty manœuvring at the time when they had come within a few ship's lengths of each other. In considering the first question, their Lordships enjoy the advantage of having the main facts necessary to its determination ascertained beyond reasonable dispute. But, in so far as it bears upon the second question, the evidence from the two ships is conflicting, and, if it be reconcilable at all, cannot be reconciled without giving the witnesses on either side credit for a considerable amount of exaggeration. In discussing the first of these questions, both parties relied, with equal confidence, upon art. 32 of the Regulations applicable to the Navigation of the Lower Danube, which contains (*inter alia*) this provision: "When a vessel ascending the river finds itself exposed to meeting a vessel descending at a point which does not afford sufficient breadth, she must stop below the passage till the other vessel has cleared it; and if the ascending vessel should be actually in the passage as the other approaches it, the descending vessel must stop above until the passage is clear." It is a comparatively easy matter for a ship steaming against a two-knot current to come to a dead halt, without stopping her engines and without losing her steerage way. But a ship descending with the current cannot, by stopping her engines, and without reversing, reduce her speed below two knots an hour; and, when her speed is reduced to that limit she drifts, and her helm practically loses all control over her movements. These considerations afford an obvious reason for requiring that, in the circumstances to which the first part of the rule refers, the ascending shall give way to the descending vessel. In their Lordships' opinion, that part of the rule becomes imperative whenever an ascending ship, approaching "a point which does not afford sufficient breadth," has notice that, if she proceeds, she will be exposed to the risk of meeting a descending ship at or near that point. The second part of the rule is not, in their opinion, meant to come into operation, except in cases where the ascending ship has reached the point of danger, and has actually begun to navigate the contracted passage before any such notice was conveyed to her. The Sulina arm may fairly be described, throughout its whole length, as a narrow channel, its waterway being more or less contracted at various points in its course. That a "narrow pass" is not, within the meaning of the Regulations, the same thing with a passage which does not "afford sufficient breadth" is evidenced by the terms of art. 36, which provides for one steam-vessel overtaking and passing another "in a narrow pass." But their Lordships entertain no doubt, and their view was confirmed by the opinion of their assessors, that the short neck of contracted waterway, just below the entrance to the Selina cut, did not, on the day of the collision, afford sufficient breadth to permit two vessels of the size and draught of the *Diana* and the *Clieveden* to navigate it at the same time with safety. They are not prepared to affirm that the channel below that point, though somewhat contracted, came within the scope of art. 32. They were advised by their assessors, in whose opinion they concur, that the *Clieveden* would have been justified in proceeding up the north side of that channel, if she had stopped short of the narrow neck leaving sufficient room for the *Diana* to pass her on the south. Their Lordships are of opinion that the *Clieveden* could not, except through negligence, have failed to observe that, by advancing as she did, she would probably, if not certainly, encounter the risk of meeting the *Diana* at or near the point of danger. It was therefore her plain duty to stop and wait before she reached that point. No doubt her master states that it would not have been "prudent" for the *Clieveden* to stop her engines. But the only reason which he assigns for that view is "because we intended to go out of the other channel before the other ship came in." That the *Clieveden* acted in gross violation of her duty in endeavouring to press through the narrow neck before the *Diana* could reach it does not appear to their Lordships to admit of reasonable doubt. That she was maintaining an undue rate of speed, for the purpose of attaining that object, is evidenced by the fact that, although she was going against the current with her engines reversed at the moment of contact, she, after collision, had still sufficient way on to push aside the stem of the *Diana* and proceed up stream. The *Clieveden* being clearly to blame, it remains for determination whether the other colliding vessel can be acquitted of contributory fault; and upon that point their Lordships have

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been unable, upon a careful consideration of the evidence, to come to the conclusion that the *Diana* was free from responsibility. Their Lordships attach no importance to the allegation of the *Clieveden's* witnesses to the effect that the *Diana* manœuvred so as to indicate that she meant to cross the bows of the *Clieveden* and go down the north side of the cut. In order to get into her proper position on the north side of the cut it was necessary for the *Diana*, whose course had been down the middle line of the St. George's arm, to make some use of her starboard helm; and the probable, if not the inevitable, result of her doing so, owing to the cross current which prevailed at that part of the river, would be to make her head unsteady, and at times to expose her starboard instead of her port bow to the *Clieveden*. That fact ought to have been known to those who were navigating the *Clieveden*. It is difficult to suppose that they really believed the *Diana* was crossing to the north side of the channel; and, if they did entertain the belief, it was in the circumstances without justification. It does not appear to their Lordships to be doubtful that, although the *Clieveden* was clearly wrong in forcing her way first through the narrow neck, it became the equally plain duty of the *Diana* to refrain from any attempt to exercise her right of precedence, whenever the intentions of the *Clieveden* to violate the regulations became reasonably apparent. And they cannot, taking into account the evidence given by witnesses from the *Diana* herself, come to the conclusion that she fulfilled her duty in that respect. According to these witnesses, they observed that the *Clieveden* was coming up the cut at a high speed, and that she maintained her speed up to and beyond the point where she ought to have stopped and waited. The *Diana* paid no heed to these indications. Her captain says, "Even if there had been another steamer alongside the *Clieveden* it would have been safe and practicable for them to come out, and a third to enter at the same time, with the precautions taken by the *Diana* to enter, to go slow with her engines." Accordingly she went on, intending to pass the *Clieveden*, port to port, whether the latter vessel had cleared the neck or not; and she did not stop and reverse until she saw that the *Clieveden* was coming straight into her. That, in the opinion of their Lordships, was an unseamanlike and an unwarrantable proceeding. The *Clieveden* could not, in the then state of the river, enter and pass upwards through the neck without coming so far towards the south side of the channel as necessarily to interfere with the course of a vessel of similar size going down that side. Being of opinion that both vessels were in fault, their Lordships will humbly advise Her Majesty to reverse the orders appealed from; to pronounce a finding to that effect; to order that no costs be allowed to either party in the court below; and to remit the cause for further procedure in terms of the finding. There will be no costs of this appeal.

Solicitors for the appellants, *Stokes, Saunders, and Stokes.*

Solicitor for the respondents, *T. Russel Kent.*

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 29, *Dec.* 1 *and* 11, 1893.

(Before LINDLEY, SMITH, and DAVEY, L.JJ.)

THE MARY THOMAS. (*a*)

Marine insurance—"General average and salvage charges payable according to foreign statement"—Bills of lading—Exceptions—Effect of—Dutch law—Contribution by cargo owners—Liability of underwriters on ship—Particular average.

Plaintiff, a shipowner, effected with the defendants two policies of insurance on a ship and freight containing the words, "general average payable according to foreign statement," and the usual sue and labour clause. A loss occurred owing to the vessel stranding through the negligence of the master, and a general average statement was drawn up (at Rotterdam) in accordance with Dutch practice. Various charges which were incurred in getting the ship and cargo off were apportioned as general average, which, if the average statement had been made in England, might have been treated as particular average on ship and freight, or as charges under the sue and labour clause. The shipowner was unable to obtain contribution to general average from the cargo owners, because by Dutch law when a loss occurs through the negligence of the master, contribution to general average losses cannot be recovered from the cargo owners by the shipowner, even though (as in this case) the bills of lading contain the exception of "strandings, . . . even when occasioned by negligence, default, or error in judgment by the pilot, master, or other servants of the shipowner." The shipowner then brought this action on the policies on ship and freight to recover as particular average on ship and freight, or as charges under the sue and labour clause, what they were precluded by Dutch law from recovering as general average.

Held, that the plaintiff having agreed to be bound by a foreign average statement, could not now go behind the statement drawn up at Rotterdam, and could not recover as particular average charges which had been treated as general average in the foreign statement, and that the foreign statement also governed as between the assured and the underwriters.

THIS was a claim by the owners of the steamship *Mary Thomas*, under policies of marine insurance on ship and freight. The ship in the course of a voyage stranded owing to the negligence of her master, and the plaintiff now sought to recover under the sue and labour clause certain sums of money which he had unsuccessfully sought to recover in general average from the cargo owner.

July 25 *and* 26, 1893.—The case was argued on an agreed statement of facts with the documents attached there. The facts and arguments of counsel appear from the judgment of Barnes, J.

Joseph Walton, Q.C. and *Holman*, for plaintiffs, cited

Dickenson v. *Jardine*, 18 L. T. Rep. 717; L. Rep. 3 C. P. 639;

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

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The Carron Park, 63 L. T. Rep. 356; 15 P. Div. 203; 6 Asp. Mar. Law Cas. 543;
Dixon v. *Whitworth*, 40 L. T. Rep. 718; C. A. 43, p. 365; 4 C. P. Div. 371; 4 Asp. Mar. Law Cas. 138; C. A. 327;
Lohre v. *Aitchison*, 38 L. T. Rep. 802; 3 Q. B. Div. 558; 4 Asp. Mar. Law Cas. 11; in the House of Lords, 41 L. T. Rep. 323; L. Rep. 4 App. Cas. 755; 4 Asp. Mar. Law Cas. 168.

Carver for the defendants.

Barnes, J.—This case raises some questions of complication and difficulty, I think partly owing to the form in which the case is stated for the opinion of the court. The action is brought by the plaintiffs, who are the owners of the steamship *Mary Thomas*, against the defendants, upon two policies of insurance, the one being for 1000*l.* upon the *Mary Thomas*, valued at 28,000*l.*, the other being for 1200*l.* on freight chartered or otherwise in the said vessel. I think both the policies contain a clause that general average is payable as per foreign custom and York Antwerp rules in accordance with the contract of affreightment, that on the ship having the words "also salvage charges." The policy upon the ship appears to form one of a number under which she was insured, so far as I gather from the average statement. It seems that the vessel was on a voyage from Nicolaieff to Rotterdam, with a cargo of grain, and it was on that freight she was insured. In the course of the voyage she stranded on a reef off the island of Malta. Thereupon the usual class of operations were entered upon by which the cargo was partially discharged and taken into Malta, and the ship was ultimately successfully got off and taken into Malta. Afterwards the cargo was completely discharged, the ship was repaired, and the cargo reloaded. Her voyage was continued, and ultimately her cargo was delivered at Rotterdam. That having taken place, a statement of general average was made up at Rotterdam, at the request of the plaintiffs, in accordance with the law and practice there prevailing. The result of that general average statement was that a sum of 3792*l.* 7*s.* 5*d.* was carried into the general average column, which then required to be apportioned amongst the various interests. Accordingly the statement proceeds to apportion it. The shipowner, in respect of his interest in the ship, is to contribute the sum of 1692*l.* 1*s.* 10*d.*, the cargo 2049*l.* 9*s.* 5*d.*, and the freight 230*l.* 16*s.* 2*d.* The statement was put before the underwriters, including the defendant, and in respect of the policy on ship the sum of 205*l.* 4*s.* is shown to be due from the underwriters on the ship in respect of a claim on that policy. In respect of the claim on the policy upon the freight, the defendants are shown to be liable for the sum of 163*l.* 0*s.* 2*d.* in the same manner. Thereupon the defendants, having that statement put before them by the plaintiffs, liquidated the demands made upon them in pursuance of it, and in fact discharged, unless something should alter it, their liability for all payments on the policy. But the plaintiffs had to demand from the cargo its proportion of the general average which was attributed to it in the statement, and thereupon they made their claim in Holland against the consignees of the cargo, and were met by this answer: "We, the consignees, are not responsible to you for any contribution in general average, because although the bills of lading under which the cargo was carried exempted the shipowners from responsibility, for, amongst other things, accidents of navigation, strandings, and damages caused thereby, even when occasioned by the negligence, default, or error in judgment of the pilot, master, or other servants of the shipowners, yet that while freeing the owners from the responsibility for the loss brought about by the stranding, which it is said was caused by negligence, does not affect the ordinary rules applicable to a claim for general average, and that as the general average loss was really brought about by the negligence of the plaintiffs or their officers in charge, the plaintiffs cannot claim from us (the consignees) any contribution in general average." That contest, so raised, came before the courts in Holland, and ended in a decision that the cargo owners were not in the circumstances liable to make a contribution in general average or otherwise to the shipowner. There was an appeal upon that matter, and the judgment was affirmed. I think that pending the appeal, on examination of the average statement, it appears that part of the final item for general average included the costs of certain repairs of the ship, and that I suppose had been so included in accordance with the law and practice at Rotterdam. But as that item, so far as it related to the cost of repairs, would not, according to the decision in this country of *Dickenson* v. *Jardine* (18 L. T. Rep. 717; L. Rep. 3 C. P. 639), be a matter for which the underwriters of the ship could be made primarily liable with a right to enforce a claim for it against the cargo owners, the underwriters on the ship appear to have assisted the plaintiffs in this appeal with the object of trying to force the liability on the cargo owners so far as it affected that item, the plaintiffs themselves endeavouring to establish that liability so far as it affected general contribution. A further statement was made up in this country by Messrs. Manley, Hopkins, Son, and Cookes, with a view of seeing how that particular matter stood, and that item which I have mentioned as the gross amount of the general average, namely, 3972*l.* 7*s.* 5*d.*, was found to be divided in the statement I have last referred to in this manner—806*l.* 9*s.* 3*d.* is treated as due to repairs, 3165*l.* 18*s.* 2*d.* as due to the ordinary operations of salving ship and cargo. The item of 806*l.* 9*s.* 3*d.* is then apportioned between the steamer, the cargo, and the freight, and the amount which the cargo would have to bear of it is 416*l.* 1*s.* 7*d.* There is a note to the effect that the underwriters being primarily liable for that item for repairs, which so far as it related to the ship had been discharged, but so far as it related to the cargo was not yet payable, agreed to bear any cost which would be attributed to that *pro rata* with the other costs in order to endeavour to get a contribution from the cargo owner. The portion due from the defendants on that item is 14*l.* 7*s.* 2*d.*, and that was paid by the defendants to the plaintiff, but when the appeal came on, the plaintiffs being defeated by the cargo owners, the underwriters did not get any portion back of that payment. The position is such that they have discharged, in addition to the original contribution claimed from them by the first statement, that extra item which relates to the cost of repairs. Having failed against the cargo owners to obtain any contribution from them, the plaintiffs originated what seems to me to be a remarkable idea. They turned round and said,

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"We have failed against the cargo owners to get any contribution from them, and now we will ask the underwriters on the ship to pay the whole expenses, which are not recoverable from the cargo owners." The proposition strikes one at the outset as a very remarkable one—that where there is an adjustment made by which so much is apportioned to the ship for saving it, and so much to the cargo for saving it, because you cannot get it from those responsible for the contribution of the cargo, therefore the underwriters on the ship are to pay the whole cost of saving ship and cargo. That is the broad way in which this case really comes before me, and the broad point which I cannot help thinking, notwithstanding the form of the case, was the real case to be put before me. But with considerable ingenuity the plaintiffs have seen no doubt the strange position which that would result in, and they have selected out of the average statement certain items the details of which are not before me, and have taken portions of those items which I suppose by some calculation on their part they are able to show have been debited against the cargo, and then have put forward these items and say that if you look at them by themselves they are items which, either partially or wholly, were moneys spent to save the ship alone. The items are these: There is first 799*l.* 12*s.*, "portion originally debited (as per foreign statement) to cargo, of share of expenses incurred in putting cargo outside into lighters, refloating the *Mary Thomas*, and towing her into Malta." That item seems as much attributable to saving cargo as ship. The second item is 150*l.* 8*s.* 9*d.*, "portion originally debited (as per foreign statement) to cargo of charges and expenses incurred with discharge of cargo at Malta." That they say is merely part of the costs of repairs, and therefore ought to be payable by the underwriters on the ship. It is not very clear in this particular case whether it really was part of the cost of repairs, because Mr. Carver has pointed out several reasons—one relating to the delay in connection with the pontoon, and the other that it was treated as a whole operation—why that should not be chargeable against the ship alone. The third item is 227*l.* 3*s.* 3*d.*, "portion originally debited (as per foreign statement) to cargo of agency and incidental expenses." This would stand or fall to some extent by the others. The last two items are 69*l.* 15*s.* 4*d.*, "balance portion originally debited (as per foreign statement) to cargo of charges and expenses incurred in warehousing cargo," which they say ought to be borne by the ship, though I do not in the least know why; and 126*l.* 15*s.* 2*d.*, "balance portion originally debited (as per foreign statement) to cargo of charges and expenses incurred in reshipping cargo," which they says is an item spent merely in earning freight. No doubt that item, taken by itself, is one which speaking quite generally, and without intending to lay down a rule, would, ordinarily speaking, be dealt with as a charge incurred for the purpose of earning freight. Those being the items picked out, the points which are taken seem to come in this way. There is no question whatever that the difficulty in this case has been created by the fact that the court in Holland has held that though the bills of lading contain the clauses to which I have referred, making the shipowner not responsible for loss or damage caused by stranding, when that stranding is brought about by negligence, it has further held that the owners cannot claim from the cargo owners any contribution for general average. That is the cause of this difficulty, and if it had arisen in this country the point would hardly have occurred as it has done, because it has already been decided by Lord Hannen, in the case of *The Carron Park* (63 L. T. Rep. 356; 15 P. Div. 203; 6 Asp. Mar. Law Cas. 543), that the cargo owners would be liable for a contribution in general average under circumstances where the accident had occurred from negligence where by the bills of lading the shipowners were not responsible for that negligence. All I need say is that, so far as my own opinion is worth expressing after Lord Hannen's judgment, I entirely concur in the reasoning which he expressed in the report of that case. It seems to me quite obvious that when by the terms of the contract of carriage certain responsibilities are excepted, that is to say, in this particular case, the negligence of the master or officer which produces the stranding—the owners not being responsible for the consequences of that negligence—the position is this, that the shipowner, on the one hand, has the ship and the freight at risk, and on the other hand the cargo owner has the cargo at risk. It is obvious that if both of the parties were present there at the time, each responsible for the difficulty in which they found themselves, they would naturally say, "We have spent a sum of money to get out of this difficulty, and that we must share from the benefits we get out of it." That seems to be the decision in that case. Therefore indirectly the contract of carriage does vary the position of parties towards general average, because it varies the risk. But the plaintiffs' point, which was taken in reply in this case, was that when the salvage operations are both for ship and cargo, the owners of the ship can in the first instance recover the whole cost of salving ship and cargo from the underwriters on the ship, leaving them to get a contribution from the owners of the cargo. That seems to me entirely wrong in principle. It is perfectly true that in one instance there is by virtue of the operation of the policy itself, a case in which that can be done, namely, where part of the subject-matter of the insurance is sacrificed. As the underwriters have insured that particular thing, the assured can say, "Pay me for the loss of it, and then you can claim any benefits or rights I have against any other person as a contribution to that loss." But it seems to me that that proposition, which is found in *Dickenson* v. *Jardine* (*ubi sup.*), is wholly inapplicable to a case of accident, and I think it can almost be demonstrated to be wrong in such a case, because the operation of saving is taken for the benefit of both ship and cargo, leaving out freight for the moment, because it is in the same position as the ship; therefore the captain at that time, who in ordinary circumstances acts as agent for the person whose property is at risk, spends that money on behalf of all who are interested, and all who are interested must contribute to it. Therefore the shipowner ought only to contribute so much, and the underwriters then have to recoup him for what he has paid. If the terms of the sue and labour clause which were referred to by the plaintiffs on this point are looked at, it will be seen that they bear out that view. What the plaintiffs want to do so far as this clause is con-

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cerned—and they tried to treat the general average in the same way—is to say that it shall be lawful to sue and labour and travel for, in and about the defence, safeguard, and recovery of the subject-matter of this insurance, or any part thereof, and all the other interests at stake, and then the company will bear their proportion of that. In support of that proposition counsel for the plaintiffs referred me to the case of *Dixon* v. *Whitworth* (40 L. T. Rep. 718, C. A.; 43 L. T. Rep. 365; 4 C. P. Div. 371; 4 Asp. Mar. Law Cas. 138; C. A. 327), which was the case in which Mr. Dixon had agreed with Mr. Erasmus Wilson for a sum of 10,000*l.* to transport the Cleopatra obelisk to this country; and, having made that arrangement, he put the obelisk in an iron case, and took out a policy with the defendants in that case upon goods and merchandise in the good ship or vessel called the *Cleopatra*, the iron vessel containing the obelisk, valued at 4000*l.* against the risk of total loss only, and then that policy contained the usual sea risk and the suing and labouring clause in the ordinary form; and the case coming on before Lindley, L.J. under the policy after an Admiralty suit had been instituted against the obelisk by salvors who had picked up the obelisk in its case at sea, and obtained 2000*l.* salvage, the owners then claimed on the underwriters for the repayment of that 2000*l.*; and Lindley, L.J. held that the plaintiffs were entitled to recover from the defendants their proper proportion in accordance with their insurance of the sum of 2000*l.* That decision was reversed on appeal (*ubi sup.*) owing to the decision in the case of *Lohre* v. *Aitchison* (38 L. T. Rep. 802; 3 Q. B. Div. 558; 4 Asp. Mar. Law Cas. 11; in the House of Lords, 41 L. T. Rep. 323; L. Rep. 4 App. Cas. 755; 4 Asp. Mar. Law Cas. 168), which decided that salvage by independent salvors could not be recovered under the suing and labouring clause, and as the policy in *Dixon* v. *Whitworth* was against total loss only, the plaintiffs could not recover for total loss, and could not recover under the suing and labouring clause. Now it is said, although the case was reversed, that the observations of Lindley, L.J. on the effect of the suing and labouring clause in his judgment, show that in the first instance the whole of that 2000*l.* could be recovered from the underwriters on the *Cleopatra* and the obelisk, and therefore it follows that the whole of the expenditure could be recovered in the first instance from the underwriters on the ship. If the judgment of Lindley, L.J. is taken as not affected by its reversal by the Court of Appeal, it will be found that his language when looked at is no authority for that proposition at all for this reason: after dealing with the language of the clauses, he says the agreement is to contribute (in proportion to the amount subscribed) to the charges of his services. In other words, the underwriters agree to pay him for his services; each underwriter agreeing to pay in proportion to the amount for which he insures. Moreover, the early part of the clause authorises the assured to endeavour to save, not his interest in the thing insured, but the thing itself; and the language of the clause is adapted to cases in which other persons besides himself are interested in that thing, and then he goes on to refer to one or two cases; but the language is wholly inapplicable to the interests of persons who are not interested in the thing, namely, the ship, but are interested in the cargo, a totally different thing from the subject-matter of insurance—another interest altogether; and in this particular case the underwriters had insured the obelisk itself and the entire vessel for the sum of 4000*l.*; and therefore by agreement between themselves and the plaintiffs they had valued the ship and obelisk at the 4000*l.*, and although there might be some interest on somebody's part in the obelisk itself behind the plaintiffs, yet the underwriters are liable to the plaintiffs for the costs of saving the iron ship and its cargo. But that has nothing to do really with a case where a ship is at risk, with somebody perhaps interested as well as the plaintiff who insured it in full; and another interest altogether, namely, the cargo, which belongs to somebody totally different, and is not insured or affected by the policy on the ship. I should like to say that if the cases to which Lindley, L.J. refers are examined, they certainly do not support the plaintiffs' proposition in this case. The case referred to by him, in which Chancellor Kent gave a decision, of *Watson* v. *Marine Insurance Company* (7 Johnson, N. Y. Rep. 57), and which seems in this judgment to have been taken as dealing with a case of different interests, and the owner's right to recover against his underwriters for all the expenses in that case, the evidence of the losses set out in that report shows that the whole of the expenses which were in dispute were incurred about the business of the ship only; and the learned chancellor in giving judgment says that the captain proved in that case that the expenditure, subject to the above exceptions, was necessarily incurred about the business of the ship, and of her only; and he expressly declines to decide the question of what would be the case if they had been partially incurred for the ship and partially for the cargo, for he says: "All these subjects of insurance were equally involved in the peril, and it would seem to be just that the ship and freight should bear these expenses in due proportions throughout; and the cargo should bear its proportion of the first part of the expenses until the captain ceased to have further concern with it. The labour and expense were incurred for the recovery of the ship, notwithstanding that other subjects might incidentally enjoy the result of the effort," and then he refers to what the captain had said in his evidence. There are two other cases referred to in that case, and in the report of another case in the same book (*Jumel* v. *Marine Insurance Company*, 7 Johnson, N. Y. Rep. 412), one of these cases being that of *Maggrath* v. *Church* (1 Caines Rep. 195), in which the same principle which is laid down in *Dickenson* v. *Jardine* (*ubi sup.*) will be found; but certainly it did not go further than that, and I think the observations of Mr. Loundes and of Mr. Phillips show that the rule which I am endeavouring to apply, and the way I am applying it, is the true one. Therefore I hold that the plaintiffs cannot, either by virtue of any principle or by virtue of any authority, claim to recover from the underwriters of the ship the whole amount of the expense incurred in saving the ship and the cargo, and can only recover the portion properly due to the ship. Then the plaintiffs' next point is, that in this particular case the money was under the circumstances only spent to save the ship, because the shipowner has not been

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able to recover from the cargo owner the contribution which he claims. The answer to that seems to me to be this, that as a matter of fact at the time the expenditure was incurred, the captain was acting in the ordinary way as much in the interest of the ship as in the interest of the cargo, and that the expenditure was, in fact, incurred in the ordinary way for the purpose of saving the ship, freight, and cargo. Then the third point is with regard to these particular items, and that point is this:—Those items are really for saving the ship and freight, and should be so recoverable. Well, some of them may be if the matter stood alone on a criticism of those terms, though only some of them really seem capable of being brought into the category of expenses incurred only for the ship. But it seems to me that in this case you must take the matter as a whole. The parties made up an average statement, claimed on their underwriters upon the footing of it, and the underwriters paid the whole of the amount expended for saving the ship and freight upon the basis of an agreement of an average statement properly adjusted according to the law of the place where it ought to be adjusted, and it is impossible to pick out from that statement some items without taking the whole into account; and if you take the whole into account the owners of the ship have paid their various proportions of the matters, which might perhaps, if you analysed the statement in England, be attributed to the cargo; and it seems to me that you must take the whole of the adjustment in which all the items have been dealt with according to the law of the place of destination; and these having been settled and paid for, there is nothing whatever to show that the plaintiffs have not received from their underwriters here all that is properly attributable to the saving of the ship, and the saving of the freight. Upon these grounds therefore I have come to the conclusion that the questions which are put forward for my decision must, under the circumstance of this case, where the matters have really been settled between the parties in the way I have already indicated, be answered in favour of the defendants.

From this decision the plaintiffs appealed.

Nov. 29 *and Dec.* 1, 1893.—*J. Walton*, Q.C. and *Holman*, for the appellants, cited

Harris v. *Scaramanga*, 26 L. T. Rep. 797; L. Rep. 7 C. P. 481; 1 Asp. Mar. Law Cas. N. S. 339;
Kidstone v. *Empire Marine Insurance Company*, 15 L. T. Rep. 12; L. Rep. 1 C. P. 535; L. Rep. 2 C. P. 397;
Lee v. *Southern Insurance Company*, 22 L. T. Rep. 443; L. Rep. 5 C. P. 397;
Dickenson v. *Jardine* (*ubi sup.*);
Watson v. *The Marine Insurance Company* (*ubi sup.*).

Carver, for the respondents, cited on the facts:

Kemp v. *Halliday*, 14 L. T. Rep. 762; L. Rep. 1 Q. B. 520;
De Vaux v. *Salvador*, 4 A. & E. 420.

The arguments appear in the judgment of the court.

Cur. adv. vult.

Dec. 11.—Lindley, L.J.—The question in this case is whether the underwriters of policies on ship and freight respectively are liable to pay certain proportions of certain expenses incurred by the assured, the shipowners, and said by them to have been incurred in saving the ship and freight respectively. These expenses have been treated as general average by a foreign adjuster, and have been apportioned by him between ship, freight, and cargo. The proportions allocated to ship and freight respectively have been paid by the underwriters, but the proportion allocated to cargo cannot be recovered by the shipowners from the cargo owners, and have been lost therefore by them. They now seek to recover them from their own underwriters. The question thus raised turns on the contract of insurance, and more particularly on that clause in which it is expressed thus: "General average and salvage charges payable according to foreign statement, or per York Antwerp rules, if in accordance with the contract of affreightment." Nothing turns on salvage or on the York Antwerp rules. For the purposes of this case the clause may be read short, thus: "General average payable according to foreign statement." The expenses referred to were incurred as stated in the agreed statement of facts, and it is obvious that most of the expenses at all events were incurred for the benefit, not only of the ship, but of the cargo also. None of them are on the footing of losses for which the underwriters were liable without any adjustment. The average adjustment was made at Rotterdam, and the adjuster, as already mentioned, treated these expenses as general average expenses. It is admitted that his adjustment is final and conclusive as an adjustment of general average. *Harris* v. *Scaramanga* (26 L. T. Rep. 797; L. Rep. 7 C. P. 481; 1 Asp. Mar. Law Cas. N. S. 339) is conclusive on this point. But the shipowners contend that they are entitled to their expenses either as partial losses or under the suing and labouring clause; and that the adjustment has nothing to do with and in no way affects claims in respect of partial losses or claims under the suing and labouring clause. It is in my opinion true that a general average adjuster ought to exclude claims for partial losses not incurred for the benefit of more parties than one, and claims under the suing and labouring clause for saving the ship alone, but he must decide what expenses alleged to have been incurred for the benefit of both ship and carge are to be treated as general average expenses and what are not, and expenses which are treated by him as general average expenses must be so treated not only as between the respective owners of ship and cargo, but also as between them and their respective underwriters. Expenses so treated cannot be treated as something else by those who have agreed to be bound by his decision. Some of these expenses incurred. according to the shipowners for the sole benefit of the ship, have been thrown on the freight and cargo by the average adjuster; others of these expenses, incurred solely for saving the freight, have been thrown on the ship and cargo, and now the assured contends that as between himself and his underwriters he is entitled to throw these expenses exclusively on the ship and freight respectively. This, in my opinion, is contrary to the contract, and cannot therefore be allowed. The assured is attempting by an ingenious process to convert his underwriters on ship and cargo into guarantors for the payment by the cargo owners of those portions of the expenses which the average adjuster has allocated to them, but which they will not pay. I am not at all prepared to say that the expenses in

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question were not general average expenses according to English law. Most, I think, were, but some may not have been. However this may be, they were all general average expenses by the law of Holland, and were so treated by the foreign average adjuster. Under those circumstances they cannot now be treated as something different. The principle contended for by the appellants is, in my opinion, unsound, and is opposed to and not in accordance with the contract entered into between the assured and the underwriters. The appeal must be dismissed with costs.

Smith, L.J.—The plaintiffs in this case are attempting to get the benefit of Dutch law as to general average, and the benefit of English law as to particular average, regardless of the fact that by so doing their underwriters may have to pay the same items of expenditure twice over. Can this be done? The plaintiffs insured their ship and freight with the defendants upon the terms that in case of a loss covered by the policy general average should be adjusted according to Dutch law. There is such a loss, and thereupon general average is so adjusted. By the Dutch law many items of expenditure are brought into general average which would have been charged to particular average against ship had the adjustment taken place in England. The general average contribution of ship and freight is consequently increased, and the plaintiffs have received the increased contribution, and have been paid by the defendants general average as per foreign statement. The plaintiffs nevertheless now resort to English law, and assert that some of the items of expenditure (which have been rightly treated by the Dutch adjuster according to Dutch law as general average charges) are particular average charges according to English law, and seek to single these items out of the foreign statement, and sue the defendants for them as being particular average on ship. This is a novel procedure. There is no authority that this can be done, and if it can, the result would obviously be most unjust to the underwriters. The case of *Dickenson* v. *Jardine* (18 L. T. Rep. 717; L. Rep. 3 C. P. 639), relied upon by counsel for the plaintiffs, is no authority for what his clients are seeking to do. What that case decided was that where goods are insured against jettison, and they are jettisoned, though under circumstances which give rise to general average, the goods owner can sue for a total loss without waiting for an adjustment, and suing for general average. It in no way decides that where general average has been duly adjusted as per foreign statement, and the assured has been paid thereon, he can afterwards single out from that statement any items of expenditure he desires, and sue for them as being due from the underwriters to him. I agree with the counsel for the defendants that the clause "general average as per foreign statement" means that in the case of a loss giving rise to general average items of expenditure are to contribute to general average according to Dutch law, and that this excludes the view that such items are to be particular average according to English law. I apply these remarks also to the suing and labouring clause. The circumstances under which the defendants did pay some particular average to the plaintiffs I have not before me. Counsel for the defendants says they did so to make themselves secure, but be this as it may, in my judgment it does not affect their position in the present case. I agree with the forcible judgment of Barnes, J., who has dealt in detail with the facts of the case. I have nothing to add thereto, and I agree that this appeal should be dismissed.

Davey, L.J.—The question is whether the defendants are liable to pay the sums mentioned in the statement of facts in respect of certain expenses either under the policy on the ship, or under that on the freight. The answer depends on the right construction of the policies. What is the effect of the clause "general average payable as per foreign custom?" The appellants admit that they are bound by it so far as the statement of the foreign average adjuster finds what can be recovered as general average against ship, freight, and cargo respectively, but they contend that they are not bound by the finding of what are general average expenses in a claim against the underwriters of the ship and freight on their policies. In my opinion this is not the true construction or effect of the clause in question. Such a construction counsel for the defendants says would on the one hand throw upon the underwriter on the ship a proportion of charges which would according to English law be borne exclusively by the cargo, and at the same time leave the shipowner free to claim from the underwriter everything which if the adjustment had been made in England would be claimable from him. In other words, the plaintiff claims the benefit of both the Dutch law and the English law. It is unnecessary to express any opinion whether that is the effect in the present case; it is sufficient for the argument of counsel for the defendants to say that it might be so. I am of opinion that it cannot be intended that the assured should be at liberty to approbate and reprobate, to take the benefit of the foreign law in claiming general average in accordance with it, and repudiate the foreign adjuster's award for the purpose of claiming particular average against his insurer upon an adjustment made by an English average stater. I am of opinion that according to the true construction of the policy the assured is bound by the foreign average adjuster's decision as to what expenses were incurred on behalf of ship and cargo, and would therefore be the subject of general average for all purposes. I was rather startled by the broad proposition put forward by counsel for the plaintiffs that the same matters might be subject of general average and of particular average. If you look into the case cited by him (*Dickenson* v. *Jardine* (*ubi sup.*), I think he laid down the proposition too widely. In that case jettison was one of the risks insured against in a policy on goods. The underwriter therefore had contracted to indemnify the assured against that particular risk, and it was held that the assured could recover according to the tenor of the policy, the insurer being subrogated to the assured's rights (if any) to contribution from ship and freight. That I understand. In the present case the assured can only recover under the suing and labouring clause the expenses incurred on behalf of the ship, and *ex hypothesi* the adjuster by bringing them into general average finds that they were incurred on behalf of ship, freight, and cargo. I am of opinion the plaintiff has agreed to be bound by that finding, and I agree with the decision of the learned judge in the court below, and with the reasons given for it. *Appeal dismissed.*

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Solicitors for appellants, *Donning, Holman,* and *Co.*

Solicitors for respondents, *Walton, Johnson Bubb,* and *Whatton.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Thursday, May 31.

(Before NORTH, J.)

J. H. SKINNER AND CO. *v.* PERRY. (*a*)

Patent—Contract for sale of patented articles—Threats of legal proceedings—Loss of contract—Injunction—Inquiry as to damages—Measure of damages—Evidence that contract was lost on account of threats—Admissibility.

The plaintiffs, who were manufacturers and patentees of photographic cameras, entered into negotiations with a company for a contract to supply the company with their patent cameras on certain terms. The company's manager, before the completion of the contract, wrote to the defendant, also a manufacturer and patentee of photographic cameras, inquiring whether the plaintiffs' camera was an infringement of the defendant's patent; and the defendant wrote in reply declaring the plaintiffs' camera to be an infringement of his patent, and threatening legal proceedings to stop the sale of the plaintiffs' camera. The company then consulted their solicitors, who wrote to the plaintiffs to the effect that the company declined to continue negotiations with them because of the defendant's threats. On the application of the plaintiffs, an injunction was granted restraining the defendant from threatening legal proceedings in respect of the plaintiffs' camera, and an inquiry whether the plaintiffs had sustained any and what damages by reason of the defendant's threats, was directed. The chief clerk found that the plaintiffs had sustained damages from the loss of their contract by reason of the defendant's threats, relying for this finding on the statements in the letter of the solicitors of the company to the plaintiffs and the rest of the correspondence, and adopted, as the measure of the damages, the profit which the plaintiffs would have obtained from the contract if it had been carried out. On a summons by the defendant to vary the chief clerk's certificate:

Held, that the letter of the solicitors of the company to the plaintiffs was admissible as evidence to prove that the negotiations for the contract were broken off because of the defendant's threats, and that it was confirmed by the rest of the correspondence.

Held also, that the measure of damages adopted by the chief clerk was the right measure.

SUMMONS to vary the chief clerk's certificate.

The action was brought on the 16th May 1892 by J. H. Skinner and Co., who were manufacturers of photographic cameras, and had obtained a patent for a camera, against Lewis Henry Perry, who also carried on business as a manufacturer of photographic apparatus under the style of J. F. Shew and Co., and was owner of a patent No. 4102 of 1885 for a camera, claiming, under sect. 32 of the Patents Act 1883, an injunction restraining the defendant from threatening the plaintiffs with legal proceedings in respect to the sale of their camera, on the ground that it was an infringement of the defendant's patent, and damages for injury caused to the plaintiffs by reason of the defendant's threats.

On the 1st July 1892, upon motion by the plaintiffs, the defendant not asking that the motion should stand over in order to enable him to bring an action, as contemplated by the proviso in sect. 32 of the Patents, Designs, and Trade Marks Act 1883, and both parties consenting to treat the motion as the trial of the action, an injunction was granted by North, J. restraining the defendant Lewis Henry Perry from threatening the plaintiffs, their customers, or any other person or persons, by circulars, advertisements, or otherwise, with legal proceedings or liability in respect of the manufacture or use of cameras made pursuant to an invention of the plaintiffs, but alleged to be an infringement of the letters patent No. 4102 of 1885. And it was ordered that an inquiry be made whether the plaintiffs had sustained any and what damages by reason of the defendant's threats, that the defendant should pay the costs of the motion, and that the costs of the inquiry should be reserved, with liberty to apply; North, J. holding that the letters of the defendant contained threats of legal proceedings within sect. 32 of the Patents, Designs, and Trade Marks Act 1883.

On the 21st Nov. 1892 the defendant appealed from that order (*Skinner and Co.* v. *Perry*, 67 L. T. Rep. 696; (1893) 1 Ch. 413) on the ground that the letters of the defendant being *bonâ fide* answers to inquiries were not threats at all, but privileged communications, or at any rate were not threats within the 32nd section of the Patents, Designs, and Trade Marks Act 1883; but the order was affirmed by the Court of Appeal.

The defendant then undertook to bring an action against the plaintiffs for an infringement of his patent, and this he proceeded to do. His statement of claim was delivered, but, on the application of the plaintiffs was amended several times; and ultimately the defendant's action was discontinued on the 4th May 1893.

The plaintiffs then proceeded with the inquiry as to damages directed by the order of the 1st July 1892, before the chief clerk, which inquiry had been stayed pending the proceedings in the action commenced by the defendant. The plaintiffs contended that they had suffered damage through the loss, by reason of the defendant's threats, of a contract with the London Stereoscopic Company for supplying the company with the plaintiffs' cameras at certain specified prices for three years, with a minimum guarantee from the company of 750*l.* per annum. A number of letters, including those set out below, were put in evidence before the chief clerk to prove the plaintiffs' claim, and also a number of affidavits as to the amount of the damages sustained by them through the loss of the contract. The manager of the company besides other witnesses gave evidence before the chief clerk, but he was not asked the reason why the company declined to continue negotiations with the plaintiffs for the completion of the contract.

The chief clerk found that the plaintiffs had sustained damages from the loss of the contract with the Stereoscopic Company through the

(*a*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

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defendant's threats, and that the measure of the damages was the profit which the plaintiffs would have derived from that contract if carried out. He calculated the profit by deducting the cost price of each camera from the selling price under the contract, which, multiplied by the minimum number of cameras which were to have been taken by the company under the contract, amounted to 300*l.* a year, and as the season for manufacturing cameras ends in May and the plaintiffs had lost two seasons through the threats of and proceedings by the defendant, the chief clerk allowed the plaintiffs two years' profits on cameras, which amounted to 600*l.*, and two years' profits on extras, &c., which amounted to 100*l.*, making the total allowance 700*l.* But the chief clerk allowed nothing for the third year covered by the contract, as the plaintiffs had the opportunity of obtaining in the market, a profit for the third year equal to what they might have obtained under the contract with the company.

This was a summons by the defendant to vary the chief clerk's certificate by disallowing the allowance of 700*l.*, on the ground of want of evidence to support such finding, or, in the alternative, by reducing the damages.

The following letters (with others) were in evidence on the hearing of the summons, as showing the terms of the contract between the plaintiffs and the London Stereoscopic and Photographic Company Limited, the manner in which the negotiations between them were broken off, the threats of the defendant, and the damages occasioned to the plaintiffs by the loss of the contract; and were referred to in the arguments of counsel and in the judgment of the court:—

106 and 108, Regent-street, W., Nov. 26, 1891.—Mr. J. H. Skinner.—Dear Sir,—I have had a conversation with the management respecting your patent camera, and the proposition that we have to make to you is, in my opinion, to your interests and a very good one. The proposal is practically as follows:

The letter then stated the terms first proposed but which were subsequently altered to those mentioned in the following letter, and concluded:

If you approve of the proposal, please notify me as soon as possible and I will have an agreement drafted. The order for the gross will be sent on upon completion of the formal agreement. There are two or three improvements in the camera which I should suggest to you, but, perhaps, it is a little useless doing so until we have come to a mutual understanding. Kindly favour me with an early reply.—Yours very faithfully, BUTLER HUMPHREYS.

East Dereham, Dec. 3, 1891.—The London Stereoscopic and Photographic Company Limited.—Gentlemen,—We have not received rough draft as promised on terms arranged, viz., you to have sole right to sell wholesale and retail the camera in question at prices quoted, for three years, with a minimum guarantee of 750*l.* per annum, we to supply all extras required, such as backs, film holders, and tripods, also shutter if satisfactory. First order for one gross of cameras and backs to be delivered as wanted, but all to be taken during first year, time for guarantee to date from delivery of first fifty cameras. You to have option of renewal of agreement so long as you take 750*l.* worth per annum. We are now making some of the quarter plates. We shall make them in figured mahogany, not in plain wood like sample. Our aim will be for them to be the best made and most highly finished of any goods you stock. We shall soon send you actual sample with suggested improvements carried out.—Yours truly, J. H. SKINNER and Co.

106 and 108, Regent-street, W., Jan. 11, 1892.—Dear Mr. Skinner,—Mr. Mitchell has the order for the cameras already written out to send down to you, and has, I believe, the agreement just about ready. In looking at your camera and thinking it over very carefully, and on comparing it with Shews', I have been very much struck with the similarity; that is, the way it is brought out to focus. Now, of course we shall all be very loth to get into any legal trouble, and the purport of present letter is to ask whether you have taken any patent agent's opinion upon the validity of your patent, and if so, could you send me a copy of same. If you have not already done so, don't you think that for our mutual advantage it would be as well to get the opinion at once? Of course this means a certain amount of expense, and it would be only reasonable if the patent agent's report was in favour of yourself that we should pay the expense; but if the reverse, you would, I am sure, not object to pay it. Please do not for one moment think that I am raising any difficulty respecting the agreement, but am only anxious that neither of us should get into any legal difficulties. Let me have the favour of your reply by return of post if possible and oblige.—Yours, with kindest regards, BUTLER HUMPHREYS.

54, Cheapside, E.C., Jan. 26, 1892.—Messrs. J. H. Skinner and Co., E. Dereham. — Gentlemen, — I am sorry that difficulties appear to be rising in concluding arrangements regarding camera. Mr. Humphreys, in whose hands the matters were placed, has been absent for a week, and consequently the standstill. There was a note from your patent agent asking that the camera should be sent him, but, as his opinion would not be satisfactory to us, I have sent the camera along with one of Shews', and their specification to our own agent and at our expense, in order to obtain an outside opinion, which I trust you will approve of. I am only too anxious to get to work with it, but at the same time I detest litigation, and have no wish for any legal questions as to infringements, designs, &c., to crop up after we have entered on the contract. We are promised reply by Monday next, after that I hope there will be little delay, and that the report will be favourable. I am sorry this was not arranged in the first instance, as it might have saved time.—Yours faithfully, J. LILLIE MITCHELL, General Manager.

106 and 108, Regent-street, W., Feb. 1, 1892.—Messrs. J. H. Skinner and Co., E. Dereham.—Gentlemen,—Inclosed please find a copy of the patent agent's opinion respecting the validity of the new patent camera. The firm from whom we have obtained same may almost be considered not only as patent agents but patent lawyers, so that you may thoroughly depend upon what they state as being absolutely correct. Considering their adverse opinion we regret exceedingly that you did not take similar steps before offering the camera. Of course such an opinion renders it quite impossible for us to take the camera up. We are the more sorry for this in that we believe that we could have done a very good business with it, but of course it is very much better to have this understanding at the beginning than for you to have made a big stock and for us to have stocked them and have them thrown on our hands to our mutual disadvantage. Under no circumstances would our directors touch an invention likely to be infringing an existing patent. They are very sensitive on such a point of honour. We regret exceedingly the delay that has occurred, but at first we rested on your assurance that the patent was sound and unchallengeable. We are more sorry than we can express, firstly because of your kindness in offering it to us, and secondly because we feel quite sure that had we been able to conscientiously take it up it would be very greatly to your and our own benefit.—We are, Gentlemen, yours very faithfully, LONDON STEREO AND PHOTO COMPANY. — J. Lillie Mitchell, General Manager.

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Memorandum from the London Stereoscopic and Photographic Company Limited, 106 and 108, Regent-street, W., 12th Feb. 1892.—Messrs. J. F. Shew and Co., 87 and 88, Newman-street, Oxford-street, W.—Gentlemen,—We have had submitted to us, with a view of placing it upon the market, a folding hand camera, which we send herewith. On looking it carefully over it struck us that in some points there were faint resemblances to your own "Eclipse" camera; and, as it would be quite contrary to our desire to in any way infringe upon your patent, we thought it would be very much better to submit it to you and ask whether you thought it in any way encroaches upon your rights; not that we think it does, but of course we are anxious to act honourably towards any other dealer in the trade. The writer will have the pleasure of calling upon you on Tuesday of next week at half-past two, by which time you will have been able to come to some decision in the matter.—We are, Gentlemen, yours faithfully, THE LONDON STEREOSCOPIC AND PHOTOGRAPHIC COMPANY LIMITED.—Butler Humphreys.

87 and 88, Newman-street, Oxford-street, W., Feb. 13, 1892.—The London Stereoscopic Company.—Gentlemen,—We thank you for your kind letter of yesterday, and in reply beg to say that the camera shown is undoubtedly, in our opinion, an imitation of ours, and an infringement. We shall be pleased to see Mr. Humphreys on Tuesday, as suggested, and shall by that time have taken further advice in the matter.—We are, Gentlemen, yours obediently (Signed), J. F. SHEW and Co.

College-hill Chambers, Cloak-lane, E.C. Feb. 19, 1892.—Messrs. J. H. Skinner and Co., East Dereham. Dear Sirs,—The London Stereoscopic Company has consulted us with reference to the proposals for a licence under your patent for improvements in cameras. We have also before us the correspondence which has passed between you and our clients. Having had business relations for some years with Messrs. Shew and Co., and particularly in relation to the camera referred to in Messrs. Shews' patent No. 4102, '85, our clients felt bound to submit to them the patent camera which you sent up with the view of obtaining their opinion as to what to our clients appeared a great similarity between the two cameras. This they have done, and the result is that they have received from Messrs. Skew and Co. a letter of which we send you a copy. Under these circumstances it is absolutely impossible for our clients to continue any negotiations for our agreement. However useful your invention may be, they cannot submit themselves to the risk of a lawsuit. We are therefore instructed to inform you that our clients decline to continue the negotiations, at the same time desiring us to express their regret that both you and they should have been put to any inconvenience in the matter. In one of your letters you state that you are prepared to dispute with Messrs. Shew the point. Do you wish us to give them your name in the matter? We shall be glad to hear from you on the point.—Yours truly, COLLETTE and COLLETTE.

Copy letter inclosed in that of Messrs. Collette and Collette:

J. F. Shew and Co., Photographic Stores, 87 and 88, Newman-street, W. Feb. 18, 1892. — The London Stereoscopic Company.—Gentlemen,—In reply to yours of the 13th inst. we beg to confirm our opinion previously expressed that the camera in question is an infringement not only of our patent No. 4102/85, but also of our No. 15,657/91. We have taken further advice in the matter, and are prepared to stop the sale of the camera if placed in the market. If you are willing to do so, it would save time and trouble if you would give us the name of the manufacturer, and we will communicate direct with him.—Yours faithfully, J. F. SHEW and Co.

East Dereham, Norfolk, Feb. 20, 1892.—Messrs. J. F. Shew and Co., London.—Gentlemen, — We are informed from a letter which you sent to the London Stereoscopic Company that you intend to dispute our right to make our patent hand camera, of which they showed you a sample. We may say we have taken competent advice from more than one eminent authority, and we are fully prepared to defend any action that you may bring. The only probable result will be the quashing of your own patent through defective specification. In any case, we are advised that our camera is clear. We are sorry to have to come to litigation with you, but we are so sure of our own ground that we cannot for a moment entertain the idea of withdrawing our camera from the market. We have already a number of these in hand, and these will be in the market directly. We shall be glad to hear from you what steps you propose taking in the matter.—Yours faithfully, J. H. SKINNER and Co.

87 and 88, Newman-street, Oxford-street, Feb. 23, 1892.—Messrs. J. H. Skinner and Co., East Dereham.—Gentlemen,—In reply to yours of the 20th we can only confirm ours of the 18th to the London Stereoscopic Company, that we consider the camera in question an infringement of our patents Nos. 4102/85 and 15,657/91, and are prepared to take action to stop the sale. In order that we may go further into the matter before loss of time is incurred, if you would send us a camera and give us the number of the patent, it would be an aid to our further investigation of the matter, saving unnecessary delay. We beg to inclose a cheque in payment of our account, and remain, Gentlemen, yours obediently, J. F. SHEW and Co.

T. Terrell for the summons.—The chief clerk is wrong in finding that the plaintiffs have suffered damage through the defendant's threats. The plaintiffs have not made out a case for damages, and have not produced admissible evidence proving that they have suffered damage through the defendant's threats. In order to entitle themselves to damages the plaintiffs must prove (1) that no legal contract was made between them and the photographic company which they could enforce, because, if they can compel the company to carry out the contract, they cannot claim damages from the defendant on the ground that they lost the benefit of the contract through the defendant's threats. If there was no legal contract the plaintiffs have to prove that the London Stereoscopic Company broke off the negotiations for a contract which they would have entered into with the plaintiffs, on account of threats by the defendant; they must prove the threats, and they must prove damages which are the natural result of the threats and not too remote. They must assume that, supposing the defendants had said nothing, the contract would have been entered into. He referred to

Mansell v. *Clements*, L. Rep. 9 C. P. 139.

The plaintiffs rely on the letter of the 19th Feb. 1892 by Messrs. Collette and Collette, the solicitors of the Stereoscopic Company to the plaintiffs as proving that the company declined to continue their negotiations for the contract because of the threats of the defendant. That letter may be evidence of the fact that the negotiations were discontinued, but, written as it was by persons who are not parties to the proceedings between the plaintiffs and defendant, it is not admissible evidence against the defendant to show that the company abandoned the proposed contract because of the threats of the defendant. That statement is not on oath, and there is no proof that the company did not abandon the contract because they were afraid they might lose by

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it, or for some other reason. The question is, what was the intention in the minds of the officials of the company when they instructed Messrs. Collette and Collette. The manager of the company was examined before the chief clerk, and the plaintiffs' counsel might have asked him what the intention was, but he did not do so. The letter itself is not evidence of the company's reason for abandoning the contract. He referred to

Carmarthen and Cardigan Railway Company v. *Manchester and Milford Railway Company*, L. Rep. 8 C. P. 685.

Negotiations for the proposed contract were broken off by the letter of the 1st Feb. 1892 from the general manager of the company to the plaintiffs, before the defendant was written to respecting the plaintiffs' camera on the 19th Feb. 1892, and before the defendant knew anything about it. Assuming the plaintiffs were entitled to some damages, the proper measure of damages was the difference between contract prices and the price which the plaintiffs could have obtained in the open market. The affidavits show that there was a market for the plaintiffs' cameras. No extras ought to have been allowed for. The damage ceased when the plaintiffs obtained an injunction on the 1st July 1892, and ought to be under 100*l.*

Moulton, Q.C. and *Micklem* for the plaintiffs.—It appears from the correspondence that both the plaintiffs and the London Stereoscopic Company were anxious to carry out a contract, the terms of which had been arranged between them, but which had not been completed by legal formalities; and that the negotiations between them with respect to the contract were ultimately put an end to by the letter of the 19th Feb. 1892 by Messrs. Collette and Collette, the solicitors for the company, which states that the negotiations were put a stop to because of the defendant's threats in his letter, a copy of which Messrs. Collette and Collette inclose. The letter of Messrs. Collette and Collette, together with the rest of the correspondence, is admissible as evidence to show why the negotiations were put an end to, and on this point the decision in *Mansell* v. *Clements* (*ubi sup.*) is in our favour. The actual cause of the breaking off of the negotiations must be inferred from the surrounding circumstances, which show that the cause was the defendant's threats. With respect to the measure of damages, the damages should be as nearly as possible what the plaintiffs would have gained from their contract with the Stereoscopic Company if it had been completed. If the wrongful act of the defendant is such as to raise a doubt as to the proper measure of damages, the defendant is not entitled to the benefit of that doubt. The question is, what profits might have been fairly expected from the contract, and the chief clerk has taken the right view. It was just to make the allowance for extra backs, &c., which come to a good deal. The minimum expected from the contract was more than 750*l.* a year without extras, as no company would guarantee to take the total number it expects to be able to dispose of. Even without any guarantee to guide them a jury could estimate the probable damage, and the defendant cannot be heard to say that the success of his wrongdoing is so complete that no one can fix the amount of damage caused by it. The allowance of 25*l.* per cent. is not too much for extras. Then, in consequence of the defendant's threats and proceedings, the plaintiffs lost two seasons of their trade, so that the chief clerk was right in allowing for two seasons at least; and the plaintiffs will have to look to the open market for their earnings in the third season, they having lost their large private customer, the Stereoscopic Company.

T. Terrell in reply.—The plaintiffs claim special damage, which must be the natural and probable consequence of the defendant's conduct and calculated for three months only, *i.e.*, to the date of the injunction.

NORTH, J.—I think that the chief clerk's certificate is right. The first question is whether, by reason of the defendant's threats, the plaintiffs were prevented from making the contract with the London Stereoscopic Company. It appears from the correspondence that the negotiations for the contract commenced in Nov. 1891, and that terms were practically, I do not say legally, arranged of a contract which would have been very advantageous, according to the evidence for the plaintiffs. The company wished to be safe, and something was said in the correspondence between the plaintiffs and the Stereoscopic Company, which took place before a formal agreement was drawn up, of a certain similarity between the plaintiffs' camera and a camera manufactured and patented by the defendant, which led to some doubt as to the plaintiffs having a title to the patent, which would enable the company, if they took a licence to work it, to get the full benefit of the licence. The point was first mooted in a letter, dated the 11th Jan. 1892, written by Mr. Humphreys, on behalf of the company, to the plaintiffs. [His Lordship read the letter, which is set out above, and continued:] That was the beginning of the difficulty raised in respect of the completion of the contract. Further letters passed, and on the 1st Feb. 1892 Mr. Mitchell, the general manager of the Stereoscopic Company, wrote to the plaintiffs. [His Lordship read the letter, which is set out above, and continued:] It is clear from this letter that the view the company took of it was this: that they had to give up what they considered an advantageous contract on both sides, because it would involve them in litigation, to which they would not, under any circumstances, be parties. They treated it as if it was only negotiation, and as if it was open to them to throw it up if they liked. The plaintiffs took a different view, which their counsel does not now contend was well founded in law, that there was an existing contract which could be legally enforced, and on the 3rd Feb. 1892 they wrote to the company to that effect. Then, after letters in which the company contended that the contract was cancelled, and the plaintiffs that it was binding, the Stereoscopic Company approached the defendant, the owner of the camera which was said to have anticipated the plaintiffs' patent. The company naturally took this view: "We think we are out of it, and we will not enter into what will be a subject of litigation; on the other hand, that will not necessarily relieve us from litigation, because we are threatened with litigation by Messrs. Skinner and Co., who say we have entered into a legal agreement, and with a litigant threatening

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us on either side, what is the best thing for us to do?" It was not common ground that the negotiations were at an end, because the plaintiffs were contending they were not and the company that they were. Then what do the company do? They take what seems to me a very reasonable course. They try whether the existing difficulty can be removed, and they communicate with the defendant. It turns out that the defendant took the view that the company thought they would take, viz., that the plaintiffs' patent was an infringement of the defendant's patent; and I see no reason for believing that at that stage, at any rate, whoever was right or wrong, it was not a *bonâ fide* view on the one side that the plaintiffs' was a good patent, and on the other that the defendant's patent was an anticipation of it. That being so, after more correspondence and an interview or two had taken place, the defendant writes the letter of the 18th Feb. 1892 to the Stereoscopic Company. [His Lordship went through the correspondence and reviewed the evidence, and continued:] I think, therefore, that the plaintiffs have made out a case entitling them to damages. Then the question is, what are the damages? The chief clerk has allowed the sum of 700*l.*, and he has proceeded on this footing: He calculated the profit which would have been made by the plaintiffs on the contract if it had gone on. The contract which was in negotiation was that the Stereoscopic Company should take from the plaintiffs a fixed minimum quantity of goods, although the letters stated, and the parties believed, that the actual amount delivered would be a good deal greater. The Stereoscopic Company, who were likely to be able to form a good opinion on that point, thought so; and, further, I think Mr. Moulton's suggestion is a very business-like one, that when the company guaranteed that they would take a minimum quantity, they would reasonably expect to be able to exceed the minimum which they guaranteed, and so they said in the correspondence. That being so, the chief clerk took first of all the minimum number. He took the figure of profit which had been calculated, and he reduced the allowance per camera to 1*l.* 15*s.* Then he found that at that rate the profit came to 300*l.* a year, and he allowed that amount for two years. The contract, if it had been entered into, would have been for three years. Although I have spoken of years, seasons is rather the proper term, because it is only during part of the year that the wholesale manufacturer can usefully prepare goods for the coming season, and the times which the parties agree upon now, and which the chief clerk has adopted are these: that the first year commenced on the 1st March 1892, the second year on the 1st March 1893, and the third on the 1st March of the present year. As regards the third year he has not allowed anything because the parties are at arm's length now. If the plaintiffs' patent is worth anything now, as they say it is, they have full opportunity of getting from the trade in the market at least what they would have got from the Stereoscopic Company. Further, this must be borne in mind, that if the contract had gone on the plaintiffs' business must have been confined to dealing with the Stereoscopic Company, who would have been their only customers. Now that the contract is at an end, it is open to the plaintiffs to sell their patented article to any person. The chief clerk therefore rejected the idea of there being any loss of profits for the third year. The first year expired, as I have said, on the 1st March 1893, but by May 1893 all the valuable part of the second year, that is to say, the second season, had expired. When the infringement action was stayed that season was over. Therefore the chief clerk, finding that the plaintiffs had lost two seasons, allowed their profits for two years. The 600*l.* is arrived at on the footing of the minimum number only having been sold. The chief clerk has allowed 100*l.* more for two years, profits on extras, &c. It is not proved that exactly that number of pounds was lost. It could not be, inasmuch as the contract did not go on. All that can be done is to arrive as nearly as possible at what would have been made if the contract had gone on, the fact being that nothing was gained or lost. It seems to me the chief clerk has taken a not unreasonable figure. It is not a large figure. It extends over the whole of two seasons. When it is said that the plaintiffs must prove loss by pounds, shillings, and pence, I dissent altogether, because it is impossible to show precisely what amount of pounds, shillings, and pence would have been realised under a contract which has never been actually completed. That, I think, disposes of the figures. It was said that the profit was not the proper measure of the damage, but it seems to me clear that, when the question is what damage the plaintiffs have sustained by reason of the loss of a contract, the measure is the profit which they would otherwise have gained. It was said by Mr. Terrell that the measure ought to be the difference between the amount of that profit, on the one hand, and the amount which might have been realised by the plaintiffs if they had gone on manufacturing the articles and selling them in the market; and that it is only that difference with which the defendant ought to be charged. But it was impossible for the plaintiffs to go on manufacturing the articles in question. At any rate, whether impossible or not, it does not lie in the defendant's mouth to say it was possible, because, in the first place, the defendant began by alleging that anything which the plaintiffs might do under their patent would be an infringement of the defendant's patent. That was the threat actually made, and although they were restrained from repeating the threat to other parties to the prejudice of the plaintiffs, yet that could not prevent the threat made by the defendant to the plaintiffs from remaining as an operative threat, and a continuing warning from the defendant to the plaintiffs that, if they chose to manufacture these articles, they must take the risk of proceedings being commenced against them by the defendant. It did not rest merely on the fact that the letter of warning was not withdrawn; but the defendant brought the case to trial before me. He then went to the Court of Appeal, and, when the Court of Appeal took the same view as I did, the defendant obtained a stay of the inquiry as to damages to enable him to bring an action against the plaintiffs to restrain them from doing the very thing which he now contends the plaintiffs ought to have been doing all along, not for their own benefit, but for the benefit of the defendant, who was not only telling them not to do it, but at this very time had actually commenced an action

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to prevent them doing it. That action came to nothing, and was discontinued in May 1893, and from that time forward the plaintiffs were entitled to manufacture their own articles undisturbed by any threat, but by that time the second season had been lost, and that is the reason for which two years' profits have been given. That being so, in my opinion the chief clerk has made a certificate with which I cannot interfere. The summons to vary his certificate will be dismissed with costs.

Solicitors: *Watkins, Baylis,* and *Co.; Waterhouse, Winterbotham,* and *Co.,* for *Cozens-Hardy* and *Jewson,* Norwich.

Thursday, June 24.

(Before NORTH, J.)

Re QUEENSLAND LAND AND COAL COMPANY LIMITED; DAVIS *v.* MARTIN. (*a*)

Company — Loan by bank — Debentures with blanks instead of the names of the obligees, as collateral security—Invalid at law—Equitable contract to give valid debentures entitling bank to rank with holders of valid debentures.

A company with large borrowing powers having issued a large number of debenture bonds got into difficulties, and obtained an advance from its bankers, giving, as collateral security for the advance, debenture bonds under the company's seal, in which debentures the name of the obligee was omitted, blanks being left for such name. In connection with the transaction between the company and the bank there was a minute of a resolution of the company duly signed by the chairman at a subsequent meeting, and a covering deed by which the property of the company was vested in trustees to secure the payment of the principal moneys and interest due on the debentures; and the bank was registered as holder of the debentures. The company was dissolved; and subsequently, upon an action by a debenture-holder, an order was made that the trusts of the covering deed should be performed and carried into execution, and inquiries as to the holders of the debentures were directed. On the further consideration of the action the question was raised whether, with respect to the debentures held by the bank, in which the name of the obligee was omitted, a blank space being left for such name, the bank was a debenture-holder, and entitled with the other debenture-holders to the benefit of the covering deed.

Held, that, although the debentures were void at law, there was a valid contract with the bank to issue valid debentures to them (the terms of which contract could be gathered from the resolution of the company, the debentures which were good as written memoranda, and the covering deed), under which contract the bank had an equitable claim to share with the other debenture-holders the benefit of the covering deed.

ACTION brought for the administration of the trusts of a deed dated the 9th June 1882 made for the benefit of the debenture-holders of the Queensland Land and Coal Company Limited.

The Queensland Land and Coal Company Limited was registered on the 1st July 1881 under the Companies Acts 1862 to 1884, with a nominal capital of 175,000*l.*, and with power to borrow money upon the security of mortgage debentures. By its trust deed, dated the 9th June 1882, after a recital that the company were about to issue a series of mortgage debentures in the form contained in the 2nd schedule thereto, for the purpose of securing the repayment of principal sums not exceeding 120,000*l.*, with a bonus of 10*l.* per cent. on such principal sums, and interest at the rate of 7*l.* per cent. thereon, certain freehold lands, coalfields, and properties of the company situated in Queensland were conveyed to trustees upon trust for the company until default should be made for three months in payment of any principal moneys and interest secured by any of the debentures, and after such default upon trust for sale as therein mentioned, and to hold the proceeds, after payment of costs, in trust to apply the same: first, in or towards payments *pari passu,* and without any preference or priority whatever, of all arrears of interest on the debentures; secondly, towards payment to the registered holders of the debentures *pari passu* in proportion to the amount due to them respectively, without any preference or priority either on account of priority of issue, or of any debenture having been drawn for redemption or otherwise howsoever, of all principal moneys due on such debentures, and that whether the same principal moneys should or should not be then payable according to the tenor of the said debentures; and thirdly, in paying the surplus, if any, as therein mentioned. And the company covenanted with the trustees that they would pay the principal and interest secured by the debentures in accordance with the tenor thereof, and that the principal and interest secured by the debentures, or intended so to be, should be the first charge on the mortgaged premises; and that the company would keep a register of all the debentures showing their respective dates, numbers, and amounts, and the names of the respective holders thereof. And it was agreed and declared that the provisions contained in the 3rd schedule thereto should have effect in the same manner as if such provisions were therein and in each of the debentures set forth; and further, that it should be lawful for the trustees to accept the said register of debentures as conclusive evidence as to the number, names, addresses, and descriptions of the debenture-holders for the time being. The provisions in the 3rd schedule stated (*inter alia*) that, until the transfer of a debenture had been registered and the name of the transferee entered on the register as the holder thereof, the transferor should be deemed to be the holder thereof.

The debentures, with respect to which the present question arose, were in the form following, which corresponds with the form in the 2nd schedule of the trust deed:

The Queensland Land and Coal Company Limited. Incorporated under the Companies Acts 1862 to 1880. Issue of 120,000*l.* First Mortgage Debentures. — No. VIII. debenture for *l.*, bearing interest at the rate of 7*l.* per cent. per annum. The Queensland Land and Coal Company Limited, in consideration of the sum of pounds paid to the company by of will pay to the said executors or administrators, or to the registered transferee for the time being of this debenture, at the time and on the conditions indorsed hereon the said principal sum of pounds, and the

(*a*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

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company will also pay to the bearer of every interest coupon hereto annexed, upon presentation and delivery at the time and place in such coupon mentioned, such sum as in such coupon is specified being interest at the rate of 7*l.* per cent. per annum on the said principal sum. And for the consideration aforesaid the company doth hereby charge with such payments all its undertaking, freehold lands, collieries, grants, concessions, property, plant, and effects acquired and to be hereafter acquired, and all the estate, right, title, and interest into and upon the said premises. This debenture is issued upon and subject to the conditions indorsed thereon. Given under the common seal of the company this day of 188 .—The common seal of the company was affixed hereto in the presence of .—Registered in the Mortgage Debenture Register of the company this day of 1884.—Secretary.

The indorsed conditions provided (*inter alia*) that the debenture was one of a series of debentures issued or about to be issued by the company for securing an aggregate principal sum of 120,000*l.* with interest as stated on the face of the debentures, and that all the debentures of the said series were entitled to the benefit of the trust deed of the 9th June 1882, and that the receipt of the registered holder of the debenture for the principal moneys intended to be thereby secured, and the receipt of the bearer of each of the said coupons for the half-year's interest therein specified, should be a good discharge to the company, and the company should not be bound to inquire into the title of such holder or bearer.

In the month of Oct. 1883 the company were in difficulties, and a proposal was made between the chairman of the company and the manager of the Queensland National Bank that the latter should advance to the company 5000*l.*, and that the company should give to the bank what security they could.

At a board meeting of the company on the 23rd Oct. 1883 the proposal was adopted, and it was resolved that the seal of the company should be affixed to debentures to the amount of 20,000*l.* to be handed to the bank as collateral security. The resolution was signed by the chairman.

At a board meeting of the company on the 6th Nov. 1883 the minutes of the last meeting were confirmed, and it was reported that arrangements had been made for a further advance of 1000*l.* by the bank, and it was resolved that the seal of the company be affixed to bonds for 2000*l.* to be handed to the bank as further cover. The resolution was signed by the chairman.

The debentures were accordingly handed to the bank. As regards the whole of these debentures for 22,000*l.*, it appeared that the name of the obligees was omitted, a blank space being left for the name. They were, however, registered in the name of the bank as the holders, and dividends were subsequently paid on some of the coupons.

The company was dissolved in 1888. In Dec. 1889 the action was brought by a debenture-holder against the present trustees of the trust deed; and an order was obtained declaring that the trusts of the deed ought to be carried into execution, and an inquiry and accounts were directed as to who were the holders of the debentures or mortgage securities, and who were entitled to the benefit of the trust deed. The bank had liberty to attend the proceedings.

The bank accordingly carried in their claim in respect of (*inter alia*) their blank debentures for 22,000*l.*; and by his certificate in answer to the inquiry and accounts directed by the order, the chief clerk certified with respect to them as follows:

The debentures held by the Queensland National Bank Limited named in the third part of the said schedule amount altogether to 23,000*l.*

In the whole of such debentures the name of the obligee is omitted, a blank space being left for such name, except as to two of such debentures for 500*l.* each (numbered 1357 and 1358) which are made payable to bearer. The said bank also hold three other debentures for 500*l.* each, also payable to bearer, but the same remain unstamped, and the claim in respect thereof has been withdrawn. The said Queensland National Bank Limited claim to hold 22,000*l.* part of the said debentures amounting to 23,000*l.* as security for payment of certain advances of 5000*l.* and 1000*l.* respectively made by them with interest at the rate of 5*l.* per cent. per annum on the said 5000*l.* from the 23rd Oct. 1883, and on the said 1000*l.* from the 6th Nov. 1883.

The said Queensland National Bank claim to hold the said debentures for 1000*l.* (the residue of the said 23,000*l.*) as security for the payment of a further advance of 500*l.* made by the said bank together with interest on the said 500*l.* at the rate of 5*l.* per cent. per annum from the 30th March 1883.

At the request of the parties I submit to the judgment of the court whether, having regard to the terms in which and the circumstances under which the said 22,000*l.* debentures were issued as stated in the evidence, and to the terms of the said trust deed of the 9th June 1882, the said Queensland National Bank Limited are in respect of the same or any of them holders of debentures or mortgage securities which have been issued or created by the said Queensland Land and Coal Company Limited, or by the directors thereof, who are entitled to the benefit of the said trust deed within the meaning of the said inquiry and accounts.

This was the further consideration of the action.

Cozens-Hardy, Q.C. and *G. F. Hart* for the plaintiff.—It must be admitted that the company owes money to the bank in respect of which the blank debentures were deposited with the bank; but the blank debentures are of no validity. The bank is entered on the register as holders of the blank debentures, but that does not create a charge in favour of the bank, since mere registration without a valid debenture gives no charge. Even if the company were estopped from denying the validity of the bank's claim there can be no estoppel as between the other debenture-holders and the bank. The decision in the case of *Mowatt* v. *Castle Steel and Iron Works Company Limited* (55 L. T. Rep. 645; 34 Ch. Div. 58) is directly in point. The blank debentures are blank paper as deeds-poll or bonds. They referred to

Société Générale v. *Walker*, 54 L. T. Rep. 389; L. Rep. 11 App. Cas. 20;
Hibblewhite v. *McMorine*, 6 M. & W. 200;
Shropshire Union Railways and Canal Company v. *The Queen*, 32 L. T. Rep. 283; L. Rep. 7 H. of L. 496.

[NORTH, J. referred to *Taylor* v. *Great Indian Peninsular Railway Company*, 4 De G. & J. 559.] There are blanks in the debentures at the present moment, and they are nullities. What was contemplated by the parties to the covering

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deed was the holding of valid deeds or bonds, and the blank debentures are not debentures under the terms of the covering deed, nor do they come within the definition of a debenture contained in that deed. They referred to

Re Strand Music Hall Company, 3 De G. J. & S. 147.

R. M. Pattison for debenture-holders.

H. S. Scrivener for other debenture-holders.

Ere for the trustees of the trust deed.—The deed contains a covenant for payment of the principal and interest secured by the debentures issued by the company.

Swinfen Eady, Q.C. and *Alexander Young* for the Queensland National Bank.—It is immaterial whether the blank debentures are valid debentures or not, as there was a contract, which is valid in equity, to give the bank a charge on the property of the company before the blank debentures were delivered to the bank. The facts of the present case are similar to those in the *Strand Music Hall Company* (*ubi sup.*). If there is a contract valid in equity to charge the property of the company in favour of the bank, what does it matter whether debentures are given to the bank or not? The present case is similar to that of *Ross* v. *Army and Navy Hotel Company* (55 L. T. Rep. 472; 34 Ch. Div. 43), which is different from that of *Mowat* v. *Castle Steel and Iron Works Company* (*ubi sup.*) relied on by the other side. The legal effect of a debenture, and of an agreement to give a debenture, is identical. He referred to

Lery v. *Abercorris Slate and Slab Company Limited*, 58 L. T. Rep. 218; 37 Ch. Div. 260.

The blank debentures are valid debentures. They are documents under the seal of the company, and each contains a reference to the register. [NORTH, J.—For the legal effect of a deed I must look to the deed itself. His Lordship then referred to *Enthoven* v. *Hoyle* (13 C. B. 373); and *Weeks* v. *Maillardet*, 14 East, 568.] A deed can always be rectified so as to make it carry out the contract existing at the time the deed was executed. [NORTH, J.—When the blank debentures were issued there was no registered contract, and any one who held a blank debenture might have inserted his name in it.] The only contract as to the blank debentures deposited with the bank was with the bank. They referred to

Cole v. *Parkin*, 12 East, 471.

Cozens-Hardy, Q.C. in reply.—[NORTH, J.—You need only reply on the question whether there was a good equitable contract with the bank.] The contract on which the bank relies is a simple contract which would have been barred by the Statute of Limitations except for the payments on account in 1888 and 1890, and of which there is no memorandum or note in writing sufficient to satisfy the Statute of Frauds. The minutes of the resolution of the company signed by the chairman at the next meeting are not sufficient to satisfy the statute. He referred to

Jones v. *Victoria Graving Dock Company*, 36 L. T. Rep. 144; 2 Q. B. Div. 314.

This is not simply a question between the company and the bank, but also between the bank and the other debenture-holders. He referred to

Ross v. *Army and Navy Hotel Company* (*ubi sup.*).

If the bank is allowed to come in at all it ought only to come in on terms. It only lent 6000*l.* to the company. [NORTH, J.—Mr. Eady, what do you say as to the fresh points raised by Mr. Hardy?]

Swinfen Eady, Q.C.—There is a sufficient memorandum or note in writing of the contract to satisfy the Statute of Frauds. The blank debentures were sealed and handed to the bank as and for valid debentures in pursuance of a resolution of the directors. There is a memorandum on the blank debentures that they are registered, and there are coupons attached to them and numbered so that the coupons can be identified as belonging to the blank debentures. The bank advanced the 6000*l.* which is the executed consideration for the contract. The bank ought to be allowed to prove for the whole amount of the debentures deposited with the bank as security for the advance. They referred to

Re Strand Music Hall (*ubi sup.*);
Re Regent's Canal Ironworks Company Limited, 34 L. T. Rep. 310; 3 Ch. Div. 43.

NORTH, J.—In my opinion the claim of the bank must be allowed. The first question is, whether the "debentures," as I will call them for the sake of convenience, give a legal right or not. In my opinion, it is clear that they do not. They are debentures by which it is stated that the Queensland Land and Coal Company Limited, in consideration of 500*l.* paid to the company by blank, will pay to the said blank's executors or administrators, or to the registered transferee for the time being, the sum of 500*l.* Therefore, the person to whom the sum is to be paid is left unexpressed. It is true that there is a reference to a possible transferee, but you cannot get a transferee before there is a transferor, viz., the person to whom the debenture is originally issued. The name of the person to whom payment is to be made is left blank, and, in my opinion, the blank with respect to the name of the person to whom the debenture is to be issued cannot be supplied after the debentures have been issued, except by the company re-executing the debentures after the necessary addition has been made. I do not think it necessary to do more than refer to the authorities I have mentioned, viz., Shepherd's Touchstone, vol. 1, p. 54; *Weeks* v. *Maillardet* (*ubi sup.*); and *Enthoven* v. *Hoyle* (*ubi sup.*), which seem to me to be exactly in point in support of this. The next question is, if there is no legal claim in respect of the debentures, what is the position of the Queensland Bank in the matter? Subject to objections which may be raised, and which I will deal with presently, I think they are persons who have an equitable claim; and I think the case of *Re Strand Music Hall Company* (*ubi sup.*), which has been cited, is exactly in point. Again, assuming that there is a clear distinct contract entered into, that the bank are to have debentures issued to them in respect of their loan, to the amount mentioned, as security for the repayment of that loan, it seems to me that they have as good a claim as the debenture itself would give them, excepting that it is an equitable claim and not a legal claim. The case of *Re Strand Music Hall Company* (*ubi sup.*), which has been referred to, was very much in point, and so were others which Mr. Swinfen Eady mentioned. In my opinion, therefore, the bank

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are in equity holders of debentures such as they would have had legally if their names had been inserted in the debentures, and the signing and sealing of the debentures are clear. The delivery I take to be sufficiently proved by the fact that after this long lapse of time the debentures are found in the hands of the bank, to whom, under the agreement outside the documents themselves, they were to be delivered, and for whose benefit they really were given. Then the bank are in equity holders of such debentures, unless the objections which are suggested by Mr. Cozens-Hardy meet the case. The first objection was that as to the statute, which seemed to me clearly a serious objection until it came out that there had been payments within a recent period, or within a period sufficiently recent to prevent the statute from applying. The next objection is with reference to the Statute of Frauds; Mr. Cozens-Hardy says there is no memorandum in writing within the Statute of Frauds. I think that the debentures must be looked at for this purpose. They are documents put into writing which cannot charge in the way in which they were intended to charge for the reasons I have given, but they are not the less admissions on behalf of the company whose seal is formally put to them. The form of the admission made is immaterial. If in point of fact you have an admission in writing signed by the party to be charged or the agent lawfully authorised, from which you can see in writing what the terms agreed upon between the contracting parties were, that is sufficient; and although no doubt if you read the resolution which supplies the main parts of the agreement you do find that there are certain things not supplied and which will have to be got elsewhere, I think a comparison of the debentures with the books and the trust deed amply supplies them. When I read the resolution of the 23rd Oct. and look at the documents sealed and delivered on the 24th Oct. and registered on the same day, it is clear to me that they are sufficiently connected in point of time to show that the transactions referred to in the various documents really are one transaction, and I have evidence enough from these documents of what they were. Then, as regards the question of the signature by the chairman. What had to be done had to be carried out by the company. The board of directors were making a loan which was admitted to be within their powers, and sufficiently required for the purposes of the company. The only possible question could be whether the security which they gave was too large or not, and events show that they were wise in their generation, and that it was not. Then that being so, a resolution was passed containing most of the terms, and that is signed in the usual way by the chairman of the meeting. I think it was the duty of the directors to put their resolution into writing and enter it in the book, and it was the duty of the chairman to sign it; and although, as I have said, it would be somewhat defective by itself, still, when I find it was followed by the issue of the debentures under the company's seal, I consider then that I have ample evidence by way of admission by the company or its agent to show me what the true terms are, and I think the case of *Jones* v. *Victoria Graving Dock Company* (*ubi sup.*) is a strong authority, if authority is wanted, for it. Then another point of Mr. Cozens-Hardy's is this: It is said the case here is one which is not to be considered as between the Queensland Bank on the one hand and the company on the other, but as between the bank on the one hand and the debenture-holders on the other. It is quite true that these debenture-holders are holders of legal debentures; but, as the Queensland Bank are what I may describe certainly as the holders of equitable debentures, which are just the same, I do not see what distinction can be drawn between the two. As regards the cases cited, I think the case of *Re Strand Music Hall Company* is exactly in point, because, although there is some obscurity as to the exact position of the persons proving as compared with others ranking equally with themselves, I think there must have been other persons to rank with them, because the statement in the text shows that there had been some other debentures issued apparently ranking equally with them; and if the persons seeking to prove were an extra class standing by themselves, I do not see that it matters what their proof was, for, whether it was for the total amount of the debentures due, or the total amount of the security itself, that could only be material when you consider their position with others standing in the same position as themselves. I think it was a question between them and other persons claiming to prove with equal rights. I do not see why they should not stand in the same position when once you have got to the point that they have equitable debentures which were as good as the legal debentures. Then the only other point suggested was that, if they are allowed to come in, they are not debenture-holders at present, they ought only to be treated as such by the intervention of the Court of Equity, and, that being so, terms ought to be imposed. But I do not see my way to imposing terms, for this reason, that we have to find out what the rights of the claimants are. They either have a claim or they have not. If they have no claim they ought not to be allowed to come in on any terms: but if, on the other hand, they have established their claim, then I do not see on what ground I can take away from them the rights which they clearly contracted for, and which it was intended they should have when the money was received from them and the security given in return was agreed upon. I think there is a definite contract, and as soon as I find there is a contract which binds the parties, I must take that contract as it is, and I cannot modify it. I have said nothing about the other 2000*l.* debentures, but it seems to me that they stand on precisely the same basis as those that I have referred to, and that the same result will follow as to them. With regard to the form of declaration, I think the convenient way would be to say that the Queensland Bank are entitled to stand in equity in the same position as they would have been in if these debentures had contained the name of the bank as the person to whom the principal was to be paid.

Cozens-Hardy, Q.C.—Will your Lordship also declare that the bank are not entitled to receive in respect of these debentures more than 6000*l.* and interest?

NORTH, J.—Yes.

Solicitors: *Biggs, Roche,* and *Co.; Chappell,*

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Griffith, and *Broadbridge*; *Hores* and *Pattisson*; *Hubbard* and *Eve*; *Stretton*, *Hilliard*, *Dale*, and *Newman*.

Jan. 30, 31, *Feb.* 1, 2, 3, 6, *and May* 1.

(Before STIRLING, J.)

ALDIN v. LATIMER, CLARK, MUIRHEAD, AND CO. (a)

Landlord and tenant—Lease of premises for purposes of particular business—Derogation from grant—Obstruction by landlord to access of air to tenant's premises—Extent of right of access of air—Parol licence—Revocation—Notice.

Under a grant expressed in general terms, and not made for any special purpose, the grantee will not acquire a right by way of easement to the access of air, except where such right is enjoyed through a definite channel over adjoining property.

This is not inconsistent with the principle recognised in Caledonian Railway *v.* Sprot (27 *L. T. Rep. O. S.* 265; 2 *Macq.* 449); North-Eastern Railway Company *v.* Elliot (3 *L. T. Rep.* 82; 1 *J. & H.* 145); *and* Robinson *v.* Kilvert (61 *L. T. Rep.* 60; 41 *Ch. Div.* 88), *that the grantor of land to be used for a particular purpose is under an obligation to abstain from doing anything on the adjoining property belonging to him which would prevent the land granted from being used for the purposes for which the grant was made.*

A tenant obtained from his landlord a revocable parol licence to erect certain ventilators in the stables forming part of the demised premises, and erected them at his own expense. The landlord without notice obstructed the access of air to the ventilators.

Held, that the tenant was not entitled to an injunction to restrain the obstruction complained of, but might take, at his own risk, an inquiry as to the amount of damage (if any) which he had suffered, by reason of the obstruction having been caused without previous notice of the revocation of the licence.

Mellor *v.* Watkins (*L. Rep.* 9 *Q. B.* 400) *followed.*

TRIAL OF ACTION.

The plaintiff was the lessee of certain premises at Richmond, in Surrey.

The defendant company were the owners of adjoining property on which they had erected works for the purpose of supplying the town of Richmond with electric light.

The plaintiff sought by the action to restrain the defendant company from violating his rights as lessee. The principal matters complained of by him, so far as they are material for the purposes of this report, were the following: (1) Interference with the access of air to the drying sheds used in connection with his business of a timber merchant; and (2) interference with certain ventilators in his stables.

The plaintiff derived his title from John Munro, who was also the predecessor in title of the defendant company.

Previously to 1878 Munro carried on business as a stonemason and timber merchant upon the premises now occupied by the plaintiff and the defendant company, of which he was owner in fee subject to mortgages. In April 1878 he agreed to sell to the plaintiff the goodwill of his business of timber merchant at the price of 1000*l.*, and also to grant to him a lease of that portion of the property on which that business was carried on. Accordingly, by a lease dated the 1st July 1878 Munro and his mortgagees demised to the plaintiff the premises in question, together with the stables, coach-house, office, and other buildings thereon, with the appurtenances, for twenty-one years from the 1st July 1878, at the yearly rent of 160*l.* The lease contained a covenant by the lessee that he, his executors, administrators, and assigns, would at all times throughout the term continue to carry on, in or upon the demised premises, "the timber trade heretofore carried on by the said John Munro," and it provided that such covenant "is not intended to hinder the lessee, his executors, administrators, or assigns, from making any alterations or improvements in or about the premises, provided that the same be made with a view to the extension or improvement of the business of the said timber trade." Munro covenanted for quiet enjoyment in the usual terms; and also that he would not, during the term, be interested either directly or indirectly in any timber trade within a certain distance of Richmond. There was also a proviso under which the lessee might, upon certain terms, obtain an extension of the term for two successive periods of seven years.

The plaintiff entered into possession under this lease, and still continued in occupation of the premises, and he had carried on the business of a timber merchant there since the date of the lease.

By an agreement under seal dated the 7th May 1888, Munro demised to the plaintiff an additional shed which was then being erected on the premises, at the cost, partly of Munro and partly of the plaintiff, at the yearly rent therein mentioned, for the residue of the term granted by the lease, and subject to the covenants and conditions therein contained.

In 1881 the plaintiff put in certain ventilators in his stables, and it appeared from his evidence that before doing so he asked Munro's permission, and that Munro gave such permission provided that he, Munro, was not put to any expense. The plaintiff accordingly put them in at his own expense. No valuable consideration was given to Munro for such permission, nor was any deed executed granting to the plaintiff the right to use the ventilators.

Munro remained in occupation of the adjoining property, and carried on there his business of a stone merchant down to his death in 1892. After his death his devisees sold the whole of his property (including that demised to the plaintiff) to the defendant company, who proceeded to erect on the property other than that demised to the plaintiff their electric lighting works of which the plaintiff complained.

Hastings, Q.C. and *Ingpen* for the plaintiff.—Where a lessor grants land to a lessee for the purpose of enabling him to carry on a particular business, the court will infer a contract on the part of the lessor to so use the adjoining land retained by him as not to interfere with the reasonable carrying on by the lessee of the business for which such land was granted:

Hall v. *Lichfield Brewery Company*, 43 L. T. Rep. 380.

(a) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

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Here the plaintiff requires for the purposes of his business, which he covenanted with Munro to carry on, the free access of air to his drying sheds. The defendants, who are the successors in title of Munro, are therefore bound not to do anything on their adjoining property which will interfere with such access of air:

Myers v. *Catterson*, 62 L. T. Rep. 205; 43 Ch. Div. 470;
Roberts v. *Macord*, 1 Moo. & Rob. 230;
Leech v. *Schwerder*, 30 L. T. Rep. 586; L. Rep. 9 Ch. 463;
City of London Brewery Company v. *Tennant*, 29 L. T. Rep. 755; L. Rep. 9 Ch. 212.

[STIRLING, J.—Does not *Harris* v. *De Pinna* (54 L. T. Rep. 38, 770; 33 Ch. Div. 238) decide that it must be proved that the air has hitherto reached the building through some definite aperture?] That was a case under the Prescription Act, and not one of contract. Further, the defendants are not entitled to interfere with the plaintiff's ventilators, as the plaintiff had a licence from Munro to put them in, and incurred considerable expense in so doing:

Winter v. *Brockwell*, 8 East, 308;
Wood v. *Leadbitter*, 4 L. T. Rep. O. S. 433; 13 M. & W. 838;
Ramsden v. *Dyson*, L. Rep. 1 H. of L. 129, 170.

Finlay, Q.C., *Beale* Q.C., and *Marcy* for the defendants.—The claim of the plaintiff to an undefined passage of air under an implied grant is too vague. Under such a grant only something very definite will be implied:

Webb v. *Bird*, 4 L. T. Rep. 445; 10 C. B. N. S. 268; 13 C. B. N. S. 841;
Bryant v. *Lefevre*, 40 L. T. Rep. 579; 4 C. P. Div. 172;
Harris v. *De Pinna* (*ubi sup.*).

Hall v. *Lichfield Brewery Company* (*ubi sup.*) and *Bass* v. *Gregory* (25 Q. B. Div. 481) were both cases in which the claim was made to a right of passage of air through a defined channel. The court will not imply a grant of the access of air through all the apertures which may have existed in the plaintiff's drying sheds at the date of the lease:

Potts v. *Smith*, 18 L. T. Rep. 629; L. Rep. 6 Eq. 311.

The defendants are entitled to use their land in any ordinary manner, and the plaintiff has failed to show that what the defendants are doing has caused any substantial interference with the access of air to his premises:

Robinson v. *Kilvert*, 61 L. T. Rep. 60; 41 Ch. Div. 88.

As regards the ventilators, the licence given by Munro to the plaintiff was revocable, and he cannot, therefore, now rely upon it, as a ground for restraining the defendants from doing what he now complains of:

Wood v. *Leadbitter* (*ubi sup.*).

Hastings, Q.C. replied.

Cur. adv. vult.

May 1.—STIRLING, J. stated the facts and continued:—The plaintiff complains that the new erections of the defendants injuriously affect the access of air to the interior of the sheds, so as to render them substantially less useful for the purposes of the timber business which the plaintiff is bound to carry on upon the demised premises. It is contended, on behalf of the plaintiff, that under these circumstances the defendants' acts constitute either a derogation from the grants contained in the deeds of the 1st July 1878 and the 7th May 1888, or else a violation of the covenants for quiet enjoyment therein contained. The legal principle invoked on behalf of the plaintiff appears to be recognised in several modern cases. Thus, in *North-Eastern Railway Company* v. *Elliot* (3 L. T. Rep. 82; 1 J. & H. 145), a case relating to a right of support, Lord Hatherley (then Wood, V. C.) says: "If a landowner conveys one of two closes to another he cannot afterwards do anything to derogate from his grant; and if the conveyance is made for the express purpose of having buildings erected upon the land so granted, a contract is implied on the part of the grantor to do nothing to prevent the land from being used for the purpose for which, to the knowledge of the grantor, the conveyance is made." That is the principle established by *Caledonian Railway Company* v. *Sprot* (27 L. T. Rep. O. S. 265; 2 Macq. 449), where Lord Cranworth says that, if a grant is made expressly to enable the grantee to build his house on the land granted, then there is an implied warrant of support, subjacent and adjacent, as if the house had already existed. In *Robinson* v. *Kilvert* (*ubi sup.*) the defendants let the floor of a house to a tenant for a paper warehouse, retaining a cellar immediately below. They afterwards commenced a manufacture in the cellar which required the air to be hot and dry, and employed heating apparatus which raised the temperature in the demised portion very considerably, with the result that some kinds of paper warehoused there were injured and made less valuable, though paper generally did not suffer. The lessors were ignorant at the time of the letting that the tenant was going to store any particular kind of paper which was liable to be deteriorated by heat which would not hurt paper generally, and it was held that they were not liable either on the ground of nuisance or derogation from their grant, or breach of the covenant for quiet enjoyment. [His Lordship read from the judgments in that case, and continued:] The result of these judgments appears to me to be that, where a landlord demises part of his property for carrying on a particular business, he is bound to abstain from doing anything on the remaining portion which would render the demised premises unfit for carrying on such business in the way in which it is ordinarily carried on, but that this obligation does not extend to special branches of the business which call for extraordinary protection. Reference was made in argument to the cases which had arisen as to the right of access of air to buildings. It is laid down in *Aldred's case* (9 Rep. 57 b., 58 b.) that, where there is a grant of windows, then "for stopping as well of the wholesome air as of light an action lies and damages shall be recovered for them, for both are necessary." In *Hall* v. *Lichfield Brewery Company* (*ubi sup.*) damages were given in respect of an obstruction of air to apertures (in the nature of windows) in a slaughter-house, the right having been gained by user for between thirty and forty years. Again, it was held in *Bass* v. *Gregory* (*ubi sup.*) that the right to the uninterrupted flow of air through a definite channel over adjoining property could be acquired by user for a sufficient period, and an injunction was granted to restrain

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interference with it. On the other hand, it was held in *Webb* v. *Bird* (*ubi sup.*) that the owner of a windmill was not entitled to complain of the erection, by the defendant, of a school-house so as to obstruct the access of currents of air to the mill, enjoyed over the defendant's land for upwards of twenty years; but Lord Blackburn (then Blackburn, J.), in expressing his concurrence with the judgment of the Exchequer Chamber, says (see 13 C. B. N. S. 844): "I wish for myself to guard against it being supposed that anything in the judgment affects the common law right that may be acquired to the access of light and air through a window, or to the right to support by an ancient building from those adjacent." In *Bryant* v. *Lefevre* (*ubi sup.*) the action was for obstructing the access of air to certain chimneys (which had been enjoyed from the defendant's land for more than twenty years), and thereby causing the chimneys to smoke. Lord Bramwell (then Bramwell L.J.) in his judgment says: "We do not say that there might not be an express grant or covenant not to interfere with the passage of air over neighbouring property, which could be enforced against the grantor or even against his assigns with notice; whether it could against his assigns without notice, it is not necessary to say." Further on he says: "There is this difference between the present claim and the claim to light. The right in that case is always limited to the particular window or aperture through which the light and air have had access; it is one, therefore, against which an adjoining owner can defend himself by blocking it up within the period necessary for the gaining of a right. Lord Wensleydale, in *Chasemore* v. *Richards* (33 L. T. Rep. O. S. 350; 7 H. of L. Cas. 349), thought this a very strong thing as a burden on the adjoining landowner. But here the claim is of such a character, that its enjoyment could only be prevented by surrounding the land with erections as high as it might at any time be wanted to build on the land." Again he says: "Where it has been said that there is a right to air, there is good ground for supposing that the wholesomeness of the air had been interfered with, or that there was some peculiarity in the land or building which made the air necessary in a definite place." Cotton, L.J. in his judgment says: "Cases to prevent, or to claim damages for, interference with ancient lights are frequently spoken of as cases of light and air, and the right relied on as a right to the access of light and air. But this is inaccurate. The cases as a rule relate solely to the interference with the access of light, and in no case has any injunction been granted to restrain interference with the access of air. It is unnecessary to say whether, if the uninterrupted flow of air through a definite aperture or channel over a neighbour's property has been enjoyed as of right for a sufficient period, a right by way of easement could be acquired." As I have already stated, it has been held in *Bass* v. *Gregory* (*ubi sup.*) that such a right may be so acquired. These two cases mainly deal with the subject of the acquisition of the right by user, and not with the rights conferred by the deed of grant. The judgments to which I have referred appear to me to show that under a grant expressed in general terms, and not made for any specific purpose, the grantee will not acquire a right by way of easement to the access of air, except where such right is enjoyed through a definite aperture in the nature of a window on the property granted, or through a definite channel over adjoining property. On the other hand, I see nothing in these cases inconsistent with the principle recognised in *Caledonian Railway* v. *Sprot* (*ubi sup.*), *North-Eastern Railway Company* v. *Elliot* (*ubi sup.*), and *Robinson* v. *Kilvert* (*ubi sup.*), that the grantor of land to be used for a particular purpose is under an obligation to abstain from doing anything on the adjoining property belonging to him, which would prevent the land granted from being used for the purpose for which the grant was made. This seems to accord with the general rule that a grantor may not derogate from his own grant, and to be far more consonant with justice than that contended for by the defendants, viz., that the grantee has no right of action unless the grantor can be proved to be acting maliciously. In the present case the lease, of the 1st July 1878, was not merely granted for the purpose that the land demised might be used by the plaintiff for the purpose of carrying on his business as a timber merchant, but it contains an express covenant binding him to carry on that business. In my opinion, Munro became subject to the obligation to abstain from doing anything on his adjoining property which would substantially interfere with the carrying on of that business in the ordinary course; and that obligation binds the present defendants as assigns from him, subject to the existing lease. By the instrument of the 7th May 1888, which is under seal, and for which valuable consideration was given by the plaintiff, a like obligation became imposed on Munro, and to it the defendants are subject. I proceed then to consider whether the evidence adduced at the trial establishes that the defendants have violated such obligation. [His Lordship then dealt with the evidence on this point, and came to the conclusion that some injury to the drying sheds had been made out, but not sufficient to justify the court in granting an injunction, and held that the plaintiff was entitled to an inquiry as to the damages he had sustained by reason of the buildings rendering the sheds less fit for use in the ordinary course of his business as a timber merchant. Then, after dealing with other matters, which do not call for a report, his Lordship stated the facts with reference to the interference with the ventilators, and continued:] The plaintiff relies on this part of the case on *Winter* v. *Brockwell* (*ubi sup.*), where it was held that the plaintiff, who had granted a parol licence to put a skylight over the defendant's area, could not complain of any nuisance occasioned to him by the skylight. If Munro or his successors in title were complaining of any nuisance occasioned by the opening of the ventilators, the case of *Winter* v. *Brockwell* (*ubi sup.*) would be in point, but it is the plaintiff who complains, and that on the ground that his ventilators have been obstructed. In *Hewlins* v. *Shippam* (5 B. & C. 221) the defendant granted to the plaintiff a parol licence to make, at the cost of the plaintiff, a drain from the defendant's land into the plaintiff's; the plaintiff accordingly made the drain at his own expense, and the defendant obstructed it. The action was brought for the obstruction. It was held that the action could not be maintained, because an incorporeal right affecting land could not be created without a deed. The doctrine

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thus laid down was acted upon in *Cocker* v. *Cowper* (1 Cr. M. & R. 418), and recognised in the well-known case of *Wood* v. *Leadbitter* (*ubi sup.*). It appears, however, from *Mellor* v. *Watkins* (L. Rep. 9 Q. B. 400) that a licensee under a revocable licence is entitled to reasonable notice of the revocation of the licence. On the authority of these cases, I hold that the plaintiff is not entitled to an injunction to restrain the obstruction complained of, but he may take at his own risk an inquiry as to the amount of damage (if any) which he has suffered by reason of the obstruction having been caused without previous notice to the plaintiff.

Solicitors: *Tempany* and *Co.*; *Pollard.*

June 5, 6, *and* 23.

(Before STIRLING, J.)

Re CHRISTCHURCH INCLOSURE ACT; MEYRICK *v.* ATTORNEY-GENERAL. (*a*)

Public Health Act 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 150—*Liability for paving, &c., expenses—"Owner"—Soil of turf common vested in lord of manor, subject as regards surface to charitable trusts.*

By the Public Health Act 1875, *s.* 4, "*owner*" *is defined to mean "the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, whether on his own account or as agent or trustee for any other person, or who would receive the same if such land or premises were let at a rack-rent." By sect.* 150 *the expenses incurred by a local authority in sewering, levelling, paving, &c., a private road are made recoverable from the "owners" of the land abutting on such road.*

By an Inclosure Act and an award made thereunder, the soil of a common was vested in the lord of a manor, subject to certain rights of turbary in favour of certain cottages, which rights had been held by the court to constitute a charitable trust.

Held, that, notwithstanding the lord of the manor was prevented by the Inclosure Act from letting the common at a rack-rent, he was "owner" thereof within the meaning of sect. 4. *and therefore liable under sect.* 150 *to contribute to the expenses incurred by the local authority in making a road upon which the common abutted.*

Bowditch *v.* Wakefield Local Board of Health (25 *L. T. Rep.* 88; *L. Rep.* 6 *Q. B.* 567) *followed. Dictum of Bowen, L.J., in* Wright *v.* Ingle (54 *L. T. Rep.* 511; 16 *Q. B. Div.* 379) *discussed.*

ORIGINATING SUMMONS.

This was a summons taken out by Sir G. Meyrick against the Attorney-General, and the Mayor, Aldermen, and Burgesses of the Borough of Bournemouth, for the determination of the following questions:—(1) Whether, having regard to the trusts and provisions of the Christchurch Inclosure Act, the applicant, as lord of the manor of Westover, was owner of the turf common set out and allotted by the Act, or of part of the turf common fronting, adjoining, or abutting on certain streets, now called Ashley-road and North-road, within the meaning of the Public Health Act 1875, and was, under the provisions of such Act, liable to contribute to the expenses incurred by the corporation in sewering, paving, levelling, metalling, flagging, or channelling the said roads or either of them. (2) Whether, in the event of question No. 1 being answered in the affirmative, the sum of 188*l.* 0*s.* 7*d.*, claimed by the corporation as the apportioned part of such expenses incurred by them as aforesaid, according to the frontage of the said turf common, or any and what part of such sum, ought to be paid by the applicant and the charity, or either of them, and in what shares and proportions, and out of what fund.

By sect. 13 of the Christchurch Inclosure Act 1802 (42 Geo. 3, c. xliii.), the commissioners were authorised "to set out and allot unto and for the lords of the several manors respectively in which the said waste grounds are situated in trust for the occupiers for the time being of" certain cottages "in lieu of their rights, or pretended rights, or custom of cutting turves . . . so much and such part or parts of the said waste grounds in such respective tythings, manors, or liberties, as the said commissioners shall think proper for a turf common" (of a certain acreage) "as shall in the judgment of the said commissioners be fit and proper for supplying turves for fuel for the use of such cottages or tenements," those allotments to be managed and the turf arising therefrom to be cut, taken, and used by the occupiers of such cottages in such quantities, and at such times, and in such manner as the lords of the manors respectively, and the churchwardens and overseers of the poor acting for or within the manor, or the major part of them, should order and appoint: the turf common not to be depastured by cattle or sheep, power being given to the lords of the manors, for the purpose of their powers of management, to appoint agents or proxies.

By their award made in 1806 the commissioners allotted to the lord of the manors mentioned certain portions of the waste (comprising in the whole 425 acres) for the purposes of a turf common.

It was established by the decisions of the Court of Appeal and of the House of Lords (see *Re Christchurch Inclosure Act*, 58 L. T. Rep. 827; 38 Ch. Div. 528, and s. c. *sub nom. Attorney-General* v. *Meyrick*, 68 L. T. Rep. 174; (1893) A. C. 1) that the soil of the turf common was beneficially vested in the lord of the manor subject to certain charitable trusts created by the Act in favour of certain cottagers.

In 1890 the Bournemouth Improvement Commissioners, who were then the local authority under the provisions of the Public Health Act 1875, put into force the powers conferred by sect. 150 of that Act, and gave notices to the owners of lands bordering on Ashley-road and North-road, requiring them to sewer, level, pave, metal, flag, and channel these roads. These roads adjoined the turf common, and Sir G. Meyrick, the present lord of the manor, was served with one of these notices. He did not do the work specified in the notice, and such work was done by the commissioners at an expense of 188*l.* 0*s.* 7*d.*

As the Corporation of Bournemouth (which had become the local authority, and succeeded to the rights of the Bournemouth Commissioners) were parties to the action, it had been agreed that his Lordship should decide the question between

(*a*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

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all parties upon the present application instead of leaving it to be determined in a proceeding at law between the corporation and the lord of the manor.

Buckley, Q.C. and *Ribton* for the summons.—The lord of the manor is not the "owner" of the turf common within the meaning of the Public Health Act 1875, and therefore is not liable to pay the expenses incurred by the corporation under sect. 150 of the Act. By sect. 4 "owner" means "the person for the time being receiving the rack-rent of the lands and premises in connection with which the word is used, whether on his own account, or as agent or trustee for any other person, or who would so receive the same if such land or premises were let at a rack-rent." Here the soil only of the common is vested in the lord of the manor, the surface being subject to certain charitable trusts created by the Inclosure Act in favour of the cottagers, which prevent him from dealing with it. Under these circumstances it would appear from a dictum of Bowen, L.J. in *Wright* v. *Ingle* (54 L. T. Rep. 511; 16 Q. B. Div. 379) that the property cannot be said to have any owner at all. The effect of the authorities upon this point is thus stated by Lord Watson in his judgment in *Great Eastern Railway Company* v. *Hackney District Board of Works* (49 L. T. Rep. 509; 8 App. Cas. 687, 693): "The authorities cited in the course of the argument appear to me to establish the proposition, that a person vested with the property of heritable subjects which have been placed *extra commercium*, or are subject in perpetuity to the burden of a public right which deprives him of their beneficial use, is not an owner of the land within the meaning of the 77th section of the Metropolis Management Act of 1862." We ask your Lordship to apply the principle thus laid down to the present case. By sect. 257 of the Act the expenses incurred by the local authority for sewering and other works are made a charge on the premises in respect of which they were incurred. Such a charge is a charge not on the interest of any particular owner of the premises, but on the total ownership:

Corporation of Birmingham v. *Baker*, 17 Ch. Div. 782;
Guardians of Tendring Union v. *Dowton*, 65 L. T. Rep. 434; (1891) 3 Ch. 265.

The common has never been rated to the poor-rate, and never could be:

Mayor of Lincoln v. *Holmes Common*, L. Rep. 2 Q. B. 482.

They also referred to

Angell v. *Vestry of Paddington*, L. Rep. 3 Q. B. 714;
Plumstead Board of Works v. *British Land Company*, 32 L. T. Rep. 94; L. Rep. 10 Q. B. 203;
Conservators of River Thames v. *Port Sanitary Authority of Port of London*, (1894) 1 Q. B. 647;
Vestry of St. Giles Camberwell v. *London Cemetery Company*, 70 L. T. Rep. 734; (1894) 1 Q. B. 699.

Ingle Joyce, for the charity, adopted the same arguments and asked that, in the event of the decision being against him, no order should be made for payment of the amount claimed, but that it should be declared a charge upon the property.

Hastings, Q.C. and *Kenyon Parker* for the Bournemouth Corporation.—The effect of the decisions of the Court of Appeal and the House of Lords in *Attorney-General* v. *Meyrick* (58 L. T. Rep. 827; 68 Ib. 174; 38 Ch. Div. 520; (1893) A.C. 1) is, that the whole of the legal and beneficial interests in the common remain in the lord of the manor subject only to the restriction that he must not depasture sheep upon the turbary allotment. He may therefore cut down the trees and brushwood, as that would not interfere with the turbary rights. It has never been held in any case that the mere fact that the land cannot be let takes it out of the Public Health Act 1875. We rely upon *Bowditch* v. *Wakefield Local Board of Health* (25 L. T. Rep. 88; L. Rep. 6 Q. B. 567), in which it was held by the Court of Appeal that one of three trustees to whom land had been conveyed under 4 & 5 Vict. c. 38, s. 2, for the purposes of the Act, and to permit the premises and buildings erected thereon to be for ever used as a school for the education of poor children, and for the residence of the master and mistress, was the "owner" within sect. 2 of the Public Health Act 1848, which was similar in terms to sect. 4 of the Act of 1875. The cases relied upon by the other side were all decided upon different statutes, and therefore do not apply. We submit that, upon the true construction of the Act of 1875, having regard to sect. 151, "owner" refers to a hypothetical owner who would receive the rent if there were any. Here the lord has a beneficial interest in the property, and is liable for the payments claimed by the corporation. They also referred to

School Board for London v. *Vestry of St. Mary, Islington*, 33 L. T. Rep. 504; 1 Q. B. Div. 65;
Pound v. *Plumstead Board of Works*, 25 L. T. Rep. 461; L. Rep. 7 Q. B. 183.

Buckley, Q.C., in reply, referred to Tudor's Charitable Trusts (3rd edit.), p. 251. [STIRLING, J. referred to *Reg.* v. *School Board for London*, 55 L. T. Rep. 384; 17 Q. B. Div. 738.]

Ingle Joyce.—The court has no general power to control a charity established, as in the present case, by Act of Parliament:

Re Shrewsbury Grammar School, 1 Mac. & G. 324, 333;
Tudor's Charitable Trusts (3rd edit.) p. 89.

Cur. adv. vult.

June 23.—STIRLING, J. stated the facts and referred to sects. 4, 150, 151, and 257 of the Public Health Act 1875, and continued:—On behalf of the lord of the manor, it is contended that he is not "owner" of the common within the meaning of the Public Health Act 1875, inasmuch as the provisions of the Inclosure Act prevent the common from being let at a rack-rent. These provisions unquestionably interfere with the beneficial ownership of the lord to a material extent. I am not, however, satisfied that they entirely prevent the common from being let, but shall, for the purposes of this judgment, assume such to be the case. In *Bowditch* v. *Wakefield Local Board of Health* (*ubi sup.*) the person who was sought to be charged as owner held the property as one of three trustees to whom land had been conveyed under 4 & 5 Vict. c. 38, sect. 2, for the purposes of the Act, and to permit the premises and all buildings erected thereon to be for ever used as a school for the education of poor children, and for the residence of the master and mistress. But it did not stop there, because the 4 & 5 Vict. c. 38, sect. 2, enabled owners of land, including tenants for life, to convey in fee simple any quantity not exceeding one acre of such land, as a site for a

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school (with a proviso as to conveyance by a tenant for life), and provided that, upon the land so granted ceasing to be used for the purposes of the Act, the same should revert to the estate. So that the Legislature annexed a condition to the validity of such a conveyance which prevented the letting of such land; nevertheless, it was held that the appellant was "the owner," and therefore liable to a rate similar to that which is in question here. Lord Blackburn, in that case, says: "The definition of 'owner,' however, in sect. 2 does not say 'owner' shall include, but shall mean. Now, though these premises are, and must be held as schools, and cannot be let for any purpose, yet if they were let the rent would come to the appellant. I think, therefore, he is 'owner' within the meaning of the definition." And Mellor, J. takes the same view, and points out that in the Act of 1848 (which is not materially different in that respect from the Act of 1875) there is a special exemption from all liability to expenses in respect of churches and chapels. That is a very strong case, and it has been recognised by the Court of Appeal in *Wright* v. *Ingle* (*ubi sup.*), which related to a Nonconformist chapel. There the trustees of the chapel were held to be the "owners" of it, and as such liable to contribute to the expense of paving a new street. The decision does not, however, govern the present case, because the Court of Appeal arrived at the conclusion that the trustees had a power of letting; but *Bowditch* v. *Wakefield Local Board of Health* (*ubi sup.*) was referred to by all the learned judges, and was not questioned by any one of them. It shows that a claim, such as is in question in the present case, may be sustained in respect of property vested, under the authority of Parliament, in a trustee for charitable purposes, even though the property cannot be let by reason of a special condition imposed by the Legislature. In principle that appears to me to govern the present case, though, no doubt, various distinctions, based on differences of fact, may be drawn between them. That which was mainly relied on was founded on the observations of Lord Bowen in *Wright* v. *Ingle* (*ubi sup.*), where he says: "But sect. 250 does not confine the term 'owner' to those persons who could receive a rack-rent from the particular premises, or who could let them at a rack-rent; it includes those persons who would receive the rack-rent if the premises were let at such a rent, and I think *Bowditch* v. *Wakefield Local Board of Health* (*ubi sup.*) is a conclusive authority, if authority were wanted, to show that a man is not the less the 'owner' of premises because, by the provisions of the deed under which he holds them, they cannot, so long as he holds them, be let at a rack-rent. Whether, in the case of premises which were prevented by an Act of Parliament from being let at a rack-rent, there ever could be an 'owner' within the meaning of sect. 250, I very much doubt. I am inclined to think that, if the incapacity to be let were stamped on the premises, they never could have an 'owner' within the meaning of sect. 250." I need not say that that expression of opinion is entitled to the greatest weight; but I am not persuaded that the learned Lord Justice meant his remarks to apply to a case such as the present. In my opinion, therefore, the claim of the Bournemouth Corporation ought to be allowed. [His Lordship then made a declaration that the sum of 188*l.* 0*s.* 7*d.*, with interest thereon, was a charge on the land in question, and directed that the same, together with the costs of the Corporation, of the summonses, should be raised under such charge, and that the costs of the other parties should be costs in the action of *Meyrick* v. *Attorney-General.*]

Solicitors: *Crawley, Arnold,* and *Co.*; *Lovell, Son,* and *Pitfield,* for *J.* and *H. W. Druitt,* Bournemouth; *Hare* and *Co.,* for the *Solicitor to the Treasury.*

June 8 *and* 9.

(Before ROMER, J.)

GUYOT *v.* THOMSON. (*a*)

Patent—Exclusive licence—Power of revocation by licensor—Breach of covenants by licensee—Default in payment of royalty—Deviation from specification in manufacturing articles under the patent—Rectification.

The defendant, who was the owner of certain patents for improvements in steam boilers, granted to the plaintiffs, in Feb. 1891, *the exclusive right to use and exercise the patented inventions during the unexpired residues of the terms of the letters patent, or any renewal or extension thereof, and to manufacture, sell, and dispose of the articles manufactured under the letters patent, when and as they should think fit for their absolute benefit. The licence was expressed to be granted in consideration of* 150*l.* *and certain royalties, and also of the plaintiffs agreeing* (inter alia) *to advertise and push the sale of the inventions, and endeavour to further their success. The deed contained a power for the plaintiffs to determine the licence by giving the defendant six calendar months' notice in writing, but no express power for the defendant to determine the licence. The defendant being dissatisfied with the plaintiffs for not pushing the invention sufficiently, and for other reasons, began himself to manufacture and sell the articles subject to the patent, for his own benefit, and in Oct.* 1893 *sent the plaintiffs written notice to determine the licence, on the ground of their breaches of covenant in not pushing and advertising the inventions, not paying the royalty punctually, and deviating from the specifications in manufacturing the articles. The plaintiffs brought this action for an injunction to restrain the defendant from exercising the patented inventions, or manufacturing or selling the articles protected by the patent. They admitted that they had retained a certain sum representing royalties pending the settlement of the dispute, but contended that the licence was not revocable at all by the defendant, and, even if it were revocable on good grounds, that nothing had occurred here which could form a valid ground for revoking it. The defendant counterclaimed for a declaration that the licence had been revoked by his notice, or in the alternative for rectification of the indenture of licence by addition thereto of a power for himself to revoke it, on the ground that the licence was intended to be revocable by him; and for an injunction to restrain the plaintiffs from manufacturing or selling as articles manufactured under his*

(*a*) Reported by R. H. DEANE, Esq., Barrister-at-Law.

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patent articles which really deviated from his specification.

Held, that the defendant had made out no case for rectification of the licence; that, on the true construction thereof, as it stood, the defendant had no power to revoke it by reason of any breach of any of the plaintiffs' covenants (having the usual remedy in damages for such breach, if any), and certainly not by reason of nonpayment of the royalty on the precise date fixed by the licence.

Held also, that the plaintiffs were entitled, on the construction of the licence, to make such deviations from the defendant's drawings and specifications as they had made, they not being bound by all the details thereof, and such deviations being merely alterations in matters of detail not affecting the principle of the inventions, and being moreover actually improvements and calculated to increase the sales of the patented articles.

Held, that the plaintiffs were therefore entitled to their injunction, but that they must pay the defendant what was due to him for royalties.

THIS was an action to restrain the defendant, who had granted to the plaintiffs an exclusive licence to use, manufacture, and sell certain patented inventions of which he was the proprietor, from using, manufacturing, or selling the articles manufactured under the patents in question, and for other relief.

The plaintiffs were Peter Guyot and Emile George Guyot, who traded at Redpath and Paris.

The defendant was Daniel Thomson, who was the registered proprietor of two inventions, one for an "improved method of and apparatus for effecting circulation in and supply of water to steam boilers," and the other for "improvements in or relating to apparatus for effecting circulation and supply of water to steam boilers," in respect of which inventions letters patent, dated respectively the 6th March 1884 and the 19th Oct. 1887, had been granted to him for the terms of fourteen years from those dates respectively.

By an indenture dated the 28th Feb. 1891, made between the defendant of the one part and the plaintiffs of the other part, in consideration of 150*l.* paid to the defendant, and of certain royalties to be paid to him, and of the covenants and agreements on the part of the plaintiffs therein contained, the defendant granted the plaintiffs "the sole full and exclusive licence to use and exercise the said inventions, and each of them, during the unexpired residues of the terms of the said letters patent respectively, or any renewal or extension thereof, and to manufacture, sell, and dispose of, all circulators and feed water heaters manufactured according to the said inventions, or either of them, when and as the licensees should think fit, for their absolute benefit." The deed contained a provision that the plaintiffs should pay the defendant while the licence lasted, 10*l.* for every circulator and feed water heater, manufactured in accordance with the inventions, or either of them, and sold. It was also agreed by the same deed that the plaintiffs, during the continuance of the licence, were to advertise and push the sale of the inventions, and use their best endeavours to further their success. The deed also contained a power for the plaintiffs, to determine the licence upon giving the defendant six calendar months' notice in writing, but there was no express power for the defendant to determine the licence.

The defendant being dissatisfied with the plaintiffs for not pushing the inventions sufficiently, began to hold himself out as a manufacturer of the circulators and feed water heaters, and to employ persons other than the plaintiffs to carry out orders so obtained. He also seems to have represented that the articles manufactured by the plaintiffs were not made in accordance with his inventions, but were spurious imitations thereof.

In the month of Oct. 1893 the defendant sent the plaintiffs a formal notice in writing purporting to revoke the licence, on the ground that they had failed to comply with the conditions on which it was granted, viz., that the royalty should "be paid within one calendar month of the expiration of six calendar months ending the 30th June and 31st Dec. in each year in respect of all circulators and feed water heaters paid for during the preceding six calendar months;" and that the plaintiffs "should at all times during the continuance of the licence advertise and push the sale of the said inventions and use their best endeavours to further their success;" and also on the further ground that they had manufactured and sold apparatus purporting to be apparatus manufactured under his specifications and letters patent, but not being in fact made in accordance therewith, but deviating therefrom without his permission and against his express directions, so as to render the apparatus inefficient and cause damage and injury to the defendant. And he thereby further gave the plaintiffs notice that he should forthwith proceed to advertise for and obtain orders for the supply and fixing of the apparatus comprised in his letters patent, and should proceed to manufacture and sell the same as though the licence of the 20th Feb. 1891 had not been granted.

The plaintiffs denied that they had failed to comply with the conditions specified, while admitting that they had retained a certain sum representing royalties pending the settlement of the disputes between themselves and the defendant.

On the 9th Nov. 1893 the plaintiffs commenced this action against the defendant for (1) an injunction to restrain him from directly or indirectly using, exercising, or putting in practice the inventions comprised in the several letters patent or either of them, and from manufacturing or selling, or causing or permitting the manufacture or sale, of any circulators or feed water heaters or apparatus known or described as "Thomson's Patent Combined Circulator and Feed Water Heater for Steam Boilers," or constructed or arranged according to the said inventions or either of them. They also claimed (2) an injunction to restrain the defendant from offering for sale, or advertising, or representing himself as entitled to manufacture, supply, or sell, the said circulators, heaters, or apparatus, or as doing so, and from soliciting orders for the same, and from representing to the plaintiffs' customers or to the public that the circulators and heaters supplied by the plaintiffs were not made according to the said inventions or were spurious imitations thereof.

The plaintiffs maintained that they were entitled to set off against the sum retained by them out of the royalties certain expenses,

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incurred by them in connection with certain circulators and feed water heaters ordered by the defendant from persons other than the plaintiffs, and in violation of their rights as exclusive licensees, but they offered to pay the sum so retained, or such part of it as the court should determine to be payable, with interest at 4 per cent. from the time when it ought to have been paid.

The defendant alleged that the licence was intended to be revocable by him, and also that it was conditional on the plaintiffs observing and performing the terms and conditions thereof, and liable to be forfeited by breach of such terms and conditions, which he alleged they had broken as mentioned in his notice to determine the licence.

He counter-claimed for (1) a declaration that the licence had been revoked and determined by his notice; or, (2) in the alternative, for rectification of the indenture of the 28th Feb. 1891 by addition thereto of a power for the defendant to revoke the licence thereby granted on breach of the terms and conditions therein contained, and on the part of the licensees to be observed and performed; (3) an injunction to restrain the plaintiffs from manufacturing, or selling, or offering for sale, as constructed in accordance with the defendant's inventions and letters patent, apparatus not so constructed, but deviating therefrom, and from thereby or otherwise committing any breach of the said licence; (4) in either alternative payment of the sum of 57*l.* 2*s.* 11*d.* for royalties; (5) return of certain patterns and chattels; (6) damages; and (7) costs.

The plaintiffs replied that they were entitled to deviate from the specifications in the way and to the extent they had done. They denied that they had broken any of the terms or conditions of the licence.

Haldane, Q.C. and *W. N. Lawson* for the plaintiffs.—The plaintiffs' licence was not conditional upon their observing and performing the agreements and covenants contained in the indenture by which the licence was granted, though as a matter of fact they have not committed any material breach of such agreements or covenants. The plaintiffs had a right to deviate from the specification so far as they did so. On this point the words of the licence should be noticed where it says, "when and 'as' the licensees should think fit" in referring to the manufacture of the machines. The actual deviations were improvements and calculated to increase the sale of the machines. The defendant had no power of revocation in any case; but even assuming he had had power to revoke the licence on adequate grounds, no such grounds existed in the present case. The plaintiffs are entitled to the injunctions they claim. There is no case for rectification. The defendant endeavoured during the negotiations with the plaintiffs to get a power of revocation by himself inserted in the deed, but the plaintiffs refused to consent to it, and he then gave up the point.

Neville, Q.C. and *Rudall* for the defendant.—The licence was expressly granted upon the terms and conditions which followed the operative words. The plaintiffs have not observed those conditions, and the defendant had therefore a right to determine the licence, and has exercised that right by the notice of Oct. 1893. If he had not such right under the indenture of licence, he is entitled to rectification, as it was the intention that he should have power to revoke it. He had no legal advice as to the form of the deed, being a poor man. The plaintiffs had no possible right to withhold the royalties. They did not push the invention as agreed. They ought not to have deviated from the specification in manufacturing the machines without obtaining the defendant's permission. Where the owners of a patent entered into an agreement to grant a licence to use the invention during the continuance of the patent upon certain specified terms and conditions, but there was no express power of revocation, it was held that the agreement was a licence coupled with an interest, and as such not revocable at will, but that it was liable to forfeiture and determinable in case the terms and conditions were broken by the licensees:

Lawson's Patents, &c. Acts, 2nd edit., p. 361;
Ward v. *Livesey*, 5 Rep. Pat. Cas. 102.

An exclusive licence is like an easement; if the licensee does not use the patent in the prescribed way, he loses the right to use it at all—the licensor can put a stop to it. [ROMER, J.—You had your remedy against them by action for breach of covenant. If you are right, a mere failure to pay royalties punctually would be fatal.] The case of *Heap* v. *Hartley* (61 L. T. Rep. 538; 42 Ch. Div. 461) shows the nature of an exclusive licence as distinguished from an assignment. They also referred to

Wood v. *Leadbitter*, 13 M. & W. 838.

ROMER, J.—There are several points which arise in this case. In the first place, I will deal with the counter-claim as to rectification. On the facts I am satisfied that no case for rectification of licence is made out at all. And further, I am satisfied that, on the true construction of this licence, the defendant had not the power to revoke it by reason of any breach of any of the plaintiffs' covenants, and certainly not by reason of a breach by nonpayment of the royalty on the precise date fixed by the licence. I need scarcely point out that the defendant was not without his remedy. If there had been any breach of their covenants by the plaintiffs the defendant would have had the usual remedy against the plaintiffs for damages. The next point I have to consider is as to the alterations in the patented machine which the plaintiffs made in certain of the machines supplied by them. Now, no doubt the plaintiffs, in some of the machines they sold, did depart in certain points from the precise details of the machine as shown on the defendant's drawings and his specification; but, on the evidence as a whole, I am satisfied that those alterations were only alterations in matters of detail—in matters not affecting the principle of the invention. And, beyond that, as a question of fact, I am satisfied on the evidence that the alterations were improvements, that they were alterations calculated to increase the efficiency of the machine, and that the employment of those alterations, and the advertisement of those alterations, were calculated to increase the reputation and enhance the sales of the patented machine. I need scarcely say that, on the construction of this licence, it is clear to my mind that the plaintiffs were entitled to do that. They

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were not bound by all the details of the drawings and the specification. The wording of the specification shows that, even if it could not have been implied without the precise wording of the specification. I refer to the use of the word "as" in the licence. Suppose, for example, that some person wanted one of the patented machines, but wanted it adapted to some peculiar circumstances which rendered it impossible to keep strictly to the drawings and the specification. Obviously, to my mind, the plaintiffs would have been entitled, paying the royalty, to have supplied the patented machine adapted to the particular circumstances of the case. It follows that, in my opinion, the defendant was not entitled to treat the sale of those machines by the plaintiffs, with the alterations in them, as anything which entitled him to treat the licence as at an end, or to attempt to revoke it. It follows that of course he had no right to represent that, after attempted revocation, he was entitled to manufacture these machines without regard to the plaintiffs' rights, or to represent that the plaintiffs' rights under their licence had ceased. An injunction in those respects must follow; and so far as the costs of the plaintiffs' action are concerned, I think the defendant must pay the costs of that action. Then I come to the counter-claim. I have already dealt with part of the counter-claim in what I have already said, but I must make a remark about the claim for royalty. Undoubtedly there is royalty due to the defendant from the plaintiffs. I can well understand the annoyance of the plaintiffs at the conduct of the defendant as explaining why they thought they were entitled to retain the amount of royalty in their hands until the defendant had ceased to represent, as he was doing, that the plaintiffs' rights had come to an end; but legally the plaintiffs were not entitled to keep back that royalty from the defendant merely on the ground that the defendant, on his part, had acted improperly in the way I have stated. It has been agreed, with regard to the amount which the plaintiffs were entitled to claim as against the defendant in respect of the matters which in the pleadings are covered by an item of 17*l.* odd, that that amount shall be halved, and that that amount shall be deducted from the amount of the royalty due from the plaintiffs to the defendant. Accordingly, on the counter-claim, I order the plaintiffs to pay the defendant the amount of royalty less one-half of 17*l.* odd which has been agreed to be dealt with in the way I have stated. Then, I think, on the whole, that the costs of the counter-claim, so far as it is strictly limited to a claim to recover the royalty, ought to be paid by the plaintiffs to the defendant. Then there is a claim made by the defendant in the counter-claim as to certain chattels. That, I understand, has been arranged between the parties, and I need not further refer to it. So far as the counter-claim refers to those chattels, there will be no order as to the costs of that counter-claim. The rest of the counter-claim fails, and must be dismissed with costs. With regard to the costs payable between the parties under the judgment which I give, of course they will be set off. I think that disposes of all the questions arising in the case. Of course, the injunction asked for in paragraph 1 of the claim should be limited so as to be only during the continuance of the licence. Then as to the injunction asked for in clause 2, the words "except for the licensees" must be put in. And in the last part of that injunction which is to restrain the defendant from representing that the circulators, &c., supplied by the plaintiffs are not made according to the said inventions, that ought not to refer to the future. It must be to restrain him "from representing by circulars that the circulators or feed water heaters hitherto supplied by the plaintiffs are not made according to the said inventions."

Solicitors: *Stibbard, Gibson,* and *Co.*; *Francis A. Rudall.*

Judicial Committee of the Privy Council.

March 14, 16, *and June* 30.

(Present: Right Hons. the LORD CHANCELLOR (Herschell), Lords WATSON and MACNAGHTEN, and Sir R. COUCH.)

WINNIPEG STREET RAILWAY COMPANY *v.* WINNIPEG ELECTRIC STREET RAILWAY COMPANY AND THE CITY OF WINNIPEG. (*a*)

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, MANITOBA.

Street railway—Exclusive right to run over streets —Construction of agreement.

The appellant company were empowered by their private Act (with the consent of the city authorities), "to use and occupy any and such parts of any of the streets and highways" in a city "as may be required for the purposes of their railway track, the laying of the rails, and the running of their cars and carriages." The mayor and council of the city afterwards by deed granted to the appellants the right to "construct, maintain, and operate . . . a double or single track railway with the necessary appurtenances, upon or along any of the streets and highways of the city and to run their cars . . . upon the same." A subsequent clause provided that, if any other party proposed "to construct street railways on any of the streets not occupied by" the appellants, "the nature of the proposal thus made should be communicated to them," and they should have the option of carrying it out themselves.

Held (affirming the judgment of the court below), that these provisions conferred no exclusive rights upon the appellants to the use of the streets of the city, but that the city authorities could validly grant to the respondent company a right to lay down street railways in streets already worked by the railways of the appellants, and also in streets not worked by them, which they were nevertheless willing to work.

THIS was an appeal from a judgment of the Court of Queen's Bench for Manitoba (Taylor, C.J., Dubuc and Killam, JJ.), which had affirmed a judgment of Bain, J. sitting in equity.

The action was brought by the appellants to obtain a declaration that they were entitled to the exclusive use of certain streets in the city of Winnipeg for tramway purposes, and also for an injunction to restrain the respondent company from running tramways on those and other streets. The sections of the Act of the appellants, and the clauses in the agreement with

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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the mayor and council of the city, on which the appellants relied, are set out in the judgment of their Lordships.

The *Solicitor-General* (Sir J. Rigby, Q.C.), *Blake*, Q.C. (of the Canadian Bar), and *Gore* appeared for the appellants, and argued that by the special Act of the Provincial Legislature incorporating the appellants, which became law on the 27th May 1882 (45 Vict. c. 37), and by the bye-law passed by the council of the city of Winnipeg on the 12th June 1882, and the agreement made on the 7th July 1882 in pursuance of it, exclusive rights were conferred upon the appellants to construct and work tramways in the city, and the mayor and council had no power to make any grant to the respondent company, except in the case of the appellants refusing to exercise their powers, which has not happened. The fact that power is reserved to the authorities to sanction another system of street railways in certain events negatives the existence of the power in cases not coming within the clause. They referred to

Ayr Harbour Trustees v. *Oswald*, 8 App. Cas. 623; and
Small v. *Smith*, 10 App. Cas. 119.

Finlay, Q.C., *Munson* (of the Canadian Bar), and *Hollams*, who appeared for the respondents, the Winnipeg Electric Street Railway Company, and *Ewart*, Q.C. (of the Canadian Bar) and *R. M. Bray*, for the city of Winnipeg, were not called upon to address their Lordships.

At the conclusion of the argument for the appellants their Lordships took time to consider their judgment.

June 30.—Their Lordships' judgment was delivered by

LORD WATSON.—The first question raised in the appeal depends upon the construction of a deed of agreement which was made on the 7th July 1882, between the mayor and council of the city of Winnipeg of the first part andthe appellants (who will hereafter be referred to as "the company") of the scond part. If the judgment of the court below upon that point be affirmed, the appeal must necessarily fail. The company were incorporated by an Act of the Legislature of Manitoba (45 Vict. c. 37) which received the Royal assent upon the 27th May 1882, the object of their undertaking being generally described as the construction, maintenance, and operation of street railways within the city of Winnipeg. In furtherance of that object they were empowered to use and occupy such parts of the streets of the city as might be required for the purpose of constructing and using their railways, subject always to the condition that they should obtain the consent of the city to the construction of their works, and should only use and occupy such portions of the streets as were required for that purpose, for such period, and upon such conditions as might be agreed on between them and the city. When the company obtained their Act the city of Winnipeg had statutory authority to pass bye-laws "for regulating and governing street railway companies and fixing the rates to be charged thereon." Three days afterwards a consolidating statute (45 Vict. c. 36) was passed in favour of the city, which (*inter alia*) conferred the power to make bye-laws "for authorising the construction of any street railway or tramway upon any of the streets or highways within the city, and for regulating and governing the same, and for fixing the rates to be charged thereon." The city authorities gave their consent to the company's undertaking being carried out, upon terms which were first specified in a bye-law passed by the mayor and council upon the 12th June 1882. It was thereby provided that the bye-law should not come into operation until an agreement had been made with the company, as contemplated in their Act of incorporation. The indenture already mentioned was then executed; and, in so far as it bears upon the present case, it simply repeats the substance of the bye-law. According to its terms, the privileges conceded to the company were to endure for twenty-five years from its date, it being in the option of the city to acquire the company's undertaking, at the expiration of that period, upon their giving five years' previous notice to that effect. The company at once proceeded with their enterprise, and before 1892 they had completed and were in course of working upwards of nine miles of street railways, and they also contemplated and had made arrangements for the extension of their system to other streets within the city. On the 1st Feb. 1892 the mayor and council passed a bye-law authorising James Ross and William M'Kenzie to construct railways upon the streets of the city. The respondent company (hereinafter referred to as "the new company") then obtained an Act of the Provincial Legislature (55 Vict. c. 56), which received the Royal assent on the 20th April 1892, incorporating them for the purpose of taking over the rights conceded to Ross and M'Kenzie, and carrying out the scheme sanctioned by the bye-law of the 1st Feb., which was scheduled to the Act. The new company's Bill was opposed by the company, who alleged that under their own Act and their subsequent agreement with the mayor and council they were entitled to a monopoly for the period of twenty-five years from and after the date of the agreement of all those streets in which their railways had already been opened for traffic, and also of certain other streets in which they had intimated that they were willing and ready to construct and operate railways. For the purpose of protecting any exclusive privilege to which the company might be able to establish their legal right, the following clause was inserted in the new company's Act: "Nothing contained in this Act or in the schedule thereto shall in any way affect or take away any right held by, vested in, or belonging to the Winnipeg Street Railway Company, if any such there be, but any such right may be held and exercised by the Winnipeg Street Railway Company as fully and effectually as if this Act had not been passed, but nevertheless the Winnipeg Electric Street Railway Company shall have power to cross, build, and operate its line of railway across the lines of the Winnipeg Street Railway Company subject to the provisions of the Manitoba Railway Act." It is unnecessary to criticise the enactments of the clause, because it was not disputed, in the arguments addressed to their Lordships, that these would be sufficient to protect any such privilege as that which was claimed by the company in this appeal. The company commenced the present suit by presenting to the Court of Queen's Bench (in equity) a bill of complaint against the new company and against the city of Winnipeg. The relief sought by the

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company need not be recited at length. They craved (*inter alia*), a declaration of the exclusive rights which they claimed against both respondents, and an injunction restraining the new company from constructing or operating railways in any street occupied by them, or in any street not then occupied by them, until an offer had been made to them of the privilege of constructing a railway upon it and had not been accepted by them within two months. In defence to the suit the respondents maintained, in the first place, that the company were not possessed of any exclusive privilege, and that the city had therefore power to sanction the construction of railways by the new company, in any street of the city, whether it was already occupied by the company or not; and, in the second place, that, if the city had in fact agreed to give the company a monopoly of the railway traffic in certain streets, the agreement was *ultra vires* and void. Those appear to have been the only points discussed in the courts below, and the argument addressed to their Lordships by counsel for the company was strictly confined to them. The cause was tried before Bain, J., who dismissed the bill of complaint with costs, and his decision was affirmed on a rehearing by way of appeal by a full court consisting of Taylor, C.J., with Dubuc and Killam, JJ. In the court of first instance the learned judge did not deal with the first point, but, assuming the alleged privilege of the company to have been conceded by the city, held that it was void in law. In the full court both points were decided against the appellants. The company's Act (sect. 9) gave them power and authority (subject always to the consent of the city) to "use and occupy any and such parts of any of the streets and highways aforesaid as may be required for the purposes of their railway track, the laying of the rails, and the running of their cars and carriages." The same clause authorises the city to grant permission to the company to construct their railway, as aforesaid, "across and along and to use and occupy the said streets or highways or any part of them for that purpose upon such condition and for such period or periods as may be respectively agreed upon between the company and the said city." It appears to their Lordships that the language of the statute conferred upon the company no right to use and occupy any part of the streets and highways within the city beyond what was strictly necessary for the temporary purpose of constructing their railways and for the permanent purpose of maintaining them in repair and conducting traffic upon them. Their Lordships do not find a single expression tending to show that the Legislature either intended that no tramways other than those of the company were to occupy the streets of Winnipeg or had it in contemplation that the company were to obtain a monopoly from the council of the city. There is no indication of any such monopoly to be found among the matters specially enumerated in sect. 17 of the Act as the subjects of the agreement which the city council had statutory authority to make with the company. It necessarily follows that the exclusive privilege claimed by the company, if it has any existence, must be derived from the indenture of the 7th July 1882. By the terms of the indenture, the mayor and council of the city granted to the company, their successors or assigns, the right to construct, maintain, and operate, and from time to time to remove and change, a "double or single track railway with the necessary side tracks, switches and turn-outs for the passage of cars, carriages, and other vehicles adapted to the same, upon and along any of the streets or highways of the city of Winnipeg, and to run their cars, take, transport, and carry passengers upon the same by the force and power of animals, or such other motive power as may be authorised by the said council of the said city." The only authority given was expressly limited to the construction, maintenance, and operation, in each street which the company might select for that purpose, of a railway, consisting of a single or double line of rails, with needful appurtenances; and the words which confer that authority are immediately followed by the declaration "and such railway shall have the exclusive right of such portion of any street or streets as shall be occupied by the said railway, and shall be worked under such regulations as may be necessary for the protection of the citizens of said city." That declaration appears to their Lordships to have been inserted in the agreement with the object of defining the extent of the uses which the company were to have of the streets of the city for the purposes of their undertaking. The company argued that the words last quoted ought to be construed as a declaration that the company's railway was to be the only railway permitted to occupy any part of those streets into which it might be introduced by them. In their Lordships' opinion, any such construction would be contrary to the plain meaning of the words of the agreement, which in substance imported that the company were to have no use or occupation of and no concern with those portions of any street which were not actually occupied by their double or single line of rails. The main and only plausible argument addressed to that board for the company in support of their claim to a monopoly was founded on the terms of a clause which occurs towards the end of the indenture. It runs thus: "In the event of any other parties proposing to construct street railways on any of the streets not occupied by the parties to whom the privilege is now to be granted, the nature of the proposal thus made shall be communicated to them, and the option of constructing such proposed railway on similar conditions as are herein stipulated shall be offered, but if such preference is not accepted within two months, then the corporation may grant the privilege to any other parties." Their Lordships do not think that it is going too far to say that, laying aside the terms of that stipulation, there is not a single expression in the deed of agreement which gives the least countenance to the suggestion that the municipal council intended to grant to the company an exclusive right to use and occupy any street for railway purposes. Those clauses of the deed which deal directly with the use and occupation of the streets which were to be enjoyed by the company, are not only silent upon the question of exclusive right, but are conceived in terms which it is exceedingly difficult to reconcile with the theory of an intention to create such a right. Had there been any such intention, nothing would have been easier than to indicate its existence, in the proper place, either expressly or by implication. In such circumstances, their Lordships are

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of opinion that the leading clauses of the agreement which define the company's rights of user and occupation cannot be qualified by a subsidiary clause, such as that upon which the company rely, unless its terms are clear and coercive. They are unable to hold that the terms of the clause in question are in themselves sufficient to control the plain meaning of the previous stipulations and to constitute the right of monopoly which the appellant company claim. The clause in question assumes that other parties than the company might propose and obtain powers to construct, maintain, and work street railways within the limits of the city of Winnipeg; and, in that event, all that it really provides is that the company are to have a preference over those rivals to the extent of having the first opportunity of making a railway in streets to which their undertaking has not yet been extended. Its terms are certainly calculated to suggest that neither the council nor the company did, at the time, anticipate that the rival schemes of those other parties would be carried to the length of competing with the company in streets where they had already constructed, or in streets where they would be the first to construct, their railway lines. But a mere expectation of that kind falls far short of a legal obligation. It cannot imply an undertaking on the part of the council that in the event of a rival company obtaining statutory powers, and desiring to compete with the appellant company in those streets in which their system has already been established, the council should be bound, although against the interest of the community which it represents, to refuse its assent to the new scheme and to allow the company to remain in the enjoyment of a monopoly. Such being the opinion of their Lordships, it becomes unnecessary to consider whether, if a monopoly had been conceded, the concession would have been *ultra vires* of the council. Their Lordships will therefore humbly advise Her Majesty that the judgments appealed from ought to be affirmed. The appellant company must pay one set of costs to the respondents.

Solicitors for the appellants, *Bompas, Bischoff, Dodgson, Coxe,* and *Bompas.*

Solicitors for the respondents, the Electric Street Railway Company, *Wilson, Bristows,* and *Carpmael.*

Solicitors for the respondents, the city of Winnipeg, *Freshfields* and *Williams.*

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, March 20.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

Re THE NEW ZEALAND LOAN AND MERCANTILE AGENCY COMPANY LIMITED. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Company—Winding-up — Public examination—Official receiver's report—Fraud not alleged—Facts stated suggesting fraud—Companies Act 1862 (25 & 26 *Vict. c.* 89), *s.* 115—*Companies* (*Winding-up*) *Act* 1890 (53 & 54 *Vict. c.* 63), *s.* 8, *sub-sects.* 2, 3.

A motion was made by certain persons who were directors of a company at the date of the order for winding it up, asking for the discharge of an order made by Williams, J. under sub-sect. 3 *of sect.* 8 *of the Companies* (*Winding-up*) *Act* 1890 *for the public examination of the applicants and certain other persons who had formerly been directors or officers of the company.*

It was decided by Williams, J. that, where a primâ facie *case of fraud against any person in the promotion or formation of a company, or against any director, appeared from the official receiver's report, all the promoters and directors, whether implicated or not, might be summoned for examination under that section; and he made an order accordingly. On appeal:*

The Court, by consent, made an order discharging the order of Williams, J. as regarded the persons consenting, and directing that a public examination of those persons should take place before the court, or such person as might be appointed by the court, with liberty for the official receiver and any creditor or contributory of the company to take part in the examination, putting such questions only as should be allowed by the court.

A MOTION was made to discharge an *ex parte* order made under sect. 8 of the Companies (Winding-up) Act 1890 for the public examination of the directors of the above-named company, viz., the Right Hon. A. J. Mundella, the Right Hon. Sir James Fergusson, Sir John Gorst, Sir George Russell, Sir Edward W. Stafford, and Mr. Henry Joseph Bristow.

The report of the official receiver upon which the order was made was the further report made in accordance with sub-sect. 2 of sect. 8. In that report the official receiver stated facts suggesting fraud, but did not express any opinion that fraud had been committed by any director or other officer of the company in relation to the company since its formation.

In March 1894 the motion came on to be heard before Williams, J.

On the 16th March 1894 his Lordship delivered a written judgment as follows:—

WILLIAMS, J.—This is a motion to discharge an order made by me in the winding-up of the New Zealand Loan and Mercantile Agency Company Limited for the examination of certain gentlemen, heretofore directors or officers of the company. Before dealing with the merits of the motion I wish to make some observations as to the form of the report upon which my order was based. This report does not expressly state that, in the opinion of the official receiver, fraud has been committed by any director or other officer of the company in relation to the company since its formation. Sir Henry James, on behalf of those who are seeking to discharge the order for public examination, made the absence of such an express statement of opinion the ground for severe comment on the official receiver, and went so far as to state that, if the official receiver was of opinion that fraud had been committed, he was guilty of a want of moral courage (at first a much stronger term was used) in not saying so in so many words. I cannot agree with this criticism, whether it is regarded as a criticism of the conduct

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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of the official receiver in so framing this particular report, or as a criticism of this form of report generally. So far as the particular report is concerned, it is made in the form in which these reports have invariably been made since I have had experience of such reports—that is to say, without stating in terms the opinion of the official receiver that a fraud has been committed. No disapproval of such a form of report has ever, so far as I know, been expressed by the Board of Trade, nor is this to be attributed to the Board of Trade's taking the view that it has no control over the official receiver in the matter of the presentation of these reports, for the Board of Trade has expressly claimed to control the discretion of the official receivers in this respect. Indeed, in this very case I was forced to rule that the Board of Trade had no jurisdiction to forbid the presentation by the official receiver of the very report with which I am now dealing, and I thought it my duty, in consequence of this claim by the Board of Trade, to make a declaration in open court as to the limits of the jurisdiction of the Board of Trade in controlling the official receiver. It seems to me, therefore, that, in view of the practice which has obtained, the conduct of the official receiver did not merit the sharp censure of Sir Henry James. I think, moreover, that there is a great deal to be said in favour of that form of report which presents to the court rather the facts which raise the presumption of fraud than the conclusion at which the official receiver has arrived. It is plain that the object of the section is that there should be a public investigation to ascertain whether or not a fraud has in fact been committed. Before this investigation by public examination can be ordered the official receiver must make the report mentioned in sub-sect. 2 of sect. 8 of the Companies (Winding-up) Act 1890, that in his opinion a fraud has been committed. This, I think, must mean, not that he has formed a conclusion of fact, for investigation has still to follow, but that there are facts which, unanswered and unexplained, raise a *primâ facie* presumption of fraud—in other words, that there is a *primâ facie* case of fraud, and not that he has arrived at any conclusion of fact. If the official receiver simply stated his opinion that a fraud had been committed, and stated no facts or grounds on which he based his opinion, I do not think a judge should, on consideration of such a report, make any order for public examination. The bare statement of the opinion would give the judge nothing to consider. The Legislature might, if so minded, have made the bare expression of opinion by the official receiver conclusive. In that case there would have been no need to come to the court at all. But the Legislature has required the court to exercise a discretion. In order to exercise that discretion the court must have facts laid before it upon which to form its judgment. The opinion of the official receiver that there are facts upon which it is right that the court should exercise its discretion is sufficiently stated by his making the further report and applying therein for an order directing the public examination of the parties whose names appear in the schedule. The aim of the Legislature in giving such prominence to the opinion of the official receiver may well have been to prevent the court from being hampered at this preliminary stage, and on an *ex parte* inquiry, by strict rules of evidence as to the exclusion of hearsay and the like, which, if rigidly applied (as the court, but for the words of the section, would perhaps be bound to apply them), might in many cases, and perhaps in most, prevent any *primâ facie* case being made out at all. The only criticism which I have to make on the conduct of the official receiver in respect of the performance of his duty to report is that he delayed his report too long. The order for winding-up was made as long ago as the 21st July 1893. The preliminary report was not presented till the 15th Feb. 1894, and the further report was presented on the 19th Feb. 1894. The statutory meetings of creditors and contributories were necessarily postponed until after the presentation of the preliminary report. I cannot recognise any sufficient reason for this delay. I have been told by the official receiver that the reason was that it was supposed that the slur of a public examination might interfere with the adoption of a scheme proposed by the committee of creditors which he, the official receiver, personally thought would be manifestly for the benefit of the shareholders and of all classes of creditors. This reason, however honestly acted on, is in my judgment inadmissible. The statute (sect. 8, sub-sect. 4) requires that, where the court has made an order for winding-up a company, the official receiver shall, as soon as practicable after the receipt of the company's statement of affairs, submit a preliminary report to the court. Then, by sub-sect. 2, "the official receiver may also make a further report or further reports." In my judgment, the official receiver has no discretion to postpone the performance of this statutory duty, and certainly not for any such reason as that suggested. I believe that in this case the scheme has been adopted by a large majority of creditors, but I have no information as to how far, if at all, the facts stated in the official receiver's report were within the creditors' knowledge when they adopted the scheme. If those facts were not within the creditors' knowledge they ought to have been. Those facts formed part of the materials the Legislature intended to be within the knowledge of the parties interested at an early stage of the proceedings. One further point I need only mention. Sir Henry James during the argument made an offer that the applicants would submit themselves for examination under sect. 115 of the Act of 1862. Such an offer was, I think, altogether beside the mark. An examination under the early Act is private, not public, and in ordinary course the depositions are accessible to the official receiver only. So much as to the form of report. Now as to the motion itself. The cases of *Re Great Kruger Gold Mining Company* (67 L. T. Rep. 770; (1892) 3 Ch. 307) and *Re Trust and Investment Corporation of South Africa*; *Re Bertram, &c., Company* (67 L. T. Rep. 777; (1892) 3 Ch. 332) have defined the conditions precedent to the right or jurisdiction of the judge to make an order for public examination. Those cases show that the persons ordered to be examined must be persons answering the description in sub-sect. 3 of sect. 8, and, further (to use the words of Lindley, L.J. at p. 242 of the report in the Law Reports), that there should be some report to the effect that some fraud has been committed —*i.e.*, in the promotion or formation of the company, or in relation to the company since the formation thereof. These cases further make it

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clear that the report need not show that some fraud has been committed by the persons to be examined, and that the official receiver need not state in terms his opinion or conclusion that there has been fraud. It is sufficient if the facts stated in his report show this. The question, therefore, for me in the present case is, Do the facts in this report support a *primâ facie* case of fraud, or, in other words, is the natural inference from the facts stated therein, if left unanswered and unexplained, that fraud has been committed? Now, it is obvious that this report suggests two distinct frauds: (1) that the directors, or some of them, from time to time issued prospectuses, inviting applications for debentures, which were misleading and known to be misleading; (2) that the directors, or some of them, on behalf of the New Zealand Loan Company, entered into a series of transactions with a company called the New Zealand Land Company Limited, not *bonâ fide* in the interest of the loan company, but in some other interest, and to its detriment. [His Lordship stated the facts of the case and reviewed the evidence, observing that it raised a *primâ facie* case of fraud against one of the directors, and concluded as follows:] It is sufficient to justify my order if a *primâ facie* case of fraud is made against one director. That fact makes it right that all the directors and officers of the company should be examined; and I cannot help thinking that—now that discussion in open court must have shown to these distinguished men that, whether or not the report makes out a *primâ facie* case of fraud, as I think it clearly does, it at all events shows a state of things demanding rigid investigation—they themselves will earnestly desire, conscious of their own innocence, that there shall be an immediate public inquiry. *Noblesse oblige.* The application will be dismissed with costs.

From that decision the applicants now appealed.

Sir *Henry James*, Q.C. (*Ingle Joyce* with him) for the appellants.—The grounds on which the application was made to discharge the *ex parte* order and on which this appeal is brought are these: (1) That Williams, J. had not before him any proper materials upon which he could exercise his judicial discretion under sect. 8 of the Companies (Winding-up) Act 1890, and that, therefore, he had no jurisdiction to make the order; (2) that if he had jurisdiction he did not exercise his discretion rightly. The only report before the learned judge was the second or further report of the official receiver mentioned in sub-sect. 2 of sect. 8, and that was all which the appellants knew. The appellants are anxious to be examined and to give the fullest information with regard to everything which can be of any importance to the creditors and the shareholders of the company. The court has ample power under sect. 115 of the Companies Act 1862 to direct an examination which would elicit the fullest information. The result of such an examination would be placed on the file of the court, and after reading it the judge would be able to make any further order he might think fit. The question is whether the examination should be a public one under this penal section in the Act of 1890, or a private one under sect. 115 of the Act of 1862. The appellants are willing to be examined under sect. 115, and desire to give the fullest information. But their objection to the order under the Act of 1890 is that it was founded on a presumption of fraud, and they desire not to admit, by not resisting the order, that there was any ground for such a presumption. In the case of *Re Great Kruger Gold Mining Company* (67 L. T. Rep. 770; (1892) 3 Ch. 307) Lindley, L.J. said that sect. 8 went much further than sect. 115, and altered the whole character of the examination, and that it was a very serious matter indeed to be examined under sect. 8. The serious matter was this—the basis on which the order was founded. It was necessary that there should be a written statement by the official receiver that, in his opinion, some fraud had been committed, or, at any rate, he must state facts from which the necessary inference was that a fraud had been committed. [LINDLEY, L.J.—Not necessarily that there has been fraud on the part of the person who is to be examined?] No. An innocent person might be examined. If the official receiver intended to say that a fraud had been committed he ought to have said so in express terms. The official receiver has not expressly stated that there has been fraud, and this is not the necessary inference from the facts which he did state. By the making of an order for examination under sect. 8 a man is gibbeted before the public as having been connected with a fraud. No judgment is pronounced by the court upon the examination, and an innocent man would not be acquitted. It might, indeed, be said that he was committed for trial upon a charge of which he could not possibly be acquitted. Sect. 8 was not intended to be used without good ground for it.

Finlay, Q.C. (*Howard Wright* with him) for the respondent the official receiver.—The official receiver will be content with an order for the public examination of the appellants of the same effect as an order under sect. 8. He is in the hands of the court, but he thinks it essential that the examination should be subject to conditions similar to those which apply to an examination under sect. 8, and in particular that the persons examined should be bound to answer any question which the court may think fit to allow to be put to them.

Reginald Bray for the respondents the debenture-holders.

LINDLEY, L.J.—The difficulty arises in this way: that in the case of *Re Trust and Investment Corporation of South Africa* (67 L. T. Rep. 777; (1892) 3 Ch. 332) the official receiver did not in terms find that in his opinion fraud had been committed. But the fraud was so patent and so unmistakable on the face of the report that we said that that would suffice. I am not sure that we were not a little lax.

KAY, L.J.—The letter of the sections requires that the official receiver should find fraud.

SMITH, L.J. concurred.

Ultimately the Lords Justices made an order by consent in the following terms:

By consent discharge the order appealed from, and let a public examination take place before the court, or such person as the court shall direct, of the persons named in the schedule with liberty to the official receiver and any contributory or creditor to take part in such examination either personally or by solicitor, or by counsel, putting

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only such questions as the court shall allow. Notes of the examination to be taken down in writing, and to be read over to or by and signed by the person examined, and to be admissible in evidence against such person, as if taken at a public examination under sect. 8 of the Act of 1890. Liberty to apply to the court was reserved.

Order varied.

Solicitors for the appellants, *Hollams, Sons, Coward,* and *Hawksley.*

Solicitors for the respondents, *Freshfields* and *Williams; Roopers* and *Whately.*

Tuesday, March 20.

(Before Lindley and Smith, L.JJ.)

Greenwood *v.* The Algesiras (Gibraltar) Railway Company.

The Same *v.* The Same. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Railway company—Damage to undertaking—Debenture-holders' action—Receiver—Power of receiver to borrow—Emergency—Preservation of property—First charge on assets of company—Sanction of court—Jurisdiction—Order XVI., r. 9.

The Court has jurisdiction to empower the receiver appointed in a debenture-holders' action to borrow money as a first charge on the assets of the company, in priority to the debentures, where such a course is necessary for the preservation of the property of the company in a case of emergency.

Decision of Kekewich, J. reversed.

The first of the above-mentioned actions was brought by the plaintiffs on behalf of themselves and all other the holders of 6 per cent. debentures and 5 per cent. debenture stock of the above-named railway company. The second action was brought by the same plaintiffs on behalf of themselves and all other the holders of prior lien bonds of the same company against the company and the trustees of certain covering deeds, for the realisation of their securities and the appointment of a receiver.

Judgment had been obtained in both actions, and a receiver had been appointed.

The company, which was limited by shares, had raised in shares, debentures and debenture stock, and money supplied by the Spanish Government upwards of 2,000,000*l.*, and that sum had been expended in constructing and maintaining the railway, which was opened in Dec. 1892.

Serious landslips had recently occurred along the line of the railway, which was carried through a mountainous country, causing considerable damage to the undertaking of the company, and it was apprehended that, unless the necessary repairs were promptly executed, the traffic would be entirely suspended, and the Spanish Government would declare the railway forfeited for discontinuance of the traffic.

The engineers in Spain had employed contractors to partially repair the damage at an expense of 4500*l.*, which they had borrowed on the security of the undertaking by way of salvage.

There was evidence that by the law of Spain money borrowed for such a purpose formed a first charge on the undertaking, and might be recovered by the seizure of the railway.

The defendants took out a summons in both actions before Kekewich, J., asking that the receiver might be at liberty to raise a sum not exceeding 10,000*l.* to defray the cost of repairing the damage caused to the railway by landslips and other accidents, and to pay expenses necessary to keep the line open for traffic throughout, and to avoid forfeiture to the Spanish Government; and to charge the same with interest not exceeding 7 per cent. upon the net revenues of the company and upon all the company's property in priority to all other charges.

It was intended, out of the 10,000*l.* to be thus raised, to pay off the 4500*l.* previously borrowed, and to expend the remaining 5500*l.* in the necessary repairs.

Kekewich, J. was of opinion that it was very desirable, and that it would be to the advantage of all concerned in the company, that the order should be made; but his Lordship doubted whether the court had jurisdiction to make it, having regard to the fact that the sum proposed to be raised would have priority over all the existing debentures, the holders of which were not all present, although they were formally represented for the purposes of the actions. The learned judge therefore declined to make the order, but suggested that the matter should be brought before the Court of Appeal.

The defendants accordingly now appealed.

A. R. Kirby (*Cozens-Hardy,* Q.C. with him) for the appellants.—Any order properly made in these actions would be binding on all the debenture-holders under Order XVI., r. 9:

Watson v. *Cave* (No. I), 44 L. T. Rep. 40; 17 Ch. Div. 19.

Kekewich, J., however, doubted whether such an order as that asked for could be made in these actions unless all parties interested were present. There is no reported case of such an order having previously been made, but orders of this kind have been frequently made in chambers by different judges of the Chancery Division. There are unreported cases, such as *Inman* v. *Cordova and North-Western Railway Company* and *Copinger* v. *Sante Fé and Cordova Railway Construction Company* and other cases, which are noted in Palmer's Company Precedents (5th ed., p. 630, Forms 446, 449). Receivers constantly obtain leave to expend small sums in necessary repairs, which are allowed to them in their accounts in priority to all other charges. I ask that this money be raised on the same principle, namely, that it is to preserve the property for the benefit of all parties.

P. B. Abraham, for the plaintiffs, supported the appeal.

Lindley, L.J.—I think the orders which have been previously made justify the court in granting this application. You may take the order. The appeal must be allowed.

Smith, L.J. concurred.

Appeal allowed.

Solicitors for the appellants, *Norton, Rose, Norton,* and *Co.*

Solicitors for the respondents, *Bompas, Bischoff, Dodgson,* and *Co.*

(a) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

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Tuesday, May 8.

(Before LINDLEY, LOPES, and KAY, L.JJ.)

LESLIE *v.* THE EARL OF ROTHES. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Will—Shifting clause—Gift over on succession to earldom—"Person for the time being entitled to possession or receipt of rents and profits"—Infant tenant in tail.

A testatrix, who died in 1861, *by her will, dated in* 1859, *devised hereditaments to uses in strict settlement, and, after directing that every male person who under the will should become beneficially entitled to the possession or to the receipt of the rents and profits of the hereditaments should take and use certain name and arms, with a gift over in default of compliance, directed that if any person who under the will "would (if this present proviso had not been inserted) for the time being be entitled to the possession, receipt, or enjoyment of the rents, issues, and profits" of the hereditaments as tenant for life or in tail by purchase should be under the age of twenty-one, the trustees of the will should enter into possession or receipt of the rents, issues, and profits of the hereditaments, and during such minority hold and continue such possession or receipt with full powers of management; and the testatrix declared that, if "any person for the time being entitled to the possession or to the receipt of the rents and profits" of the hereditaments should succeed to a certain earldom, then and in such case and immediately thereupon the hereditaments should go over as if such person were dead without issue. In* 1882 *the defendant, an infant, who was born in* 1877, *became entitled as tenant in tail in possession by purchase, and in Sept.* 1893 *he succeeded to the earldom.*

Held, that the defendant did not come within the meaning of the words "entitled to the possession or receipt of the rents and profits" in the shifting clause when he succeeded to the earldom; and that therefore the event had not happened which would bring the shifting clause into operation.

Decision of Kekewich, J. affirmed.

THIS was a special case stated for the opinion of the court, under Order XXXIV., containing the following facts:

Lady Elizabeth Jane Wathen, by her will, dated the 29th July 1859, devised a freehold dwelling-house and hereditaments to Martin Leslie Haworth, the eldest son of her niece Mary Elizabeth Haworth, during his life, with remainder to his first and other sons successively in tail, with remainder to the third son of her said niece (passing over the second son) for life, with remainder to his first and other sons successively in tail, with remainder to her fourth and fifth sons successively for their respective lives, and to their respective sons successively in tail, with remainder to trustees to preserve contingent remainders, upon trust "to permit the rents, issues, and profits of the said hereditaments to be received and taken from time to time by the person who, if the said Mary Elizabeth Haworth were dead, would be for the time being entitled to the possession or receipt of the same rents and profits under the limitations hereinafter contained;" with remainder to the sixth and other sons of the said Mary Elizabeth Haworth for their respective lives and their respective sons successively in tail, with an ultimate remainder to the right heirs of the testatrix.

The will contained a proviso that every male person who under or by virtue of the limitations of the will should become beneficially entitled to the possession or to the receipt of the rents and profits of the hereditaments thereinbefore devised should, within the space of one year next after he should become entitled, if he should be then of full age, or if he should be under that age, then within one year after he should attain such full age, take upon himself, and use on all occasions, the surname of Leslie and no other surname, and also take and bear the arms of Leslie and no other arms, or if such person should be or become a peer, then the surname of Leslie with the title of his peerage, and the arms of Leslie quartered together with the armorial bearings belonging to his peerage; and also should within the space of one year next after he should become so entitled as aforesaid, or next after he should attain his full age as aforesaid, as the case might be, apply for a licence from the Crown to authorise him to take, use, and bear the surname and arms of Leslie in manner aforesaid. And the testatrix declared that in case of default the limitation of the hereditaments to the person so making default should cease and become void, and the hereditaments should devolve on the person next in remainder under the limitations of her will. Provided also, and the testatrix further declared, that during such time as the said Martin Leslie Haworth should be under the age of twenty-five years, or as any person who under or by virtue of her will would (if this present proviso had not been inserted) for the time being be entitled to the possession, receipt, or enjoyment of the rents, issues, and profits of the hereditaments thereinbefore devised as tenant for life or tenant in tail by purchase, should be under the age of twenty-one years, then in such case, and so often as the same should happen, the trustees of her will should enter into the possession or receipt of the rents, issues, and profits of the hereditaments, and should during such time or minority hold and continue such possession or receipt of rents, issues, and profits, and manage or superintend the management of the same hereditaments, with full power to fell timber from time to time for repairs or sale, and to repair the dwelling-house, hereditaments, and premises, and keep the same insured against damage by fire, and from time to time during such possession should by and out of the rents, issues, and profits of the same hereditaments, or, if the same should be insufficient, by and out of any other moneys which should come to their hands under the trusts thereinafter declared concerning her residuary personal estate, pay the expenses of such management, repairs, and insurance, and all other outgoings relating to the hereditaments, and subject thereto should pay such sum as the trustees should think fit for or towards the maintenance or education of Martin Leslie Haworth or of such minor as aforesaid (either directly or to his guardian or guardians), and should stand possessed of the residue of the rents, issues, and profits upon such trusts as were thereinafter declared of and concerning the capital of her residuary personal estate, or such of them as should be then subsisting and capable of taking effect. The will then contained a power

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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to tenants for life beneficially entitled if of full age, and to the trustees during the minority of any person who, if of full age, would be entitled at law or in equity to the possession or to the receipt of the rents and profits of the hereditaments and premises, to let all or any of the hereditaments and premises for twenty-one years.

And then followed this proviso:

Provided always, and I hereby declare that, if any person for the time being entitled to the possession or to the receipt of the rents and profits of the said hereditaments and premises herein devised shall succeed to the title or dignity of Earl or Countess of Rothes, then and in such case and immediately thereupon, and as often as the same shall happen, the said hereditaments and premises shall go and remain to the uses upon and for the trusts, and with and subject to the powers, provisoes, and declarations to, upon, for, under, and subject to which the same premises would have stood limited and settled under and by virtue of this my will, if the person who shall so succeed to the said title or dignity were dead without issue.

The will also contained a gift to the trustees of certain jewels, fixtures, and other articles, in trust that they should go along with the dwelling-house, and be used and enjoyed therewith so long as the rules of law and equity would permit by the person or persons entitled at law or in equity to the possession or the receipt of the rents and profits thereof.

The testatrix bequeathed the residue of her personal estate to trustees upon trust to convert the same into money, and subject to certain trusts to invest the ultimate residue in real estate with the consent of the person for the time being entitled to the possession or the receipt of the rents and profits of the hereditaments thereinbefore devised, if such person should have attained the age of twenty-one years, and otherwise at the discretion of the trustees to be settled upon the same trusts as thereinbefore declared concerning the said hereditaments.

The testatrix died on the 19th June 1861.

Martin Leslie Haworth entered into possession of the devised hereditaments, and obtained a Royal licence to take and use the name and arms of Leslie.

During his life the devised hereditaments were sold under the provisions of the Settled Estates Acts, and the proceeds invested in consols in the names of the trustees. He died on the 15th July 1882, leaving an only son, the defendant Norman Evelyn Leslie Leslie, who was born in July 1877.

On the death of Martin Leslie Haworth, the trustees of the will paid the dividends of the trust fund, representing the devised hereditaments, to the guardians of the defendant Norman Evelyn Leslie Leslie for his maintenance and education.

On the 19th Sept. 1893 the defendant Norman Evelyn Leslie Leslie, being still an infant, succeeded to the title and dignity of the Earldom of Rothes, on the decease of his paternal grandmother, the Countess of Rothes.

The third and fourth sons of Mary Elizabeth Haworth mentioned in the will died without issue.

The plaintiff Raymond Evelyn Leslie was the fifth son, and would be entitled to an estate for life in the devised hereditaments if the defendant Norman Evelyn Leslie Leslie, Earl of Rothes, were dead without issue. He claimed to have become entitled for life, under the provisions of the will, to the income of the trust fund representing the devised hereditaments on the succession of the defendant Norman Evelyn Leslie Leslie to the Earldom of Rothes.

The special case came on to be heard before Kekewich, J. in March 1894.

It was decided by Kekewich, J. that, as by reason of the infancy of the defendant, the possession or receipt of the rents and profits was by the terms of the will taken from him and given to the trustees, he was not, when he succeeded to the earldom, a person "for the time being entitled to the possession or to the receipt of the rents and profits" within the meaning of the shifting clause; and that, therefore, the gift over had not taken effect, and the title of the defendant had not been displaced.

From that decision the plaintiff now appealed.

Crackanthorpe, Q.C. and *B. B. Rogers* for the appellant.—The question is, whether upon the succession of the defendant to the earldom the shifting clause took effect, and the plaintiff became entitled as tenant for life. The ambiguous use of the word "possession" in different parts of the will gives rise to the doubt. It is sometimes used as referring to possession *de facto*, *i.e.*, the actual and physical possession, or the actual physical receipt of the rents; at other times it is used as referring to possession *de jure*, *i.e.*, the possession of the person who, having an estate *in præsenti* and not in reversion or expectancy, is entitled to the receipt of the rents. Upon the language of the shifting clause alone there would be no doubt. In the trust to preserve contingent remainders, and the gift of the jewels and chattels as heirlooms upon trusts corresponding to the limitations of the dwelling-house, the possession referred to is a possession in title. The name and arms clause expressly recognises the fact that an infant may be a person "beneficially entitled to the possession or to the receipt of the rents and profits." In the gift of the chattels an infant is treated as a person who is to enjoy the jewels and heirlooms as being entitled in possession. In the management clause the language and context are different, and the word "possession" must have a different meaning. The object of that clause is, that if the property is in lease, and the infant cannot give a discharge, a receipt may be given by the trustees, and that if the property is not in lease, the trustees may enter into actual physical possession of the property, manage it, superintend it, and maintain the infant. In the shifting clause the word "possession" is used in connection with the word "entitled," and refers to the legal title to possession. No entry by the trustees under the management clause could affect the title of the infant to possession. The physical and actual possession might be in the trustees, but the infant would still remain entitled in possession under the will. It is necessary to read the shifting clause as if it said actual possession. But when you do not find those words there is a very strong argument that actual possession of the trustees is one thing, and entitled to possession is another. That harmonises with all the clauses in the will. The intention of the testatrix was, that the earldom and the estate should not be united in one person. The whole of the income is now being received by the infant, so that he is practically in the same

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position as if he were of full age and had the possession *de facto* as well as *de jure*. As to the meaning of the word "possession" see Stroud's Judicial Dictionary (tit. "Possession.") The case of *Fazakerly* v. *Ford* (4 Sim. 390; 1 Ad. & Ell. 897, 900), which was relied upon on behalf of the defendant in the court below, is not really in point. The whole argument there turned upon actual possession, *i.e.*, possession *de facto*, and nothing was said as to possessory title. Nor does *Harrison* v. *Round* (2 De G. M. & G. 190) assist in the matter.

Cozens-Hardy, Q.C. (*Renshaw*, Q.C. and *Vernon R. Smith* with him) for the respondent.—The defendant, when he succeeded to the earldom, was not a person "for the time being entitled to the possession, or to the receipt of the rents and profits," within the meaning of the shifting clause, and therefore the gift over has not taken effect, and there has been no displacement of his title as tenant in tail. The plaintiff, seeking to bring himself within the clause, must show the affirmative proposition that the defendant was in Sept. 1893 entitled to the possession. Words which divest a gift clearly given must be as clear as the words which confer it:

Doe d. Hearle v. *Hicks*, 8 Bing. 475;
Lady Langdale v. *Briggs*, 8 De G. M. & G. 391.

The shifting clause cannot be read alone, detached from the rest of the will; and when the management clause is referred to it is manifest that the infant was not entitled either to the possession or to the receipt of the rents and profits. No doubt he would have been so but for that clause; but by it both the possession and the receipt were taken from him. It is said that the language of the shifting and management clauses ought to be differently construed, but there is no necessity for so doing. The expression "possession" refers to property in hand, and "receipt of rents and profits" to property which is not in hand. The trustees are to have the possession in one case, and the receipt in the other, and what they are to have the infant is not to have.

Warmington, Q.C. and *E. Knowles Corrie* for the respondents, the trustees.

Crackanthorpe, Q.C. replied.

Lindley, L.J.—I do not pretend to have mastered the whole of this will, because there is a good deal in it which I do not understand, but I think I can see my way through it sufficiently to dispose of this appeal. It is the will of a lady who had certain property, and who devised that property in the events which have happened to the present Earl of Rothes, who is tenant in tail in possession, with remainder to the plaintiff. The question is whether under this will the estate, which is vested in the Earl of Rothes subject to the divesting clause which I will read presently, is to vest in the plaintiff, the next tenant in tail. That is the short point. In order to answer that question I must look through the will and see if I can what was the testatrix's intention, having regard to the language which she has used. After the devise of the estate in the way I have mentioned, there is a name and arms clause which runs thus: [His Lordship read that clause and continued:] Now there Mr. Rogers' observation is right. That clause shows that there may be a person under age who may become beneficially entitled to possession or to the receipt of the rents and profits of the hereditaments. With respect to the word "peer," when you bear in mind that if he shall become a peer he is to take the surname of Leslie and the arms of Leslie quartered with it, and when you bear in mind that Leslie was the family name of Rothes, I doubt whether "peer" there meant the Earl of Rothes. That does not seem to me to embrace the case of a person succeeding to the earldom of Rothes, and I do not think it is adapted to that particular case. I think you must construe the word "peer" as meaning something besides, or excluding the Earl of Rothes. Now, I pass on from the name and arms clause, and come to the management clause, which is very important. The testatrix says this: [His Lordship read that clause and continued:] Now, pausing there, what are the trustees to do? They are to enter into possession or receipt of the rents, issues, and profits of the hereditaments. What does that mean? That means that they are to take possession of such hereditaments as are not let, and are to receive the rents and profits of such hereditaments as are let. They are to hold and continue in such possession, subject to the trusts of keeping up the property and the maintenance of it. They are not to stand possessed of the surplus in trust for the owner of the property, but they are to capitalise it—it is to go into residue and be capitalised, and then it is to be invested in the purchase of land. But the person entitled to this property is not to be the sole *cestui que trust*. That is the important point. Now I ask myself this question: While these trustees are in possession or receipt of the rents, issues, and profits of this property, can anyone else be in possession or receipt of the rents, issues, and profits of the same property? It is very difficult to see that they can, very difficult. I pass on to the leasing clause, in which the same expression is used. It runs thus [His Lordship read that clause and continued:] Now I come to the shifting clause, and it is on the meaning of the shifting clause that the whole of this case turns. It is as follows: [His Lordship read that clause and continued:] We have to apply that to the facts. What does the expression "any person for the time being entitled to the possession, or to the receipt of the rents and profits," mean? Mr. Rogers asks us to read it in this way: "And I declare that if any person be entitled to the property." That is not what the testatrix says, and I do not think that that is what she means. If she had meant that, she would not have employed the longer expression "any person for the time being entitled to the possession or to the receipt of the rents and profits." Mr. Crackanthorpe suggests that it means in possession as distinguished from reversion. But there again the expression is not any person entitled in possession, but it is "entitled to the possession or to the receipt of the rents and profits." We all know that, in speaking of a freehold estate, it is called estate in possession and reversion. And, in the present case the Earl of Rothes is in one sense the tenant in tail in possession, as contrasted with remainder or reversion. But that does not answer this language. He is not "entitled to the possession or to the receipt of the rents and profits." That is the position of the trustees. In other words, the event in which this property is given over has not happened as I construe this

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clause. I do not profess, as I said before, to have mastered the whole of this will. It certainly was not, to my mind, the intention of the testatrix to allow this property to go over in all cases in which the earldom might devolve upon or come to the Earl of Rothes. She seems to have been trying to discriminate, and there I fail to catch the intention. All I can say is that, construing this will as best I can, the event referred to in the shifting clause has not happened. The appeal, therefore, will be dismissed with costs.

LOPES, L.J.—I am of the same opinion. The present earl is seventeen years of age, and is tenant in tail by purchase, and in those circumstances we are asked to construe the shifting clause. I must confess, equally with my brother Lindley, that I am unable to see what the object of this shifting clause is. I am unable to see precisely what the testatrix had in view. But I look at the clause, and I endeavour to construe it as best I can, having regard to the language used in it and also to the other expressions in the will and the surrounding circumstances. The first question is, what is the meaning of "entitled to the possession or to the receipt of the rents and profits of the hereditaments?" It was contended by Mr. Crackanthorpe that possession is used in opposition to reversion. I cannot think that that is the correct view. In my opinion, the words "in possession or receipt of rents and profits" as used here are quite clear. "Possession," in my judgment, refers to a property which is not let—probably to the mansion-house which is not let—but at all events to any property that is not let; and "receipt of rents and profits" refers to property that is let. I give the ordinary meaning to those words. Now a case has been cited to us—a very valuable one—as to the proper mode of construing a shifting clause like this. It is the case of *Lady Langdale* v. *Briggs* (8 De G. M. & G. 391). There is a passage in the judgment of Turner, L.J. (p. 429) which I will read: "The authorities, I think, warrant us in saying that these shifting clauses, if not to be construed strictly, are at all events not to receive such a construction as shall carry them beyond the purpose for which they were designed. The intention of the testator, to be ascertained from the language which he has used, and from the surrounding circumstances, so far as those circumstances can be regarded in proof of the intention, must govern the construction of shifting clauses as well as of other clauses of wills; but regard is also to be had to the rule that an estate, well created, is not to be taken away by doubtful or equivocal expressions." Now, looking at other passages in the will, it appears to me that the testatrix has herself put an interpretation on the words "possession or receipt of rents and profits," and I refer particularly to the management clause. [His Lordship read that clause, and continued:] Now it seems to me very difficult to say that the language used in the shifting clause can have any reference to possession or receipt of the rents and profits by the infant earl. And, in point of fact, according to this management clause, the possession or receipt of the rents and profits is not in him, but in the trustees. I cannot myself see how the possession or receipt of the rents and profits can be in two people at the same time. I say that, as showing what is meant by "possession or receipt of the rents and profits" in the shifting clause. But when we come to look at the clause which immediately precedes, there are expressions which to my mind are more cogent still. It is a clause making provision for a minor, and there these words occur: [His Lordship read that clause and continued:] As I read the words, it is contemplated that there might or would be an infant who, being a minor, would not be entitled in law or equity to the possession of the property or the receipt of the rents and profits. Both those clauses seem to me strongly to show that the words "possession or receipt of the rents and profits" in the shifting clause are such as I have stated. According to my view, therefore, the earl was not in possession or in receipt of the rents and profits within the meaning of that shifting clause. But, even if I am not correct as to that, and have formed too strong an opinion upon it, I am clear that the expressions used are so equivocal as to bring the case within the authority that I have read, *Lady Langdale* v. *Briggs* (*ubi sup.*), in which it is established that the words which destroy or shift a gift must be as clear as those which create it. These words, to say the least of them, are most ambiguous; I therefore think that the decision of the learned judge in the court below was right.

KAY, L.J.—I also think that the only safe mode of dealing with a shifting clause like this is to say that anybody who succeeds by virtue of that shifting clause in claiming the estate as having gone over must show very clearly that he comes within the words of the clause. It is a prominent canon of construction that words which divest a gift clearly given should be as clear as the words which confer it. That was established in the case of *Doe d. Hearle* v. *Hicks* (8 Bing. 475), and it was referred to and acted on in the case of *Lady Langdale* v. *Briggs* (8 De G. M. & G. 391), decided by Turner, L.J. in the words which have been read by Lopes, L.J. Now, beginning with this shifting clause, it most clearly does not divest the estate of any person who becomes the Earl of Rothes unless that person is for the time being entitled to the possession or the receipt of the rents and profits of the hereditaments devised by the will. I read the words "possession or the receipt of rents and profits" thus: Some part of the estate, the mansion-house for instance, may be in hand not let and not producing rents and profits. "Possession," as contrasted with "receipt of rents and profits," means possession of such parts of the estate as do not yield rents and profits and entitled to the receipt of the rents and profits of such parts of the estate as produce rents and profits. The Earl of Rothes, if he became Earl while he was an infant, under these limitations, was tenant in tail in possession as contrasted with being entitled in reversion. The estate was not in reversion, but it was an estate in possession, and it is to be observed that it was a legal estate; therefore with a limitation which was a legal limitation. There is a direction for the use of one life, with remainder to the first and other sons in tail, and so on. But does this clause mean entitled in possession as contrasted with entitled in reversion? It does not say so. Those are not the words. It is not "entitled in possession," which is the ordinary phrase used when we contrast title in possession with title in reversion, but it is "entitled to the possession or the receipt of the rents and profits of the said hereditaments

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and premises." It is entitled to the possession of the said hereditaments and premises or the receipt of the rents and profits of the said hereditaments and premises. Then by the management clause, which shortly precedes the shifting clause, it is provided as follows: [His Lordship read that clause and continued:] So that during his minority he is not entitled to receive one farthing of the rents—he is not entitled to possession of any of the property which does not produce rent; but the trustees who are in possession are entitled to that possession and receipt of rents, and he is not beneficially entitled. Therefore the rents which they are entitled to receive are not to be handed over to the infant, but to the trustees. He is only entitled to receive out of them such moneys as the trustees shall think fit to allow for his maintenance. It is accurate to say that he will not receive the money, but he will receive such sums as the trustees think fit to allow for his maintenance after they have received the rents themselves. Therefore he cannot during his minority be entitled to the possession of any land, nor can he during his minority be entitled to the rents and profits of any land. Consequently, if the earldom devolves upon him, he can say, as he says here, "I am not in possession; therefore this shifting clause does not apply to me." Now, it is answered that in various other parts of the will the words "entitled to possession or receipt of the rents" are used in such a sense as to show that in the opinion of the testatrix for some purposes an infant might be entitled. I agree that there are such phrases in the will, but we have to deal with this particular clause. I agree that it is extremely difficult to see any intelligible reason why the testatrix should provide that if the earldom descends to an adult who is entitled in possession the estate shall shift, but if it devolves upon an infant the estate in possession as contrasted with the estate in reversion shall not shift. I cannot see any reason for it, but because I cannot see any reason for it, am I to depart from the rule which has been laid down and acted upon? I have asked the learned counsel to tell me what their notion of the scheme of the will is. The only answer they can give is, that the shifting clause was to take effect in all cases where the estate was not in reversion. All I can say is, that there are not words which bear out that contention. I agree most entirely in the canon of construction which has been referred to. It seems to me that during the minority of this infant the possession and receipt of the rents and profits is taken from him and vested in trustees; and therefore the event that the shifting clause contemplated has not happened. I think the learned judge in the court below was right, and that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant, *Tathams* and *Pym*.

Solicitors for the respondents, *Russell Cooke* and *Co.*

Monday, Dec. 18, 1893.

(Before LINDLEY, SMITH, and DAVEY, L.JJ.)

Re MARTHA BAGGS (a Person lawfully detained as a Lunatic). (*a*)

ORIGINAL APPLICATION TO THE LORDS JUSTICES SITTING IN LUNACY.

Lunacy—Person lawfully detained as a lunatic, though not so found by inquisition—Person appointed to exercise powers of committee—Tenant for life—Settled land—Exercise of power of sale—Jurisdiction—Lunacy Act 1890 (53 *Vict. c.* 5), *ss.* 116, 120, 128, 341—*Settled Land Act* 1882 (45 & 46 *Vict. c.* 38), *ss.* 3, 62.

The Court has no jurisdiction to authorise a person who has been appointed to exercise the powers of a committee of the estate of a tenant for life of settled land who is lawfully detained as a lunatic, though not so found by inquisition, to exercise on behalf of the lunatic the power of sale vested in the lunatic by the Settled Land Act 1882. *The lunatic must be so found by inquisition before such an order can be made.*

MARTHA BAGGS was a person "lawfully detained as a lunatic, though not so found by inquisition" within sect. 116, sub-sect. 1 (*c*) of the Lunacy Act 1890. Under a settlement she was tenant for life with remainder to her children of property which consisted only of a leasehold house in bad repair, which it was impossible to let, and for the ground rent of which the landlord was threatening proceedings.

The trustees of the settlement were dead. The settlement contained a power to appoint new trustees, but no power of sale.

An application was now made by summons for the sanction of the court to an order appointing the lunatic's son to exercise the powers of a committee of her estate, and in particular the power of sale vested in her as tenant for life by the Settled Land Act 1882. The summons also asked for the appointment of new trustees, and that the son might be authorised to take proceedings to have them appointed trustees for the purposes of the Settled Land Act 1882.

Bissill in support of the summons.—The court has jurisdiction to authorise a person to act as committee, and to exercise the powers of a tenant for life of settled land under the Settled Land Act 1882, and to sell the property. Sect. 62 of the Settled Land Act 1882 enables a committee to sell in this way, and the court can authorise the lunatic's son to exercise the powers of the committee in the present case. The Lunacy Act of 1890, sect. 116, enables the court to authorise some person to exercise powers on behalf of the lunatic. [DAVEY, L.J.—That section refers to powers under the Lunacy Act 1890. This power is under the Settled Land Act 1882.] By sect. 120 (*a*) a committee may sell, or (*b*) exercise any powers vested in the lunatic for his own benefit. That is not confined to powers under the Act. Here the proposed sale is clearly for the benefit of the lunatic. Further, under the Settled Land Act 1882, s. 53, a tenant for life is to a certain extent a trustee, and by sect. 128 of the Lunacy Act 1890 the committee may exercise powers enjoyed by the lunatic as trustee. [DAVEY, L.J.—That means a trustee in the proper sense of the term.] It includes every kind of trust:

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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see sect. 341, the definition clause, of the Lunacy Act 1890.)

LINDLEY, L.J.—This is one of those cases which are not provided for by statute. We are asked to exercise the powers conferred by sect. 116 of the Lunacy Act 1890, by appointing the lunatic's son to exercise the powers of a committee of the alleged lunatic's estate, and to authorise him to get new trustees appointed for the purposes of the Settled Land Act 1882, and to sell the property under that Act as committee of the estate of the tenant for life. Here the tenant for life is a person lawfully detained as a lunatic, though not so found by inquisition, so she is not a "lunatic" within the meaning of sect. 62 of the Settled Land Act 1882, which is expressly limited to lunatics so found, and she is obviously not by virtue of sect. 53 of the Settled Land Act 1882. It is suggested that, as tenant for life, she is a trustee within sect. 53. A tenant for life has, under the Settled Land Act, certain powers, and is made responsible for the exercise of those powers. If he does anything improperly he is to be deemed to be in the position and to have the duties and liabilities of a trustee, but that does not make him a trustee within sect. 128 of the Lunacy Act 1890. There is nothing then in the Settled Land Act 1882 which authorises us to make this order. But we are asked to do it under the Lunacy Act 1890, by virtue of the combined operation of sects. 116, 120, and 128. In my opinion, neither of those sections enables us to do so. Sect. 120 looks most in point, but it does not meet this case. The truth is, that the court has at present no power to do what is asked in this case. The lady must be found a lunatic by inquisition, and then it can be done.

SMITH and DAVEY, L.JJ. concurred.

Solicitor: *C. Etherington.*

Monday, May 28.

(Before LINDLEY, LOPES, and DAVEY, L.JJ.)

Re X. (a Person through mental infirmity incapable of managing his affairs). (a)

ORIGINAL APPLICATION TO THE LORDS JUSTICES SITTING IN LUNACY.

Lunacy — Settlement — Tenant for life — Person incapable of managing his affairs — Person appointed to exercise powers of committee— Power of sale—Jurisdiction—Lunacy Act 1890 (53 *Vict. c.* 5), *s.* 116, *sub-sect.* 1 (*d*), *sub-sect.* 2; *sect.* 120 (*a*) (*l*); *s.* 128.

A settlement made in 1858 *contained a power for the then tenant for life to sell the settled estates with the consent of the trustees. The present tenant for life having through mental infirmity become incapable of managing his affairs, his son had been appointed to exercise certain powers on his behalf. The son applied for an order authorising him to exercise the power of sale.*

Held, that the Court had jurisdiction to make the order.

Re Martha Baggs (ante, p. 138) *distinguished.*

BY a settlement dated the 10th Aug. 1858, certain real estates were resettled. The settlement contained a power for the then tenant for life during his life with the consent in writing of the trustees therein named, or the survivor of them, his executors or administrators, and after the decease of the first tenant for life for his eldest son and other successive tenants for life, when in actual possession of or entitled to the receipt of the rents and profits of the settled property with the like consent, to sell or exchange for other hereditaments all or any of the settled property by public auction or private contract, and the trustees were to receive the purchase money.

The first two tenants for life died, and in 1885 X. became tenant for life in possession under the settlement.

In 1886 he and his eldest son executed a resettlement of the property, but this did not affect the tenancy for life of X. under the settlement of 1858.

X. having become, "through mental infirmity arising from disease, incapable of managing his affairs" within sect. 16, sub-sect. 1 (*d*) of the Lunacy Act 1890, an order was made on the 15th July 1891 by Lord Halsbury, L.C., authorising the eldest son of X. to manage the settled property and to exercise on his behalf, amongst other powers, the powers vested in him by statute or under the settlement of granting such building, agricultural, and mining leases of the settled property as the master in lunacy should approve.

Owing to changes in the character of the neighbourhood in which the settled property was situated it had been desired for some years to sell the park and mansion-house.

An application was accordingly made by summons for an order authorising the eldest son of X. to exercise on behalf of his father the power of sale conferred by the settlement.

A statement of facts had been prepared, in which it was erroneously alleged (in paragraph 5) that the power of sale in the settlement of 1858 did not include the mansion-house.

The proposed sale had been sanctioned by the master in lunacy subject to the determination of the point involved in this application.

Cozens-Hardy, Q.C. and *Ingle Joyce* in support of the summons.—The applicant seeks to exercise the power of sale contained in the settlement of 1858, upon which there is no restriction. Therefore it includes power to sell the mansion-house. The case of *Re Martha Baggs* (*ubi sup.*) need not embarrass the court, the application there being for authority to exercise the statutory power of sale given to tenants for life by the Settled Land Act 1882. Sects. 116 to 130 of the Lunacy Act 1890 apply both to lunatics so found and to persons through mental infirmity incapable of managing their affairs. The applicant is in the position of a committee. Sect. 120, sub-sects. (*a*) (*l*) enables the court to authorise him to sell X.'s property or exercise any power vested in X. for his own benefit. The power of sale is a power for X.'s own benefit, and the master in lunacy has so found, and he has approved the sale, subject to the determination of the point involved in this application. Sect. 128 gives the necessary authority where the power is vested in a lunatic as trustee. Sect. 137 of the Lunacy Regulation Act 1853 (16 & 17 Vict. c. 70), contains practically the same provision. It has been held that, under that section, the court has jurisdiction to authorise the committee of a lunatic to consent on his behalf to the exercise of

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law

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a power of advancement conferred by a marriage settlement on the trustees:

Re Nevill, 54 L. T. Rep. 290; 31 Ch. Div. 161.

New trustees were appointed in

Re Blake, (1881) W. N. 1;
Re Bowmer, 28 L. J. 618, Ch.

C. T. Mitchell for the surviving trustee of the settlement of 1858.—There can be no objection to the sale, which will be very beneficial to all concerned. But I would point out that in *Re Martha Baggs* (*ubi sup.*) the court considered these sections of the Lunacy Act 1890 and decided that a power of sale was not within sects. 120 or 128. [Davey, L.J.—This case is not affected by *Re Martha Baggs* (*ubi sup.*), which was decided exclusively on the fact that the statutory power under the Settled Land Act 1882 is confined to the case of the committee of a person of unsound mind so found by inquisition.]

Lindley, L.J.—I think, now that we understand this matter, that there is no difficulty at all in seeing that the court has power to authorise the applicant, who has been appointed to take care of the supposed lunatic in this case, to exercise the power of sale. What difficulty there is has arisen from a misstatement in paragraph 5 of the statement of facts, and that statement of facts had better be amended. Otherwise the order will be apparently wrong. It can be amended by putting that mistake right, and then it appears that we are not asked to run counter to *Re Martha Baggs* (*ubi sup.*), nor to run counter to the Settled Land Act 1882, or anything of the kind; but rather to apply sects. 120 and 128 to a power contained in the settlement authorising the tenant for life to concur in a power of selling (*inter alia*) the mansion-house. All difficulties are at an end if that is understood. The statement of facts should be amended, because this case may be cited as an authority for what has never been really contended. Paragraph 5 in the statement of facts had better be struck out altogether.

Lopes, L.J.—We clearly cannot accede to this application under the Settled Land Act 1882. The power there given is confined to a person of unsound mind so found by inquisition. The person in this case is not so found, but I am entirely of opinion, beyond all question, that sects. 120 and 128 of the Lunacy Act 1890, together with the powers contained in the settlement, enable that to be done which is desired in this case.

Davey, L.J.—I agree. I have nothing to add.

Solicitors for all parties, *Grover, Humphreys, and Son.*

June 19 *and* 21.

(Before Lindley, Smith, and Davey, L.JJ.)

Guild and Co. *v.* Conrad. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Guarantee or indemnity — Verbal promise — Promise to indemnify against liability generally —Promise to answer for the debt of another— Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

In March 1888 *the defendant's son became a partner in a firm of C., W., and Co. In June* 1888 *the defendant gave the plaintiff a written guarantee for* 5000*l. in consideration of the plaintiff's allowing C., W., and Co. to draw upon him. C., W., and Co. gradually increased their overdraft until March* 1891, *when, according to the plaintiff, he met the defendant, who then verbally agreed to increase his guarantee to* 6000*l. on condition that the plaintiff should give credit to C., W., and Co. up to* 10,000*l. In Dec.* 1891 *the plaintiff declined to go on taking up the bills of C., W., and Co., as their overdraft exceeded* 4000*l. The defendant thereupon, at an interview with the plaintiff in Dec.* 1891, *verbally undertook to provide funds to meet a batch of bills of C., W., and Co. for* 5950*l. which were then falling due; and in Jan.* 1892, *at another interview with the plaintiff, the defendant undertook in the same way to provide funds to meet another batch of bills for* 5280*l. which were then falling due. Mathew, J. decided that the extension by* 1000*l. of the guarantee of March* 1891 *ought, as required by the Statute of Frauds, to have been in writing, and that, as it was not, the plaintiff could not recover that* 1000*l. But he decided that the undertakings of Dec.* 1891 *and Jan.* 1892 *were not guarantees, and were not, therefore, within the requirement of the Statute of Frauds, and that the plaintiff was entitled to recover upon them. Consequently judgment was given for the plaintiff for all the sums in question except the* 1000*l. The defendant applied for judgment or a new trial of the action.*

Held, that the true result of the interviews was, that the defendant promised that, if the plaintiff would accept the bills of C., W., and Co., he would take care that they should be met; that the plaintiff accepted the bills on the faith of that promise; and that, therefore, this was a promise to indemnify and not a guarantee, and came within the principle of Thomas *v.* Cook (8 *B. & C.* 728).

Decision of Mathew, J. affirmed.

The plaintiff in this action was William Binney, who traded as William Guild and Co.

The defendant Julius Conrad was a partner in the firm of Hermann, Conrad, and Co., the other partner being Benjamin Conrad.

In March 1888 the defendant's son J. W. Conrad became a partner in a firm of Conrad, Wakefield, and Co., in Demerara.

By his statement of claim the plaintiff alleged that, by a letter, dated the 27th June 1888, the defendant agreed that, if the plaintiff would give Conrad, Wakefield, and Co. a drawing credit on the plaintiff's firm to the extent of 5000*l.*, the defendant would indemnify the plaintiff to the extent of 5000*l.* in respect of any liabilities incurred by the plaintiff to third parties on bills accepted by him under such drawing credit; and that by an agreement made orally between the plaintiff and the defendant on or about the 23rd April 1891 the defendant agreed that, in consideration of the plaintiff increasing the said drawing credit on his said firm in favour of Conrad, Wakefield, and Co., beyond the said sum of 5000*l.* up to 10,000*l.*, the defendant would indemnify the plaintiff to the extent of such increase in respect of any liabilities incurred by the plaintiff to third parties on bills accepted by him under such increased drawing credit,

(*a*) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

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The plaintiff also alleged that, by a further agreement made orally between the plaintiff and the defendant at an interview on or about the 31st Dec. 1891, the defendant agreed that, if the plaintiff would accept certain bills of exchange then drawn upon him by Conrad, Wakefield, and Co. to the extent of 5950*l.* beyond their said drawing credit, the defendant would indemnify the plaintiff to the extent of any liabilities incurred by the plaintiff to third parties in consequence of the acceptance of such bills at the defendant's request; and that by a further agreement made orally between the plaintiff and the defendant at another interview on or about the 14th or 15th Jan. 1891, the defendant agreed that, if the plaintiff would accept certain bills of exchange then drawn upon him by Conrad, Wakefield, and Co. in excess of their drawing credit to the extent of 5280*l.* the defendant would indemnify the plaintiff to the extent of any liabilities incurred by the plaintiff to third parties in consequence of the acceptance of such bills at the defendant's request or any other bills drawn by Conrad, Wakefield, and Co., accepted by the plaintiff in excess of their drawing credit, and would further procure that the proceeds of certain cargoes of breadstuffs and rice purchased there by Conrad. Wakefield, and Co. for resale should be appropriated to the discharge of their indebtedness to the plaintiff and of any liabilities to third parties incurred by the plaintiff at the defendant's request.

The plaintiff further alleged that he, relying on such promises, accepted certain bills drawn on him by Conrad, Wakefield, and Co., and incurred liabilities to third parties thereon; that Conrad, Wakefield, and Co. did not provide funds to meet such bills at maturity; that he, the plaintiff, had in consequence become liable to pay to third parties certain sums for which Conrad, Wakefield, and Co. had only partly provided; and that the defendant had not provided all or any part of such sum, nor had the proceeds of the cargoes of breadstuffs and rice been appropriated to the discharge of such liabilities.

The plaintiff accordingly brought this action to recover 17,230*l.*, viz., 5000*l.* under the written guarantee of June 1888; 1000*l.* under the increased guarantee of March 1891; 5950*l.* under the verbal undertaking of Dec. 1891; and 5280*l.* under the verbal undertaking of Jan. 1892.

At the trial of the action, on the 3rd May 1894, before Mathew, J. and a special jury in Middlesex, there was a direct conflict of evidence between the plaintiff and the defendant as to what took place at the two interviews in Dec. 1891 and Jan. 1892 respectively, the defendant denying that he gave any promise whatever to the plaintiff either of guarantee or indemnity.

The jury having intimated that they believed the plaintiff, the judge put the following questions to them: (1) Was the 5000*l.* guarantee extended in March 1891 to 6000*l.*? (2) Did the defendant undertake to provide funds to meet the 5950*l.* in Dec. 1891? (3) Did the defendant undertake to provide funds to meet the 5280*l.* in Jan. 1892?

The jury answered all these questions in the affirmative, and the parties then agreed that the jury should be discharged, and that the remaining questions in the case should be dealt with by the judge on further consideration.

An argument was subsequently heard upon the points of law arising, and on the 7th May 1894 the following considered judgment was delivered by

Mathew, J.—As to the 1000*l.* I have already intimated that it seems to me that the attempt to increase the guarantee verbally must fail. I refer to the attempt to substitute one figure for another in the original document, which appears to me to be a document purely of guarantee, and a document that bound the promiser, the defendant, to be responsible for the default of the Demerara firm. As to that it is not necessary to say more. Then a very important question arises as to the two batches of bills. In dealing with that question, in the first place I must point out that the learned counsel on each side very properly agreed that those questions should be submitted to the jury which the jury could easily deal with; and they further agreed that, in the course of any subsequent argument on the legal liability, if any question of fact should be discovered which the findings of the jury did not cover, I or the court should dispose of those questions of fact. I say at once that I give credit to the statement of the plaintiff here as against the statement of the defendant, and I have to look at this transaction as it is disclosed upon his evidence and the documents in the case. It is a simple mercantile relation, and one that is established by the original contract between the firm in Demerara and the plaintiff's firm. The plaintiff was to open a credit with the Demerara firm to a certain amount. He undertook to accept bills for the Demerara firm upon the understanding that he should have cover supplied before the bills became payable. In the ordinary course, the bills being ninety days' bills, would be discounted abroad, and in that way the Demerara firm were put in cash. The bills would come forward here through the bankers or their agents to be presented for acceptance, and the question for the person who opened the credit was whether the bills should be accepted or not. That is a very ordinary condition of affairs, and the firm here thought it prudent to obtain the guarantee of the defendant before the credit was opened, and in the end the guarantee stood as a guarantee for 5000*l.* upon the terms of the letter, which has been read, of the 27th June 1888. The transaction went on for some time smoothly enough. The Demerara firm drew upon the London firm, the plaintiff's firm, and remittances were made before the bills became due to enable the acceptors to meet their acceptances. After a time there were irregularities, and the credit which was originally contemplated and fixed by the documents was exceeded. I have not the smallest doubt that the defendant knew perfectly well that the credit was being exceeded; but whether he did or did not appears to me immaterial, because there was no limit as between the defendant's firm and the plaintiff's firm as to the extent of the guarantee upon the face of the guarantee. Towards the end of the year 1891 the credit had been largely increased, and the conduct of the defendant shows that he knew that perfectly well. The first batch of bills came forward, which would have largely increased the amount of the credit of the Demerara firm. The plaintiff naturally refused to accept them, and placed himself in communication with the defendant, whose extensive interest in the Demerara firm it is only just necessary to glance

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at. Now, what took place upon that interview? The bills had come forward or were coming forward. They would be in the hands of the bankers here, and be tendered for acceptance speedily, or they had actually arrived—it does not matter which. It was for the plaintiff to say whether or not the bills should be accepted. He had no cover; he had little anticipation that cover would be forthcoming if he did, and he placed himself in communication with the defendant and a Mr. Wakefield, who was one of the Demerara firm and one of the drawers of the bills, the bills being drawn under his power of attorney left with another, Conrad, or with a clerk called Symonds, at Demerara. At that interview an explanation was offered which I am willing to believe the defendant thought was a proper explanation of this extensive overdraft, and the explanation was this, an explanation in which Wakefield, who, above all, ought to know, concurred: "The firm abroad have had to make extensive purchases there for breadstuffs and other property, representing the amount of those purchases to pay for the breadstuffs. They have had to discount drafts, and these drafts will be paid if time is given to realise these breadstuffs." The plaintiff was not satisfied, and he might very well hesitate to accept an explanation of that sort; but that he had the assurance from the defendant and Wakefield I am perfectly certain. It was not suspected at that time that there was any irregularity, and the bills ought to be represented by property in Demerara, and finally he is told: "If you accept those bills, and make yourself responsible to the banker who now holds the bills, funds shall be forthcoming, and I will find them, and to make assurance doubly sure I will go out myself"—says the defendant—"to Demerara, and will see that all those goods are realised, and as there must be a renewal to give time for the realisation of the goods, if you accept you shall be placed in funds to meet the acceptances." Upon two occasions the same process was repeated practically, and the second batch of bills came forward, and on these assurances the plaintiff accepted. Now, it is said that he described the transaction himself as a transaction of guarantee. I am not in the least disturbed by the use of that phrase. What was meant was, that if he accepted them he should be placed in funds. The jury have accepted that as the result of the transaction, and that was the meaning of the parties. On the faith of that promise, that he would be placed in funds to meet those bills in the hands of third parties, he accepted the renewals. It is said that that is a "promise to answer for the debt, default or miscarriage of another person." I say not. It appears to me to be a promise to pay the bankers who held those bills at the time the bills became due. The Demerara firm was out of any arrangement upon the subject. Whether the Demerara firm had means or would have means is entirely a supposition at that time. The contracts were not co-extensive, and were not of the same character. And it was not a contract to pay if the foreign firm did not pay, because there was no expectation at the time that the foreign firm would be able to pay. The contract was to find funds to enable the plaintiff to meet those acceptances. Now, without going through the authorities again, this is not a contract within the Statute of Frauds. It appears to me to be illustrated, first, by a very early case, the case of *Castling* v. *Aubert* (2 East, 325), by the well-known case of *Eastwood* v. *Kenyon* (11 Ad. & Ell. 438), by the equally well-known case of *Thomas* v. *Cook* (8 B. & C. 728), by the case of *Fitzgerald* v. *Dressler* (7 C. B. N. S. 374), and the case of *Reader* v. *Kingham* (13 C. B. N. S. 344), and the two recent cases in the Chancery Division which have been referred to, namely, the case before Malins, V.C. of *Wildes* v. *Dudlow* (L. Rep. 19 Eq. 198), and the case before Chitty, J. of *Re Bolton's Estate*; *Morant* v. *Bolton* (8 Times L. Rep. 668; on app. (1892) W. N. 163). I think this contract was not within the Statute of Frauds under the circumstances, and that the defendant cannot rely on that. Then as to the last straw that is caught at, the suggestion was made that, because there were proceedings in Demerara, out of which proof might possibly have been made against whatever estate of the Demerara firm there was there, this action could not be maintained, I must say I see no authority whatever for that proposition. The case that has been referred to by Mr. Reed is a case where an English court considered itself entitled to restrain, or to treat as restrained, proceedings in a foreign bankruptcy. The general principle is that a foreign bankruptcy does not get rid of an English debt, and I see nothing here to indicate any election to choose one form or the other. The proof was never made, and the proof at the time it was put forward was so submitted, with a notice that action was being brought in England in respect of the money claimed. For these reasons I think judgment must be for the amount for which the jury returned their verdict, upon an agreement between the parties, less the sum of 1000*l*.—that is to say, 16,230*l*.

The defendant now applied for judgment or a new trial.

Herbert Reed, Q.C. and *J. F. P. Rawlinson* for the applicant.—We say that there was no evidence to support the findings of the jury, and we set up the Statute of Frauds in respect to the verbal contracts. Except as to the first sum of 5000*l*. there was no contract in writing between the parties within the requirement of sect. 4 of the Statute of Frauds as to guarantees. The plaintiff's contention is, that the contracts were contracts of indemnity and not of guarantee, and that is the point in dispute between the parties. The promise which the defendant made to the plaintiff wes conditional upon default being made in payment by Conrad, Wakefield, and Co, who were to remain primarily liable, and that, we submit, is a guarantee within the Statute of Frauds. When the promise is made, there must be some person liable, or about to become liable, in the first instance for the debt or default guaranteed:

> *Mountstephen* v. *Lakeman*, 25 L. T. Rep. 755; 30 L. T. Rep. 437; L. Rep. 7 Q. B. 196; 7 E. & I. App. 17.

Here there was another person to become liable in the first instance. Conrad, Wakefield, and Co. drew the bills, and the plaintiff accepted for their accommodation and at their request, and Conrad, Wakefield, and Co. were debited with the bills. The question may be, "to whom was the credit given?"

> *Anderson* v. *Hayman*, 1 H. Bl. 120.

If credit is given to the promiser together with

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the debtor the statute applies. The promise must be to the person to whom another is or is to become liable:

Eastwood v. *Kenyon*, 11 A. & E. 438.

As regards the authorities relied upon by the learned judge in the court below, the promise was to the debtor, not to the creditor. In *Castling* v. *Aubert* (2 East, 325) there was a purchase of the plaintiff's interest in the policies, a promise to pay what the plaintiff was liable to pay if the plaintiff would furnish him with the means of doing it. In *Fitzgerald* v. *Dressler* (7 C. B. N. S. 374) there was not an absence of liability except by reason of the express promise. In *Reader* v. *Kingham* (13 C. B. N. S. 344) the promise was to the bailiff, not the creditor. That case does not overrule *Green* v. *Cresswell* (10 A. & E. 453), which is still good law. *Wildes* v. *Dudlow* (L. Rep. 19 Eq. 198) has no application to the present case. They referred also to

Forth v. *Stanton*, 1 Wms. Saund. 211 (*e*);
Sutton and Co. v. *Grey*, 69 L. T. Rep. 354, 673; (1894) 1 Q. B. 285, 288.

Robson, Q.C. (*Scrutton* with him) for the respondent.—The contract was an undertaking by the defendant, in consideration of the plaintiff accepting the bills in question, to indemnify the plaintiff in any event, and the defendant's liability being primary, and not secondary, the Statute of Frauds does not apply. The case is governed by the principle established in *Thomas* v. *Cook* (8 B. & C. 728). That case, it is true, was not followed in *Green* v. *Cresswell* (10 A. & E. 453), but *Green* v. *Cresswell* itself was overruled by *Reader* v. *Kingham* (13 C. B. N. S. 344), where *Thomas* v. *Cook* (*ubi sup.*) was approved, as also it was in *Hargreaves* v. *Parsons* (13 M. & W. 561, 570). He referred also to

Wildes v. *Dudlow*, L. Rep. 19 Eq. 198:
Re Bolton's Estate; *Morant* v. *Bolton*, 8 Times L. Rep. 668; on app. (1892) W. N. 163.

Herbert Reed, Q.C. replied.

LINDLEY, L.J.—This is a case of considerable difficulty, and one that is very near the line. The question is, whether the promises made by the defendant to the plaintiff were contracts of guarantee or indemnity, under circumstances which I will shortly allude to. [His Lorship stated the facts of the case, and continued:] The difficulty is to know what took place at the interviews in Dec. 1891 and Jan. 1892. The plaintiff's version is, that the defendant undertook to indemnify him against the bills of Conrad, Wakefield, and Co., which were then about to become due. The defendant says that he refused to do anything of the kind. The jury found on that controversy in favour of the plaintiff. They found that the defendant promised the plaintiff to find funds to meet the two batches of bills which were then falling due. Thereupon it was arranged that all further questions in the case should be left to the learned judge. The judge then addressed his mind to the question whether that promise of the defendant's was in such a shape that the Statute of Frauds rendered it inoperative because it was not in writing, or whether it was in such a shape that the statute did not apply. The learned judge came to the conclusion that the promise was not a promise to pay the plaintiff if the foreign firm did not pay, because there was no expectation on the part of anybody concerned that the foreign firm would be able to pay, but was a promise to find funds to enable the plaintiff to meet the bills. Whether the jury intended to decide that question or not was doubtful, but, if not, the facts were left to the judge, and he so found. It was said that the plaintiff's evidence did not amount to that, and that the contract was conditional upon the failure of the foreign firm to meet the bills. We are asked to differ from him on that finding of fact, and to say that he ought to have found the contrary. That is a point of considerable difficulty. But, although the evidence is very loose, I am not prepared to say that it does not bear the construction which the learned judge has put upon it. I am bound to say that I think that the learned judge has taken the true view. I am inclined to think that the true result of the interviews was, that the defendant did promise that, if the plaintiff would accept the bills of the foreign firm, he would take care that they should be met, and that the plaintiff accepted the bills on the faith of that promise. If that is the true view of the facts, and if the learned judge was right in his conclusion upon them, then the authorities show that the statute does not affect the transactions. The case is not distinguishable from *Thomas* v. *Cook* (8 B. & C. 728), where it was held that a promise to indemnify was not within the words or the policy of the Statute of Frauds. [His Lordship read extracts from the judgments of Bayley, J. and Parke, B. in that case, and continued:] But it is said that *Thomas* v. *Cook* (*ubi sup.*) is bad law. It is true that *Thomas* v. *Cook* (*ubi sup.*) was not followed in *Green* v. *Cresswell* (10 A. & E. 453), but it was treated as right in *Hargreaves* v. *Parsons* (13 M. & W. 570) and *Reader* v. *Kingham* (13 C. B. N. S. 344). In my opinion *Thomas* v. *Cook* (*ubi sup.*) and the modern cases of *Wildes* v. *Dudlow* (19 Eq. 198) and *Re Bolton*; *Morant* v. *Bolton* (8 Times L. Rep. 668; on app. (1892) W. N. 163), which were founded upon it, were rightly decided. The application must be refused with costs.

LOPES, L.J.—It is clear law that a promise to become liable conditionally on the principal debtor making default is a guarantee and is within the statute, and must be in writing. On the other hand, an independent promise to become liable in any event is not within the statute. The question is, under which of those two heads is the present promise to be placed. I cannot disguise the fact that the question is a difficult one, because the evidence is capable of either construction. But we have to decide that the learned judge was wrong if we say that this promise required to be in writing. I think he was right. If that is the true meaning to be placed upon the evidence this is a promise to indemnify, and then the case comes within the principle of *Thomas* v. *Cook* (*ubi sup.*). It is said that the case of *Thomas* v. *Cook* (*ubi sup.*) was disapproved of in *Green* v. *Cresswell* (*ubi sup.*). In *Wildes* v. *Dudlow* (*ubi sup.*) it was said: [His Lordship read extracts from the judgment in that case, and continued:] I therefore come to the conclusion that the learned judge in the court below was right, and that we ought to refuse this application with costs.

DAVEY, L.J., in delivering judgment to the same effect, said that he agreed that, in considering whether the Statute of Frauds applied, there was an essential difference between a

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promise to pay a creditor if the principal debtor made default and a promise to indemnify against a liability without regard to the question whether anybody else made default or not. His Lordship added that, in his opinion, the case of *Thomas* v. *Cook* (*ubi sup.*) was rightly decided.

Application refused.

Solicitors for the appellant, *Charles A. Bannister* and *Reynolds*.

Solicitors for the respondent, *Parker, Garrett*, and *Parker*.

Wednesday, July 4.

(Before LINDLEY, LOPES, and DAVEY, L.JJ.)

KENNEDY *v.* THOMAS. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Bill of exchange—Dishonour—Days of grace—Bills of Exchange Act 1882 (45 & 46 *Vict. c.* 61), *ss.* 14, 19, 47.

The holder of a dishonoured bill of exchange cannot commence an action to recover the amount until after the expiration of the third day of grace.

Wells *v.* Giles (2 *Gale*, 209) *followed.*

Leftley *v.* Mills (4 *T. R.* 170) *considered.*

Decision of Cave, J. reversed.

THIS action was brought to recover the sum of 75*l.*, the amount due to the plaintiff as the holder of a bill of exchange for that amount, dated the 16th Oct. 1893, drawn upon and accepted by the defendant. The bill was made payable three months after date, and was accepted payable at a specified bank. The 19th Jan. 1894 was the third of the days of grace. The bill was presented for payment on the afternoon of that day at the bank, and payment was refused. Later on the same day the writ in the action was issued.

By his defence the defendant raised (*inter alia*) the objection that the action had been commenced prematurely before the expiration of the three days of grace allowed by sect. 14 of the Bills of Exchange Act of 1882; and it was contended that, the acceptance being what is defined by sect. 19 as a "general" one, payment might have been made elsewhere than at the bank, and that the defendant might have paid at any time before the expiration of the last day of grace, and that consequently no cause of action against the defendant had arisen when the writ was issued.

By sect. 14 of the Bills of Exchange Act 1882:

Where a bill is not payable on demand the day on which it falls due is determined as follows: (1) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace.

By sect. 47:

(1.) A bill is dishonoured by nonpayment (*a*) when it is duly presented for payment and payment is refused or cannot be obtained, or (*b*) when presentment is excused and the bill is overdue and unpaid. (2.) Subject to the provisions of this Act, when a bill is dishonoured by nonpayment an immediate right of recourse against the drawer and indorsers accrues to the holder.

At the trial of the action on the 1st May 1894 before Cave, J., sitting without a jury in Middlesex, the learned judge overruled the defendant's objection and gave judgment for the plaintiff for 27*l.* 10*s.*, the amount which he had paid for the bill.

The defendant appealed.

E. B. Calvert (*Lister Drummond* with him) for the appellant.—The holder of a dishonoured bill of exchange cannot commence an action to recover the amount till after the expiration of the third day of grace:

Wells v. *Giles*, 2 Gale, 209;
Hartley v. *Case*, 1 C. &. P. 555; 4 B. & C. 339; 6 D. & R. 505.

[He was stopped by the Court.]

R. A. Germaine for the respondent.—Having regard to the provisions of sect. 47 of the Bills of Exchange Act 1882, and to the opinion expressed by Buller, J. in *Leftley* v. *Mills* (4 T. R. 170, at p. 174), I ask the court to hold that the cause of action against the acceptor of a dishonoured bill of exchange accrues before the expiration of the last of the three days of grace, and that, therefore, the present action was not commenced prematurely. *Leftley* v. *Mills* (*ubi sup.*) was discussed in the following cases:

Haynes v. *Birks*, 3 Bos. & Pul. 599;
Burbridge v. *Manners*, 3 Camp. 193.

[LOPES, L.J. referred to Byles on Bills, 13th edit. p. 211; 14th edit. p. 299.] It is noticeable that *Wells* v. *Giles* (*ubi sup.*) is not cited in Byles on Bills.

Lister Drummond, in reply, referred to the following American cases as supporting the rule established by *Wells* v. *Giles* (*ubi sup.*):

Osborn v. *Moncure and Robinson*, 3 Wendell, 170;
Hopping v. *Quin*, 12 Wendell, 517.

LINDLEY, L.J.—[His Lordship stated the facts of the case, and continued:] There is no doubt that, upon payment of the bill being refused by the bank, the plaintiff had an immediate right of recourse against those secondarily liable, viz., the drawer and indorsers. But the question which we have to consider is, whether the plaintiff had then a cause of action against the acceptor—whether the acceptor could be sued upon the bill before the expiration of the last of the three days of grace. In other words, whether the acceptor was not entitled to the whole period up to the end of that day in which to pay the bill. *Prima facie*, I should have thought it plain that, according to ordinary principles of law, he was so entitled. But we are asked to hold the contrary, partly upon the construction of the Bills of Exchange Act 1882, and partly in deference to the opinion expressed by Buller, J. in *Leftley* v. *Mills* (4 T. Rep. 170, at p. 174). When we look at the Act we see that it does not go to that extent. It certainly seems a little paradoxical that a bill of exchange should be treated as dishonoured for one purpose and not for another. But it is clear that, when payment of a bill is refused upon its presentation at any time during the day on which it falls due, the holder has an immediate right of recourse against the drawer and the indorsers. He can at once give notice of dishonour to the drawer and the indorsers. But he is not entitled to commence an action against those parties any more than against the acceptor before the expiration of the last day of grace. If we were to hold the contrary we should really be cutting down the days of grace. It is true that in *Leftley* v. *Mills* (*ubi sup.*) Buller, J. dissented

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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from the view expressed by Lord Kenyon, C.J. Lord Kenyon thought that, in the case of a bill of exchange, as in the case of other contracts, if a man was bound to pay money within a certain time, "the party bound had till the last moment of the day to deliver himself from the obligation by paying." Buller, J. said that the acceptor's undertaking was "to pay the bill on demand on any part of the third day of grace," and that the bill was "payable any time within last day of grace on demand, provided that demand be made within reasonable hours." But the point there before the court was not the right of the holder to bring an action upon a dishonoured bill, but his right to protect the bill, or to give notice of dishonour. And, as to that, the view expressed by Buller, J. was clearly accurate. The point which we have to decide is not a new one; it was actually decided in *Wells* v. *Giles* (2 Gale, 209), though that case is not referred to in Byles on Bills. But it is a clear decision that an action upon a dishonoured bill cannot be commenced upon the third day of grace. The same thing has been decided in America, as is shown by the cases which have been cited to us, and it is not inconsistent with the provisions of the Bills of Exchange Act 1882. *Hartley* v. *Case* (1 C. & P. 555) is rather in favour of this view than against it. The argument addressed to us on behalf of the respondent is not, as it appears to me, supported by any English authority; and there is the direct authority of *Wells* v. *Giles* (*ubi sup.*) to the contrary, which is in accordance with the general understanding of merchants. In my opinion, judgment must be entered for the defendant, with costs. The defence is a technical one, but it was distinctly raised on the pleadings.

LOPES, L.J.—I am of the same opinion. Sect. 14 of the Act says that a bill of exchange is "due and payable on the last day of grace," and I read that as meaning that the bill is due and payable at the end of the last day of grace, and that no cause of action by the holder against the acceptor exists until the end of the third day of grace. Presumably the object is to give the acceptor the opportunity of paying the bill at any time during the three days of grace. If he has not the whole of the third day during which to meet the bill I cannot see how he gets three days of grace. That was evidently the view of Byles, J., for he says in his work on Bills, 14th edit., at p. 278: "Three days of grace are in every case (unless otherwise provided in the bill or note) added to the time of payment, and the bill or note falls due on the last of these." And, again, at p. 281: "A presentment for payment before the expiration of the days of grace is premature, and will not enable the holder to charge the antecedent parties." And again, at p. 299: "The acceptor has the whole of that day" (the day on which the bill falls due) "within which to make payment; and, though he should in the course of that day refuse payment, which refusal entitles the holder to give notice of dishonour, yet, if he subsequently on the same day makes payment, the payment is good, and the notice of dishonour becomes of no avail." In my opinion, the true view is that the acceptor is entitled to the full benefit of the three days of grace. And, notwithstanding the able argument which has been addressed to us, and the cases which have been cited, I am of opinion that an action cannot be brought against the acceptor until after the expiration of the last of those three days. The appeal ought therefore to be allowed, and with costs.

DAVEY, L.J.—I am of the same opinion, and I should add nothing but for the fact that we are differing from the judgment of the court below. But for the very able argument of Mr. Germaine, and for the fact that a different view was taken by the learned judge, I personally should not have thought the point an arguable one. I should have thought that both under the statute and under the law merchant, which is part of the common law, when three days of grace are allowed for the payment of a bill of exchange, the acceptor has the whole of the last day in which to pay the bill, subject to his doing so within reasonable hours, and that he cannot, for the purpose of an action being brought against him upon the bill, be said to have made default in payment until the end of the third day of grace. In other words, no right of action accrues to the holder of the bill against the acceptor until the expiration of the third day of grace. Although there is no other express decision on the point, there is *Wells* v. *Giles* (2 Gale, 209). And the opinion of Byles, J. to the same effect is clearly expressed in the passage which has been read by my brother Lopes. We are asked to take a different view by reason of some of the words of the Act and other cases which have been referred to. But those authorities do not seem to me to be in point. They are all directed to the point whether notice of the dishonour of a bill can be given to the drawer and indorsers on the last day of grace, so as to entitle the holder subsequently to recover from them. It is true that in *Leftley* v. *Mills* (4 T. R. 170, at p. 174), Buller J. expressed an opinion different from that of Lord Kenyon, C.J.; but the point to which his observations were directed was whether notice of dishonour given upon the third day of grace was sufficient to charge an indorser of the bill. The same point arose in *Haynes* v. *Birks* (3 Bos. & Pul. 599). There the question was whether a bill having become due on Saturday, and having been dishonoured, notice of dishonour given to an indorser on the following Tuesday was sufficient to charge him; and in dealing with that question Lord Alvanley, C.J. referred to the opinion expressed by Buller, J. in *Leftley* v. *Mills* (*ubi sup.*), and he came to the conclusion that the notice was sufficient to enable the holder to have recourse to the indorser. The case had nothing to do with the accruer of a right of action upon the bill. The same point was dealt with in *Burbridge* v. *Manners* (3 Camp. 193). In *Hartley* v. *Case* (1 C. & P. 555) both the judgments of Abbott, C.J. (that at the trial and that in banc) assume, I think, that the acceptor has the whole of the last day of grace in which to pay the bill, although nonpayment upon presentation of the bill at any time on the last day is such a dishonour as entitles the holder to give notice of dishonour to the drawer and indorsers. Those I think were all the cases referred to by Mr. Germaine. As regards sect. 47 of the Act, I do not construe it as Mr. Germaine does. It does not say that on the presentment and dishonour of the bill an immediate right of action against the drawer and indorsers accrues to the holder, and I do not think that that is the meaning. It would be very anomalous if in respect of the same bill of exchange rights of action against different persons

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were to accrue at different times. In my opinion sect. 47 means only that the holder of the bill may immediately upon payment being refused by the acceptor give notice to the drawer and the indorsers, telling them that he shall hold them liable upon it. But they, as well as the acceptor, still have the whole of the last day of grace in which to pay the bill, and if it is not paid before the end of that day the holder's right of action against them becomes complete It is for the benefit of the holder that he should be able to give notice of dishonour on the last day of grace, because by so doing he obtains a right of action against the drawer and the indorsers earlier than he otherwise would. I agree that the appeal should, under the circumstances, be allowed, with costs, and judgment should be entered for the defendant.

Appeal allowed.

Solicitor for the appellant, *Frederick C. Sydney.*
Solicitor for the respondent, *Edward Kennedy.*

Monday, July 9.

(Before the LORD CHANCELLOR (Herschell), LINDLEY and DAVEY, L.JJ.)

Re McHENRY; McDERMOTT *v.* BOYD. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Mortgage—Power of sale—Realisation of security—Contract—Statute of Limitations (21 *Jac.* I, *c.* 16), *s.* 3.

In 1881 *B. advanced to M. a sum which was invested in securities, which were handed to B., who received the dividends thereon. Until* 1890, *when the securities were sold, B. had sent M. an account appropriating* 360*l. dividends received on the securities towards the debt due to him, and to this M. made no objection.*

Held, by North, J., that the mere sending of an account by the creditor to the debtor, of which no notice was taken by the debtor, could not be regarded as an acknowledgment so as to prevent the debt from being barred by the Statute of Limitations.

In 1882 *a further advance was made by B. upon similar terms, but with an express agreement by M. to pay any deficiency upon realisation. The securities were sold in* 1889.

Held, by North, J., that B.'s claim to the deficiency was not statute-barred, as the obligation to pay the deficiency which might arise when the securities were realised did not become a "debt" until the sale of the securities. On appeal:

Held (reversing the decision of North, J.), that the contract to pay any deficiency on realising the securities was not a separate one, and did not give rise to an independent cause of action; and that, therefore, the Statute of Limitations applied to the whole debt.

IN Aug. 1881 Henry J. Barker advanced to James McHenry the sum of 4512*l.* 10*s.*, which was invested in the purchase of 5000*l.* Western Extension 7 per Cent. Bonds of the Atlantic and Great Western Railway Company.

The bonds were held by Barker as security for the loan, and he received the dividends thereon until the bonds were sold in 1890.

Barker had sent in an account to McHenry, appropriating 360*l.* dividends received on the bonds towards the amount due to him, and McHenry made no objection to that appropriation.

In Aug. 1882 Barker made a further advance to McHenry for the purchase of 13,500*l.* Western Extension 8 per Cent. Bonds of the same railway company.

The loan was made for a period of three months. On the occasion of the loan being made, McHenry addressed the following document to Barker, dated the 25th Aug. 1882:

In consideration of your advancing to me the sum of 13,365*l.*, at the rate of 6½ per cent. per annum, repayable with interest on the 30th Nov. 1882, I hand you herewith the undermentioned securities, of the nominal value of 13,500*l.*, to be held by you as collateral security for the due repayment of the said loan and the interest thereon. In the event of the loan remaining unpaid after it becomes due, I hereby authorise you to realise the securities as you may deem fit for the purpose of repaying yourself the amount due to you, and I undertake to pay you any difference between the net proceeds of the securities and the amount due to you as well on account of the sum advanced as for interest thereon and all charges and expenses of realisation.

The loan was renewed for a further period of three months, and in 1884 100*l.* was paid on account. McHenry did not make any further payment on account of the loan, and in Sept. 1889 Barker sold the bonds, the proceeds of which, however, were not sufficient to repay the whole of the loan.

McHenry died on the 26th May 1891, and an order for the administration of his estate was made upon the application of E. R. McDermott, a creditor, on the 4th Aug. 1891.

Barker carried in claims to prove against McHenry's estate for the unpaid balances owing to him in respect of the two advances.

The chief clerk disallowed Barker's claims on the ground that they were wholly barred by the Statute of Limitations (21 Jac. 1, c. 16).

A summons was taken out by Barker to vary the chief clerk's certificate by admitting his claims.

The summons was adjourned into court, and came on to be heard before North, J. on the 2nd May 1894.

On the 3rd May 1894 the following considered judgment was delivered by

NORTH, J.—This summons is with reference to a claim made by Mr. Barker to prove against the estate of Mr. McHenry. In the years 1881 and 1882 Mr. Barker was employed by Mr. McHenry to purchase certain securities, and Mr. Barker found the bulk of the price. The balance was found by Mr. McHenry. The loan was intended to be for a short period, but it went on and on, and has not been paid, except from time to time certain payments were made by Mr. McHenry on account. An account has been produced here which has not been proved. It is a matter for proof before the chief clerk. A question arose, as I understand, in respect to how far the Statute of Limitations applied to it. It was adjourned to me for the purpose of dealing with that question. I assume for the purposes of my judgment that the account could be made out as it stands. Various payments, as I have said, were made by Mr. McHenry on account, the last being made on the 12th Sept. 1884. Mr. McHenry

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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died in May 1891. After that time there was no receipt of money by Mr. Barker excepting that on the 12th Aug. 1889 he brought into account dividends received on these securities to an amount of 360*l.* Then, after that, in Sept. 1889, he sold a part. In July 1890 he sold the residue of the securities he held. That left a considerable sum due to him, and that is what he now claims to prove for. What I have to deal with is the question of the Statute of Limitations. First of all it was said that the receipt by Mr. Barker in Aug. 1889 of dividends on the securities had the effect of preventing the statute from running. The last payment in cash having been in Sept. 1884, the statute had run, unless there was something to take the case out of it. It was said that the receipt of these dividends did so, but in my opinion they did not. It could only do so if there was some payment or acknowledgment, and a payment must be a payment by the debtor or some agent authorised to act for him. In the present case there was nothing whatever paid in Aug. 1889 by Mr. McHenry or any agent of his. The creditor, no doubt, who was the legal owner of these securities, which are transferable to bearer, and who had the complete power of dealing with them, had the right to receive the dividends upon them. He did receive certain sums, and those, if an account had ever come to be settled between him and Mr. McHenry, would have had to be brought into account. But the sums that he, as owner of these securities, received from the railway company are certainly not a payment by Mr. McHenry or any person acting as his lawful agent. Then, as regards an acknowledgment, it was said that there was some acknowledgment because copies of the statements of account were from time to time sent to Mr. McHenry. I do not see how those can be any acknowledgment of the kind. An acknowledgment is no use unless it is an acknowledgment from which you can imply a promise to pay. If a tailor chose to send in an old account to a customer annually for several years, of which the customer took no notice, excepting annually to put it into the fire, it would be idle to say that each of those transactions amounted to an implied promise by the customer to pay the balance of the account. And I do not see any difference between that kind of case and this. Supposing these statements were sent, if they had been acknowledged it might have been a very material matter; but they were not. The absence of acknowledgment, in my opinion, is nothing from which a promise to pay can be implied. Therefore, so far as these dividends go, the statute is a complete bar. I have treated the two claims down to the present time on the same footing, as they are for that purpose. But it is necessary to look at the second claim separately, because there was with respect to that a written document given on the 20th Aug. 1882. [His Lordship read the first paragraph of that document, and continued:] Now, pausing there, whatever right Mr. Barker, to whom this batch of securities was given, would have against the securities, there was nothing there that would prevent the statute from running as against that claim. But the document does not stop there; it proceeds thus: [His Lordship read the remainder of the document, and continued:] That document was signed by Mr. McHenry. Now it is said on behalf of his estate that there is nothing in that to prevent the statute from running as it clearly would have run if that later clause had not been found in the document, because the whole sum was due under the original transaction; and that there was a right to sell under that. It is said that everything that is included in the second part of that document is part of the debt covered by the first, as the law would have given Mr. Barker the power of selling given by the document. Therefore, it is said, the construction of the later part of the document merely is this: It is a provision in favour of Mr. McHenry, and says that, if the loan is unpaid when due, you may sell to repay what is due to you. It is said that the phrase "I undertake to repay you any difference between the net proceeds of the securities and the amount due" merely amounts to this: a recognition of his liability to pay that difference, and a reduction in reality of what Mr. McHenry would have to pay from the larger amount to the smaller amount. But I do not take that view of that myself. In the first place, it is a mistake to say that the law would have given him the power which is given by the later part of the document, namely, the power of sale. It may be that the law would have given him such a power of sale, or a similar power, if there had been no express agreement on the subject. But there is here an express agreement with respect to sale, express on the face of it—and *expressum facit cessare tacitum.* Therefore, if there is a sale, the only sale must be under the express power contained in this document. This document therefore does give something that he would not have had without it. It gives a power of sale that he can only have by virtue of its being contained in the document. Then it is suggested that that undertaking to pay the difference is merely equivalent to saying, "My liability in that case will be for the difference." But that is an alteration in the language of the document that I do not feel at liberty to make. If a man says, "I undertake to pay you the difference between two sums," I do not think it would be fair to say it is not an undertaking to pay; but it is something else—a recognition that the debt otherwise secured, namely, by the earlier part of the document, will be less than it otherwise would be. Well, then, in the third place I do not agree that everything which is the subject of the undertaking to pay in the second portion of the document is part of what is covered by the first portion of it, because the first portion merely deals with principal and interest, and has nothing whatever to do with selling the securities. The second portion provides for the sale of the securities, and provides also that the amount to be paid then is "the difference between the net proceeds of the securities and the amount due to you, as well on account of the sum advanced as for interest thereon, and all charges and expenses of realisation." Now, under the first portion of the document there would be no charges and expenses of realisation included in the original debt at all, because there was no power to sell for that purpose. It is only when the second portion gives the power of sale that the charges and expenses of realisation are for the first time introduced. And when the undertaking is to pay the "difference between the net proceeds of the securities" on the one hand and the "amount due to you as well on account of the sum advanced as for interest thereon, and all charges and ex-

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penses of realisation" on the other, I do not see how the amount to which the undertaking is to apply can be arrived at before the securities have been realised. Suppose, for instance, that the securities had sufficed to pay exactly what was due for principal and interest but would not pay for the charges of realisation in addition; it is quite clear that the undertaking to pay the charges and expenses of realisation can only apply when the realisation has taken place. And therefore, in my opinion, this undertaking to pay the difference can only be applied, and the statute can only run with respect to it from the time when the amount as to which there is the obligation to pay has arisen; that is to say, at the time when the securities have been realised. In my opinion, therefore, under the later part of the document there is a right to prove against Mr. McHenry's estate in respect of the difference mentioned there. But this decision will apply merely to the second batch of the securities purchased in 1882, and not to the first, because this is a document relating to the second only. The matter will therefore go back to the chief clerk to further investigate the claim so far as relates to the transaction to which this document refers. As regards the costs, the claimant may add his costs to his security; that is to say, the costs of the adjournment into court. The costs of the claim the chief clerk will deal with.

From the decision as to the advance made in 1882 McDermott now appealed.

Cozens-Hardy, Q.C. and *Gregson* for the appellant.—The Statute of Limitations (21 Jac. 1, c. 16) is a complete answer to the claim:

Reeves v. *Butcher*, 65 L. T. Rep. 329; (1891) 2 Q. B. 509.

S. Hall, Q.C. and *C. Herbert Brown* for the respondent.—There were two separate and independent causes of action. The respondent could have sued first for the whole debt, and secondly for the deficiency after the realisation of the securities. But until the amount due was ascertained there was no right to sue:

Hammond v. *Smith*, 33 Beav. 452.

[The LORD CHANCELLOR.—In that case there was no liability to pay at any other time.] The power to sell the securities does not touch the debt.

No reply was called for.

The LORD CHANCELLOR.—It is said that 100*l.* all was paid on account. The sole question is, in whether the claim is barred by the Statute of Limitations. [His Lordship stated the facts of the case, and continued:] Notwithstanding the payment of the 100*l.*, the original debt was completely statute-barred at the death of the testator. But it is said that the claim was not barred, by reason of the second clause in the document of Aug. 1882. It is said that, until the realisation of the securities by the sale of the bonds, the difference between the net proceeds of sale and the amount due could not be ascertained, and that, consequently, the statutory period ran only from the date of the sale. And this view was adopted by the learned judge in the court below. With all deference to his opinion, I am unable to agree with it. The second clause of the document of Aug. 1882 was intended to give, and no doubt did give, to Barker a power to sell the bonds. If he exercised that power, he would be bound to set the amount realised by the sale against the debt due to him, and only the net proceeds of the sale could be set against the debt, the costs of realisation being a first charge on the proceeds. Independently of any express authority to that effect, and even if the second clause of the document had merely conferred a power of sale, the right of the creditor would have been exactly the same. It appears to me that it is impossible to say that the power of sale conferred a new, separate, and independent cause of action. The second clause of the document did not create a new debt; it merely prescribed what was to be done upon the realisation of the securities. The words gave the creditor no right which would not equally have existed without them. The argument on his behalf must be carried to this length, that the operation of the Statute of Limitations could be indefinitely postponed by a mere statement of the legal rights which he would have had without any such statement. It is impossible to maintain such an argument. The decision of the learned judge must be reversed, and the claim rejected. The appeal will be allowed with costs, including the costs of the summons to vary.

LINDLEY, L.J.—I am of the same opinion, and, as we are differing from the learned judge in the court below, I will very briefly state my reasons for the view I adopt. [His Lordship shortly recapitulated the facts of the case, and continued:] It is obvious that an action could have been brought, though the clause relied on by North, J. does not affect the duty to pay, but the course to be followed on realisation of securities. If the amount due is not paid when payable, and the creditor realises, he must deduct the amount realised. It does not affect the cause of action.

DAVEY, L.J.—I am of the same opinion, and I have nothing to add to the view which has been expressed.

Appeal allowed.

Solicitors for the appellant, *Hores* and *Pattisson*.

Solicitors for the respondent, *G. S.* and *H. Brandon*.

June 20 *and July* 16.

(Before LINDLEY and LOPES, L.JJ.)

THOMASSET *v.* THOMASSET. (*a*)

APPEAL FROM THE DIVORCE DIVISION.

Husband and wife—Divorce—Maintenance and education of children of the marriage—Exercise of jurisdiction of the court during whole period of infancy—20 *&* 21 *Vict. c.* 85, *s.* 35—22 *&* 23 *Vict. c.* 61, *s.* 4.

The jurisdiction conferred by the Divorce Acts to make orders thereunder respecting the custody, maintenance, or education of infants can be exercised during the whole period of infancy, i.e., *until the children, whether males or females, attain twenty-one years of age.*

Decision of Sir Francis Jeune reversed.

APPEAL by the petitioner from an order of Sir Francis Jeune, dated the 4th June 1894.

The facts of the case sufficiently appear from the judgment of Lindley, L.J.

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law

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Inderwick, Q.C. (*Searle* with him) for the appellant.—Sect. 35 of 20 & 21 Vict. c. 85 enacts, that ". . . . on any petition for dissolving a marriage, the court may from time to time, before making its final decree, make such interim orders, and may make such provision in the final decree as it may deem just and proper with respect to the custody, maintenance, and education of the children, the marriage of whose parents is the subject of such suit. . . ." This power was extended to applications made after decree by sect. 4 of 22 & 23 Vict. c. 61, which enacts that "The court, after a final decree of . . . dissolution of marriage may . . . make from time to time all such orders and provision with respect to the custody, maintenance, and education of the children the marriage of whose parents was the subject of the decree . . . as might have been made by such final decree or by interim orders in case the proceedings for obtaining such decree were still pending. . . ." On the question of providing for the custody, maintenance, and education of children of divorced parents there have been the following decisions:—Two-thirds of a guilty wife's property were settled immediately on her children, and the remaining one-third on her death or re-marriage, in

Bacon v. *Bacon*, 2 Sw. & Tr. 86.

A moiety of the income of the property of a wife against whom a decree of judicial separation had been pronounced was made payable for the maintenance and education of her children in

Seatel v. *Seatel*, 4 Sw. & Tr. 230.

A fund was ordered to be held in trust for the children of the marriage in equal shares in

Bent v. *Bent*, 2 Sw. & Tr. 392.

The age of an infant child was successfully set up by a father as a ground for refusing to give up its custody in

Ryder v. *Ryder*, 2 Sw. & Tr. 225.

It was held that there was no jurisdiction to order maintenance for a child over sixteen in

Webster v. *Webster*, 31 L. J. N. S. 184, P. M. & A.

In addition to permanent alimony a guilty husband was ordered to pay 30*l.* a year towards the maintenance and education of his children in

Milford v. *Milford*, 21 L. T. Rep. 155; L. Rep. 1 P. & D. 715.

The power of the court to make provision for the benefit of children was considered in

Marsh v. *Marsh*, 16 L. T. Rep. 366; L. Rep. 1 P. & D. 440.

An allowance was made for a child until twenty-one in

Benyon v. *Benyon*, L. Rep. 1 P. & D. 447.

It was held that upon a decree for judicial separation, when the court had ordered a provision to be made for the children, it had no power to order also that the respondent should secure the payment, in

Hunt v. *Hunt*, 8 Prob. Div. 161.

It was held that the court had no jurisdiction to make an order as to the custody or maintenance or education of a child over sixteen in

Blandford v. *Blandford*, 67 L. T. Rep. 392; (1892) P. 148.

That case proceeded on *Webster* v. *Webster* (*ubi sup.*), and the petitioner here is practically appealing from *Blandford* v. *Blandford* (*ubi sup.*), as Sir Francis Jeune followed *Blandford* v. *Blandford*. His Lordship did not go into the question of discretion at all. He said he had no power to order maintenance to be paid for a child who had attained the age of sixteen. The order made by the registrar was affirmed by Sir Francis Jeune because he was of opinion that, as a matter of law, the order of the 8th Aug. 1893 ought to be discharged as regarded the child who had attained sixteen years of age. But the petitioner now appeals, and I ask the court to say that the learned judge took a wrong view of the law on this point, having regard to the various decisions which I have cited.

Bayford, Q.C. (*Barnard* with him) for the respondent.—The case of *Bent* v. *Bent* (*ubi sup.*) is no authority for this matter at all. As regards all the other cases, they were either under sect. 45 of 20 & 21 Vict. c. 85, which deals with the settlement of the property of the guilty party, or under sect. 4 of 22 & 23 Vict. c. 61, which deals with the alteration of such a settlement. Arguments founded on cases relating to settlements of property have really nothing to do with the present point. The object of those enactments is to prevent a guilty wife from going off with her property without making a proper provision for her husband and children. That, I say, distinguishes the cases entirely. In Simpson on Infants (2nd edit., p. 141) the following passage appears: "There is no case in England expressly determining the age at which a male infant acquires such right of election, but it may be gathered from *Reg.* v. *Clarke* (7 Ell. & Bl. 186) that it is fourteen, at which time the age of nurture ceases. In Ireland there are two cases expressly deciding this point: *Re Shanahan* (20 L. T. Rep. O. S. 183); *Re Connor* (16 Ir. C. L. 112)."

Inderwick, Q.C., in reply, referred to

Re Ethel Rowe (or Brown), 51 L. T. Rep. 793; 13 Q. B. Div. 614;

Short & Mellor's Practice of the Crown Office, p. 343.

Cur. adv. vult.

July 16.—The following written judgments were delivered:—

LINDLEY, L.J.—This is an appeal from an order of the President of the Divorce Court discharging the defendant from further maintaining one of his children, who has recently attained sixteen. On the 15th March 1892 the petitioner, Mrs. Thomasset, obtained a decree for divorce from the respondent. On the 8th Aug. 1893 an order was made for the payment by the respondent to the petitioner of permanent alimony at the rate of 266*l.* per annum, and 23*l.* 6*s.* 8*d.* per annum for each of the four younger children of the marriage for their maintenance and education. On the 27th March 1894 the eldest of these four children, Theodore, attained sixteen, and on the 1st June 1894 an order was made by the registrar, on the application of the respondent, that the allowance of 23*l.* 6*s.* 8*d.* for the maintenance of such child should cease. This order was affirmed by the President, not because he was of opinion that under the circumstances of the case it was just or expedient to vary the former order of the 8th Aug. 1893, but simply because as a matter of law that order ought to be discharged as regards the child who had attained sixteen. The object

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of this appeal is to have the view of the law reconsidered. The question thus raised is one of very considerable importance, and renders it necessary to consider the jurisdiction and practice of the Divorce Court as regards the custody, maintenance, and education of children. Before, however, referring to the statutes which relate to this matter it is desirable to state, shortly, the law and practice of the courts of common law and Chancery and of the Ecclesiastical Courts as regards infants. In former times the Ecclesiastical Courts appointed guardians for infants in testamentary causes and cases of intestacy (see 4 Burn's Eccles. Law, 9th edit., p. 142), but it is so long since these courts have interfered between parent and child that it is needless to refer further to them. The jurisdiction of courts of law was exercised by *habeas corpus*. The principles on which courts of common law act in dealing with persons brought up under a *habeas corpus* are very clearly stated in Coleridge, J.'s judgment in *Rex* v. *Greenhill* (4 Ad. & Ell. 624, at p. 643). [His Lordship read an extract from that judgment, and continued:] The age at which a child is deemed to have a discretion is fourteen in the case of a boy and sixteen in the case of a girl: (see *Reg.* v. *Clarke*, 7 Ell. & Bl. 186). The age of sixteen appears to have been adopted by reason of the language used in the statute 4 & 5 P. & M. c. 8, s. 3, relating to the abduction of girls: (see *Reg.* v. *Howes*, 3 E. & E. 332; 30 L. J. N. S. 47, M. C.) After a child has attained the age of discretion a court of common law will set it free if illegally detained, but will not force a child against his or her will to remain with his or her father or legal guardian, although Lord Mansfield said that the court had a discretion as to the order it would make: (see *Rex* v. *Delavel*, 3 Burr. 1, 435; and see the note to *Ex parte Hopkins*, 3 P. Wms. 151, 153.) It must not, however, be inferred from the decisions referred to above that a father has no legal right to the custody of his child after he or she has attained the age of fourteen or sixteen. The father's right to such custody exists until the child attains twenty-one. This is clearly stated in Hargreaves's note to Coke upon Littleton, p. 88. This right of the father was extended by 12 Car. 2, c. 24, s. 8, which enabled him by deed or will to appoint a guardian for any of his children until they attain twenty-one. The right of the father himself as guardian of his children to their custody until they attain twenty-one is taken for granted, although not expressly declared in this statute. Such right, moreover, was distinctly recognised by Patteson, J. in an opinion given by him when a judge to Sir Erskine Perry: (see *Reg.* v. *Clarke*, 7 Ell. & Bl. 186, 199), and was again recognised by Cockburn, C.J. in *Reg.* v. *Howes* (*ubi sup.*). Lastly, this right was recently emphatically asserted by the Court of Appeal in *Re Agar-Ellis* (50 L. T. Rep. 161; 24 Ch. Div. 317), where an attempt was made to remove a girl over sixteeen from the care of her father. The jurisdiction of the Court of Chancery over infants is twofold. In so far as it depends on the law relating to writs of *habeas corpus*, the power of the court appears to have been the same as that of courts of common law. But quite independently of those writs the Court of Chancery exercised the power of the Crown as *parens patriæ* over infants, and in the exercise of this jurisdiction the power of the court has always been much more extensive than that possessed by courts of common law under a writ of *habeas corpus*: (see *Re Spence*, 2 Ph. 247, 252; per Cotton, L.J., in *Re Agar-Ellis* (*ubi sup.*); and *Reg.* v. *Gyngall*, 69 L. T. Rep. 481 (1893) 2 Q. B. 232.) The Court of Chancery has exercised this larger power in aid of fathers and guardians over children who have attained the age of discretion. Thus, in *Hall* v. *Hall* (3 Atk. 721) and in *Anon.* (2 Ves. sen. 374), boys over sixteen have been compelled to go to the schools selected by their guardians, and in *Todd* v. *Lynes* (not reported, but referred to in Simpson on Infants, 2nd edit., p. 144) a boy of seventeen was taken from a monastery and given up to the father. What the wishes of the boy were does not, however, appear. In the exercise of this jurisdiction the rights of fathers and legal guardians were always respected, but were controlled to an extent unknown at common law by considering the real welfare of the infants: (see *Re Macgrath*, 69 L. T. Rep. 636; (1893) 1 Ch. 143 and the cases there referred to.) As regards maintenance the parent's obligations were measured both at law and in equity by the poor laws. I know of no case in which a father has been ordered by a court of equity to maintain his child. Courts of equity ordered children to be maintained out of their own property. But the jurisdiction as to maintenance and education was limited to such property. By the Judicature Act 1873, each division of the High Court can exercise the jurisdiction of the old Court of Chancery, and by sect. 25, clause 10, it is enacted that "in questions relating to the custody and education of infants the rules of equity shall prevail." This enactment enables all divisions of the High Court, even on *habeas corpus*, to regard something more than strict legal rights of fathers and guardians, and requires all the divisions to recognise the cardinal principle on which the Court of Chancery always proceeded, viz., that in dealing with infants the primary consideration is their benefit. This view of the enactment was distinctly adopted and acted upon by the Court of Appeal in *Reg.* v. *Gyngall* (69 L. T. Rep. 481; (1893) 2 Q. B. 232), in which the Master of the Rolls explained some previous observations made by him in *Re Agar-Ellis* (*ubi sup.*), and which observations had apparently been somewhat misunderstood. Having made these preliminary observations, I proceed to consider the jurisdiction of the Divorce Court as regards the custody and maintenance of the children of persons divorced or judicially separated. The Act of 20 & 21 Vict. c. 85, sect. 35, runs thus: [His Lordship read the section, and continued:] This power was extended to applications made after decree by 22 & 23 Vict. c. 61, sect. 4. [His Lordship read it, and continued:] The jurisdiction thus conferred is far greater than that exercised by any court previously existing. This was early seen, and is explicitly stated in *Marsh* v. *Marsh* (1 Sw. & Tr. 312) and *Spratt* v. *Spratt* Ib. 215). Nothing can be wider than the discretion and power conferred upon the Divorce Court by those two sections. It can order parents to maintain and educate their children at their own expense, which no court could do before. And if it were not for the decisions to which I am about to refer, I should have thought that the power to order payment of a proper sum for the maintenance and education of the children under twenty-

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one of persons who had been divorced or judicially separated too clear for reasonable doubt. I can discover no ground for saying that infants between the ages of fourteen or sixteen and twenty-one are not children within the meaning of the above enactments. The necessity for providing children with maintenance and education does not stop at fourteen or sixteen, and neither the necessities of the case nor the language of the statutes require or, in my opinion, admit of a construction which limits the power of the court to provide for children under fourteen or sixteen. However, there are decisions to the effect that the power of the court is so limited, and the President has considered himself bound by those decisions. It is necessary to examine them. There are five in all, viz., three before the Judicature Act and two since. Those before the Act are—(1861) *Ryder* v. *Ryder* (2 Sw. & Tr. 225), custody; (1862) *Webster* v. *Webster* (31 L. J. N. S. 184, P. M. & A.), maintenance; (1866) *Mallinson* v. *Mallinson* (14 L. T. Rep. 636; L. Rep. 1 P. & D. 221), custody. *Ryder* v. *Ryder* (*ubi sup.*) was a decision of the full court, consisting of Sir Cresswell Cresswell, Willes, J., and Channell, B.; and it was there decided that the court had no jurisdiction to make any order as to the custody of children over sixteen. The main ground for this decision appears to have been that courts of common law did not make orders disposing of the custody of children over sixteen, and the Divorce Court had not the children before it, and could not therefore enforce against them any order it might make. This reasoning does not appear to me satisfactory. The Divorce Court could decide as between the parents which parent should have the custody of the children. And even if the Divorce Court could not bring the children before it and exercise jurisdiction over them, still, if the Divorce Court had made an order binding on the parents, such an order might, if necessary and proper, have been enforced by proceedings in Chancery. The effect of *Ryder* v. *Ryder* (*ubi sup.*) practically was to enable a delinquent father to set up the age of his infant child as an answer to an application for an order for its custody. This was, in my opinion, an unfortunate decision; but it is one from which the Judicature Acts have, in my opinion, set us free. It was also wrong to hold as a matter of law that maintenance followed custody, and that the court had no jurisdiction to order maintenance for a child over sixteen. This was decided in *Webster* v. *Webster* (*ubi sup.*), although Willes, J., in *Ryder* v. *Ryder* (*ubi sup.*) had pointed out that it did not follow from that decision that maintenance could not be ordered for a child over sixteen. Even before the Judicature Act 1873 the cases, in my judgment, went too far. But after that Act I confess my inability to understand how it can be right to hold that the statutory discretion conferred upon the court is restricted within the narrow limits previously supposed. And in *Benyon* v. *Benyon* (L. Rep. 1 P. & D. 447) an allowance was made for a child until twenty-one. However, in *Blandford* v. *Blandford* (67 L. T. Rep. 392; (1892) P. 148) the late president of the Divorce Court (Sir Charles Butt) distinctly held that the court had no power to make an order as to the custody, or maintenance, or education of a child who was over sixteen years of age. The attention of the President does not, however, appear to have been called either to the Judicature Act 1873, or to the case of *Re Agar-Ellis* (*ubi sup.*), and his decision, in my judgment, was erroneous. In the present case the learned President has simply followed *Blandford* v. *Blandford* (*ubi sup.*), which he considered to be binding on him. In my judgment the wide discretion conferred on the Divorce Court by the Divorce Acts has been unduly restricted by judicial decision. Such discretion ought to be exercised in each particular case as the circumstances of that case may require. And in exercising such discretion the Divorce Court, which has now all the powers of the old Court of Chancery, is not and ought not to consider itself fettered by any supposed rule to the effect that it has no power to make orders under the Acts respecting the custody, maintenance, or education of infants who, being males, are over fourteen, or who, being females, are over sixteen. I am clearly of opinion that, whether the children are males or females, the jurisdiction conferred by the sections of the Divorce Acts on which this case turns can, since the Judicature Acts at all events, be exercised during the whole period of infancy—that is, until the children, whether males or females, attain twenty-one, although I do not, however, say that a child who has attained years of discretion can, except under very special circumstances, be properly ordered into the custody of either parent against such child's own wishes. The appeal must therefore be allowed, and the case must be remitted to be dealt with on its merits, freed from the fetter by which the discretion of the judge was previously considered to be restricted. The costs of the appeal must be borne by the respondent.

LOPES, L.J.—This is a very important case, and as we are expressing a view different from that previously entertained, I desire to give my reasons for the conclusion at which we have arrived. The jurisdiction of the Divorce Court with regard to the custody, maintenance, and education of the children of parents divorced or judicially separated is derived from sect. 35 of the Act 20 & 21 Vict. c. 85, extended to applications made after decree by 22 & 23 Vict. c. 61, s. 4. [His Lordship read the section, and continued:] It is this section which the court is now called upon to construe. If I was construing this section for the first time apart from authority, I should have no hesitation in holding that a wide and comprehensive power was conferred on the Divorce Court, enabling the court in the case of parents who by their misconduct had subjected themselves to its jurisdiction to order them to educate and maintain at their own cost the children of the marriage so long as they should be under the age of twenty-one; a power, however, to be exercised at the discretion of the court according to the particular circumstances of each case in which its interference is invoked. It is difficult to see on what ground infants under the age of twenty-one are not to be regarded as children within the meaning of sect. 35. Nor can I understand on what ground the obligation to maintain and educate them is to determine at the ages of fourteen in the case of males and sixteen in the case of females, even if the right to their custody was to terminate at those periods. There is nothing in sect. 35 warranting such a conclusion, and, having regard to the words of the

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section, I should be slow to adopt such a construction of the section unless compelled so to do. Education and maintenance are as necessary between the ages of fourteen or sixteen and twenty-one as before those periods. To leave a child at the age of fourteen or sixteen without any provision for its maintenance and education in the case of parents divorced or judicially separated would be inhuman, and could never have been intended by the Legislature. Apart from authority, I do not understand that the President would so have interpreted the section in question. I rather gather that his view was in favour of the construction which I place upon the section, but he considered himself bound, as he was, by previous decisions of his court. I proceed to consider those decisions and the grounds upon which they were based. *Ryder* v. *Ryder* (2 Sw. & Tr. 225) was decided in 1861 by the full court, consisting of Sir Cresswell Cresswell, Willes, J., and Channell, B., and it was held that the court under the 35th section of the Divorce Act has no jurisdiction to make any order as to the custody of children upwards of sixteen years of age; but Willes, J. said at the conclusion of his judgment: "The question as to any order in respect of the maintenance of children above sixteen, if necessary, is not affected by our present decision." And this dictum is more fully given in the report of the same case in 30 L. J. N. S. 44, 47, P. M. & A., where the learned judge is reported to have said: "It is not to be inferred that the court has no power to order the maintenance of children between the ages of sixteen and twenty-one. It may well confer a benefit on parties not before it, but that is a very different thing from its interfering with their liberty, and ordering them to do something which they may not approve." *Webster* v. *Webster* (31 L. J. N. S. 184, P. M. & A.) was decided in 1862 by Sir Cresswell Cresswell, and in that case the Judge Ordinary, although the dictum of Willes, J. in *Ryder* v. *Ryder* (*ubi sup.*) was brought to his notice, held that the court had no power to order that a provision should be made for the maintenance and education of a child above the age of sixteen, saying "that in his opinion the maintenance followed the custody." I am at a loss to understand on what the learned judge based this opinion, even if he thought the power with regard to the custody terminated at that age. *Mallinson* v. *Mallinson* (14 L. T. Rep. 636; L. Rep. 1 P. & D. 221) came before the court in 1866, and Lord Penzance, following *Reg.* v. *Howes* (3 E. & E. 332; 30 L. J. N. S. 47, M. C.), considered that the power of the court to control the custody of children terminated at the age of sixteen. These are all the decisions before the Judicature Act 1873. Since the Judicature Act there are two cases to which it is necessary to refer. The one is *Benyon* v. *Benyon* (1 Prob. & Div. 447) where an order for maintenance was made for a child until twenty-one. The other is *Blandford* v. *Blandford* (67 L. T. Rep. 392; (1892) P. 148), the case upon which, as I understand, the President acted. In this case the late President held that the court had no power to make provision for the maintenance of children above the age of sixteen. He says: "It is perfectly clear on principle and authority that, if I were dealing with the first of the matters mentioned in the sections, that is, with custody, I should have no power to make an order as to the custody of a child who had attained the age of sixteen years. When we come to the next matter—education—the sections can only be intended to apply to the education of young persons, and are certainly not intended to apply to the education of a child as long as he or she may live. Am I to put a different construction on the sections in regard to maintenance? My own opinion is, that the sections dealing with the custody, maintenance, and education of children apply only to infants, and deal with all these matters exactly in the same way." Such is the state of the authorities at the present time. In the Divorce Court, therefore, it has been held that, the right of parents to the custody of their children terminating at sixteen, no provision for education or maintenance can be ordered after that age. As I have said before, even if the right to the custody did terminate at sixteen, I should not be prepared to hold that the power to order a provision for education and maintenance was to be so limited. The Act of Parliament does not, in my opinion, associate custody, education, and maintenance together with a view of subjecting them to the same incidents, but intends the court to deal with each in such a way as it thinks fit. The basis upon which the decisions are founded is the assumption that the right of the parent to the custody of his children terminates at the age of sixteen. But is this correct? No doubt a writ of *habeas corpus* would not go to compel a child over the age of sixteen to return into the custody of the parent when such child was unwilling to submit to such custody. But, subject to such unwillingness on the part of the child, I can entertain no doubt but that the parent is entitled to the custody of his child as against anybody detaining the child against its will up to the age of twenty-one. There can be, I think, no doubt but that the right of parents to the control and guardianship of their children exists up to the age of twenty-one years, unless the parents have, by their own grossly immoral and improper conduct, forfeited their rights or abdicated their parental authority. The Act 12 Car. 2, c. 24, gives the father the power of appointing a testamentary guardian. Sect. 8 of that Act gives to a father power by will, or by a deed, to dispose of the custody and tuition of his child or children for and during such time as he or they shall respectively remain under the age of twenty-one years or any lesser time. That Act authorises the father to delegate to others the custody and tuition of his children until they are twenty-one. Nothing can be a clearer declaration of the law than that the father himself, when living, has the right to the custody and tuition of his children whilst they are under the age of twenty-one years. *Reg.* v. *Howes* (3 E. & E. 332, 336; 30 L. J. N. S. 47, 48, M. C.) was a *habeas corpus* case, but Cockburn, C.J. says, in one part of his judgment: "Now, the cases which have been decided on this subject show that, although a father is entitled to the custody of his children until they attain the age of twenty-one, this court will not grant a *habeas corpus* to hand a child which is below that age over to its father, provided it has attained an age of sufficient discretion to enable it to exercise a wise choice for its own interests." The Lord Chief Justice distinctly recognised that during infancy and over sixteen the right of the father still continues. The right of the father to control

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and direct the education of children until twenty-one was very fully considered in the case of *Re Agar-Ellis*; *Agar-Ellis* v. *Lascelles* (50 L. T. Rep. 161; 24 Ch. Div. 317), and it was held that the right continued until the age of twenty-one was attained. I am unable, therefore, to agree with the assumption upon which the cases in respect of maintenance in the Divorce Court have proceeded, viz., the right of the parent to the custody of his children terminating at the age of sixteen. In my judgment, the Divorce Court has power under the sections in question to make orders for the custody, education, and maintenance of children up to the age of twenty-one—a power to be exercised with discretion, according to the particular circumstances of each case in which its interference is invoked. The appeal must be allowed, and the case go back to be dealt with on its merits.

Appeal allowed.

Solicitors for the appellant, *Field, Roscoe*, and *Co.*

Solicitor for the respondent, *G. D. Byfield.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

April 14 *and May* 9.

(Before STIRLING, J.)

MACK *v.* POSTLE. (*a*)

Practice — Stop-order — Effect of — Stop-orders against share of person interested in income only containing no words referring to income—Certificates of Paymaster-General treating stop-orders as affecting capital only—Mortgage not disclosing prior settlement—Stop-order by mortgagees—Priority.

The court may, applying the principle of Macleod v. Buchanan (10 *L. T. Rep.* 9; 4 *De G. J. & Sm.* 265), *look at that which appears on the face of a stop-order and construe the stop-order in a way which will not render it a nullity.*

The object of obtaining a stop-order is to give effectual notice not to an officer of the court but to the court itself. Where no person has been misled by the paymaster's certificates based on a mistaken view of the effect of a stop-order and no questions of gravity and difficulty have arisen in consequence of such certificates or order, the court is at liberty to give effect to the stop-orders according to their true construction.

In view of the practice in the Paymaster-General's office of regarding stop-orders on funds in court as not affecting income where income is not mentioned on the face of the stop-orders, care should be taken in drawing up stop-orders to express on the face of them plainly what it is, whether capital or income, which is to be restrained, and where the operation of stop-orders is not so limited they should be treated at the paymaster's office as extending both to capital and income.

THIS was a summons asking for the payment of the income of a certain fund in court to the trustees of the marriage settlement of Arthur Paston Mack. The summons involved the question whether the mortgagees of the life interest of A. P. Mack, who was entitled to the income of the fund, were entitled to priority over the trustees of the settlement.

The settlement was prior in date to the mortgages, but the trustees of the settlement had obtained no stop-order and the mortgagees had no notice of the settlement. The mortgagees had obtained stop-orders, but it was objected that they did not affect the income of the fund. The facts are fully stated in the judgment of Stirling, J.

Graham Hastings, Q.C. and *Hadley* for the plaintiffs, Arthur Paston Mack and his wife, and the trustees of their marriage settlement.—The stop-orders cannot give the assignee any priority in respect of income. They are on capital only, and do not in any way affect the income of the fund. We are consequently entitled to the income of the fund. *Dearle* v. *Hall* (3 Russ. 1) was a case where the notice by the assignee expressly required the moiety of the dividends to be paid to him. The effect of placing a stop-order on a fund is merely to give notice to the Paymaster-General. The court is not in the position of a trustee receiving notice. Payment into court by trustees does not put an end to their trusteeship of the fund. A stop-order is not equivalent to notice to trustees, and does not in any way perfect the title. [STIRLING, J. called attention to *Lloyd* v. *Banks*, L. Rep. 4 Eq. 222; 36 L. J. 751, Ch.; 15 W. R. 1006.] That was a case of notice to trustees of an assignment of an interest in a trust fund, and decided that the reading by the trustee in the newspaper of an advertisement of a petition in the Insolvent Court, by which he became aware of the insolvency of his *cestui que trust*, did not amount to a formal notice to the trustee, and that the person who had taken a mortgage of the *cestui que trust's* interest subsequently to the insolvency, and had given the first formal notice to the trustees, was entitled to priority over the assignee in the insolvency. *Warburton* v. *Hill* (Kay, 470; 23 L. J. 633, Ch.) shows that trustees who pay money into court still remain trustees of it, and their trusteeship is not ousted unless the court has dealt with it, in which case the court becomes trustee. In a case like the present, where the court is not a trustee and it is impossible to give notice to the court, which would be equivalent to notice to trustees, a stop-order cannot affect the priority of incumbrancers. An order of the court prohibiting any dealing with the fund would alone be effectual. The paymaster would not have continued to make payments of income if these stop-orders had affected the income of the fund. The mortgagee of a life interest must lose his priority if he does not take possession of the interest mortgaged by applying to have the income paid to him. [STIRLING, J.—What authority is there for this?] They referred also to

Greening v. *Beckford*, 5 Sim. 195.

Buckley, Q.C. and *R. F. Norton* for the defendants, the trustees of the Legal and General Life Assurance Company.—The question is, what is the effect of these orders. The view the Paymaster-General has taken is, that it is simply an order upon capital. Having a stop-order on a share or interest, you cannot escape the duty of inquiring what the share or interest is. The court will

(*a*) Reported by J. SANDERSON, Esq., Barrister-at-Law.

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ascertain in every case what the effect of the stop-order is:

Macleod v. *Buchanan*, 10 L. T. Rep. 9; 4 De G. J. & Sm. 265.

The order in that case necessarily in point of form affected the whole fund, but only in point of form. For information as to the extent of the interest assigned it was necessary to have recourse to the petition. The orders in this case affect the share or interest, and the court, as in *Macleod* v. *Buchanan* (*ubi sup.*), will ascertain what that share or interest is. A stop-order on a fund in court, like notice to trustees in the case of the funds being in their hands, is the most effectual step that can be taken towards equitable possession. See the judgments of the Court of Appeal in *Mutual Life Assurance Society* v. *Langley* (54 L. T. Rep. 326; 32 Ch. Div. 460). We admit that the court is not a trustee. The mortgagee of a life interest is under no obligation to take steps to be put in possession of the interest of his mortgagor, and runs no risk by omitting to do so.

Charles Church for the trustees of the will.

Hastings in reply.—Though there are a number of orders the income has never been stayed. An order by which income is stayed alone can give priority. *Macleod* v. *Buchanan* (*ubi sup.*) is in no way inconsistent with this proposition. It is not the practice of the Paymaster-General's office to treat a general stop-order as affecting income, and this being the case these general orders will give no priority in respect of the particular limited interest of A. P. Mack. Priority is gained by the first stop-order dealing with the income, and by that alone. The practice prevailing in the Paymaster-General's office is conclusive.

Cur. adv. vult.

May 9.—STIRLING, J. gave judgment as follows:—In this action a fund of 31,867*l.* 17*s.* 1*d.* Consols has been carried over to "the account of the legacy bequeathed to Arthur Paston Mack and his children, if any." To the income of this fund Arthur Paston Mack became entitled on attaining twenty-five; until that age he was only entitled to so much of that income as the trustees of the testator's will thought fit to allow for maintenance. He has no interest in the capital. Arthur Paston Mack attained twenty-one on the 22nd Jan. 1883, and subsequently to that date and prior to 1887 an order was made directing payment to him of 500*l.* per annum out of the income. In 1887 Arthur Paston Mack married, and on the occasion of his marriage assigned his life interest in the fund upon trusts, first, for payment of the premiums on a policy settled by him; secondly, for payment of 400*l.* per annum to his wife, and subject thereto for himself. No stop-order has ever been obtained by the trustees of this settlement. On the 14th March 1888 Arthur Paston Mack, without disclosing the settlement, mortgaged his life interest to the trustees of the Legal and General Life Assurance Company to secure repayment to them of 700*l.* On the 24th March 1888 the trustees of the insurance company obtained an order "that no part of the share of the plaintiff Arthur Paston Mack of and in the 31,867*l.* 17*s.* 1*d.* Consols in court to the credit of this cause *Mack* v. *Postle*, the account of the legacy bequeathed to Arthur Paston Mack and his children, if any, be transferred, sold, or otherwise disposed of without notice" to the trustees, the applicants. Subsequently Arthur Paston Mack executed a series of mortgages to the same trustees, still without disclosing the settlement, and on the occasion of each such mortgage a stop-order was obtained similar in form to that which I have stated, though not in absolutely identical language. Perhaps the widest is that of the 1st July 1891, which runs that "no part or share of and in the funds" (specifying them) "be transferred, sold, paid out, or otherwise disposed of.' In others the language is that "no part of the shares or interest of the plaintiff, Arthur Paston Mack, in the funds" be transferred, sold, or otherwise disposed of. In none of the orders is the income of the fund expressly mentioned. On the 12th Jan. 1894 the summons with which I have now to deal was taken out, asking for payment of the income of the fund in court to the trustees of Arthur Paston Mack's marriage settlement. This application is resisted by the trustees of the Legal and General Assurance Company, who claim priority over the settlement trustees by virtue of their stop-orders, and ask that the whole income should be paid to them. Before dealing with the case in its legal aspect, I must say something as to the circumstances under which the order of the 24th March 1888 was obtained. The summons as originally brought into chambers, which I have before me, was in this form. It asked "that no part of the 31,867*l.* Consols in court to the credit of the cause to which the plaintiff A. P. Mack is or may become entitled may be transferred, sold, paid, or otherwise disposed of without notice to the applicants." It went in the first place before the junior clerk in chambers, and he, seeing that the interest of A. P. Mack was limited to the income only, proposed to alter the summons by inserting, before the 31,867*l.* Consols, the words "dividends to accrue upon." One reason why the applicants resisted limitation to income was that they desired to have notice of change of investments. Ultimately the chief clerk decided that the "order may go, though strictly it should only affect dividends." The stop-order was practically simultaneous with an order of the 13th April 1888, for payment of the whole dividends to Arthur Paston Mack. On the application for the order of the 13th April 1888 the chief clerk insisted, and I think rightly insisted, that the consent of the incumbrancer should be obtained to the order, and accordingly the order of the 13th April 1888 is expressed to be made notwithstanding the stop-order previously made. The chief clerk has, as I understand on all subsequent occasions, insisted on the presence of the incumbrancer whenever the fund has been dealt with. The various stop-orders having been obtained under the circumstances which I have mentioned, it is next to be inquired what is the true construction of them. Certainly not one of them contains the apt words for dealing with the income of the fund mentioned in them. I apprehend, however, that in ascertaining the effect of these orders the court is not bound to confine its attention merely to the language of the orders themselves. In *Macleod* v. *Buchanan* (10 L. T. Rep. 9; 33 L. J. 306, Ch.; 4 De G. J. & S. 265) a stop-order expressed in terms wide enough to affect the whole of a fund was held to be limited in its operation to a particular share of it. Turner,

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L.J. says, at page 272 (4 De G. J. & S.): "It is true that the order obtained, in point of form, affected the whole fund, but it affected it in point of form only. Such orders, although they are drawn up as affecting the whole fund, do not of necessity show that the whole fund has been assigned, for every such order must affect the whole fund, as separate portions of the fund cannot be dealt with whilst the whole fund remains undivided. The form of the order, therefore, cannot be taken to show the extent of the interest assigned; but for this information recourse must, if necessary, be had to the petition on which the order is founded, and which, of course, must in the body of it disclose the assignment. In most cases, however, as in this, it is not necessary to resort to the body of the petition for this information, for either the assignor joins in the petition, as is the case here, or is served with it, and this appears on the order itself, which thus shows by whom the assignment has been made." Stop-orders are no longer obtained on petition, but this seems immaterial, for if the petition could be looked at, *à fortiori* one may look at what appears on the face of the order itself. Now, in each of these orders a mortgage by Arthur Paston Mack is entered as read, and by each the disposition of his share of the fund is restrained. For the purpose of ascertaining what the share is, the will of the testator must be looked at. When that is done, it is found that the only "share" of the fund to which Arthur Paston Mack is entitled is the income arising from such fund, and that income only is expressed to be assigned by the several mortgages mentioned in the orders. It seems to me that, under these circumstances, the orders must be construed as affecting that income, for on any other interpretation each would be simply a nullity. It is said, however, that it is the practice of the Paymaster-General's office to treat stop-orders as not affecting income except where income is mentioned on the face of the order; and that in this very case these orders have been so regarded, and are mentioned in the certificates of the fund issued under rule 99 of the Supreme Court Funds Rules 1886 as affecting capital but not income. I have ascertained by inquiry at the Paymaster-General's office that this statement of the practice is correct. I am further informed by the registrars that it is the practice of each of them in such orders to mention specifically income, whenever it is known to them that income is intended to be affected. The question then arises whether I am bound, having regard to this practice, to treat these orders as affecting capital only. For the purpose of determining this question I must consider, first of all, what is the general nature and effect of a stop-order; and secondly, what are the duties and obligations of the Paymaster-General. Now, as regards the question of the nature of a stop-order, it was decided in *Dearle* v. *Hall* and *Loveridge* v. *Cooper* (3 Russ. 1), and is now well-established law (see *Ward* v. *Duncombe*, 69 L. T. Rep. 121; (1893) A. C. 369), that where a fund is in the hand of trustees an incumbrancer on the interest of a beneficiary who gives notice to the trustees gains priority over an earlier incumbrancer who does not. It is equally well settled that where a fund is in court an incumbrancer cannot effectually gain priority except by obtaining a stop-order. So far as I can discover, the first reported case in which this was decided was *Greening* v. *Beckford* (5 Sim. 195), but no reasons are given for the decision. The foundation of the rule was carefully considered by Lord Hatherley (then Wood, V.C.) in *Warburton* v. *Hill* (Kay, 470; 2 W. R. 365). In that case a judgment creditor of a person interested in a fund in court had obtained charging orders on the debtor's interest, and had left copies at the office of the Accountant-General, and entries had been made of the orders, but he obtained no stop order. The Vice-Chancellor, although he did not decide the case on this ground, expressed the opinion that the judgment creditor's notice did not give priority, He gives his reasons at page 478 (Kay): "Suppose a party did not think it necessary to go to the Accountant-General, but came here and got the first stop-order, he would effectually prevent the transfer of the fund, which mere notice to the Accountant-General would not do. . . . It has been decided that notice to the trustee is sufficient to complete an equitable charge upon a trust fund, and that it is not necessary to make inquiry of the trustees. . . . If that be so, it can only be on the principle that notice puts it out of the trustee's power to deal with the fund. If, therefore, a person obtaining a stop-order is not affected by anything which the Accountant-General knows concerning the fund, it must be because he is only an officer of the court, which is really the trustee, and therefore it is that the party should come to the court to obtain a stop-order if he wishes to prevent a transfer of the fund. I see enormous inconvenience to the course of proceedings in the court in holding the Accountant-General to be a trustee, not taking into account the personal consequences to him. He is the agent of the court, and nothing more; the court is the trustee of the funds in his hands when it has made any order concerning them, and the person who paid them in remains the trustee until the court has dealt with them." Since this judgment was delivered the court has frequently been spoken of as standing in the place of a trustee as regards the funds under its control. Such language is made use of, for example, by the Court of Appeal in *Re Holmes* (54 L. T. Rep. 328; 29 Ch. Div. 788). There Brett, M.R. says, at p. 788: By the practice of the Court of Chancery when a fund was in court the court was considered to be in the position of a trustee, and a stop-order had the same effect as the notice of an incumbrance to a trustee;" and Cotton, L.J., at p. 789, says: "A stop-order takes the place of notice to a trustee." In the case of *Mutual Life Assurance Company* v. *Langley* (54 L. T. Rep. 326; 53 L. J. 996, Ch.; 32 Ch. Div. 460) Cotton, L.J. says, at p. 469 (32 Ch. Div.): "The true principle is this. One ought to consider how will notice be effectually given so as to prevent the fund which is being dealt with being improperly dealt with. As regards the funds in court, of which I will not call the court a trustee, but which the court has control and custody of, there the proper mode of giving effectual notice and the best mode is to obtain a stop-order." At p. 471 Bowen, L.J. says: "The doctrine upon which notice is necessary to complete the title is the branch of a broad rule that you must do your best to perfect the transfer of possession, and the notice really goes as far towards equitable possession as you can go,

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because you affect with notice the person who has actual control of the fund. In order to go as far as you can towards equitable possession you must direct your steps straight to the person in whose hands the fund is. He is the person who has obtained the control of it, and he is the person who alone ought to be dealt with as far as notice is concerned. If you have two sets of funds in the hands of two sets of persons, notice to one set is not sufficient notice to both. You must give notice to both. If you only give notice to one set you have only given notice to those who are in possession of part. When you apply that reasoning to money paid into court by the trustee it is perfectly clear that as soon as the trustee has parted with the dominion and control of part of the fund —as soon as the fund is partly in court—then the trustee has ceased to have control and dominion over the whole of it, he is no longer the person who has the control and dominion over the part that is in court. It may be an inaccurate expression to say the court is trustee, or that the trustee ceased to be trustee when the money was paid into court. He has no longer that sort of dominion over it which makes giving notice to him the best step to be taken towards equitable possession." [His Lordship then referred to the judgment of Fry, L.J. at p. 473, and continued:] The object, therefore, of obtaining a stop order seems to me to be to give effectual notice, not to the Paymaster-General or any particular officer of the court, but to the court itself. If the order when brought to the attention of the court is such upon its true construction as to affect a particular interest, it would seem to me to be sufficient and effectual to give priority to an incumbrancer on that interest, unless there is something in the rules of the court which renders it specially necessary to bring home notice to the Paymaster-General. The position and duties of the Paymaster-General are defined by the Chancery Funds Act 1872, sects. 4, 9, the Supreme Court of Judicature Funds Act 1883, sects. 2, 5, and the Supreme Court Funds Rules 1886, rules 45, 99. [His Lordship then considered these sections and rules at some length, and proceeded:] Rule 99 imposed (I believe for the first time) on the Paymaster-General the duty of certifying whether stop-orders affect principal or interest. As I have said, the certificates given by the paymaster in the present case treat the stop-orders obtained by the trustees of the insurance company as affecting capital and not income. That is not, as I think, the true construction of the orders; but if any person had been misled by the paymaster's certificates—if, for example, the present applicants had advanced money on the faith of those certificates, or if any official of the court had been induced to make an order which otherwise would not have been made—then it seems to me a question of gravity and difficulty would have arisen. Nothing of the kind has happened. The marriage settlement was prior to all the mortgages and all the stop-orders; the trustees of it have neglected to take the ordinary and proper step in order to make the assignment effectual. No officer of the court has been led by the orders or the certificates either to do or abstain from doing anything which he would otherwise have avoided or done; on the only occasion on which either the capital or the income of the fund in court has been sought to be dealt with the chief clerk has required the presence of the incumbrancers. Under these circumstances I think that I am at liberty to give effect to the stop-orders according to what I consider their true construction, and therefore hold that the incumbrances created by Arthur Paston Mack take priority over his marriage settlement. I wish to add that it seems to me to deserve consideration whether in future care should not be taken in drawing up stop-orders to express on the face of them plainly what it is, whether capital or income, which is to be restrained, and whether in all cases where their operation is not so limited they ought not to be treated at the paymaster's office as extending both to capital and income. The clerks in the Paymaster-General's office are not necessarily persons who have had a legal training, and even if they had, the materials which they have do not enable them to put the true construction on the order. They can only look at the title of the account, which in this case does not appear to me to have been happily expressed; and at the order which comes before them, which also in this case appears to me to be not happily framed. I think, therefore, that attention should be directed, in all cases in which stop-orders are sought, to the question whether capital or income, or both, are to be affected.

Solicitors: *Henry G. Church; Lawrence, Graham, Gray,* and *Sutherland.*

Friday, May 25.

(Before STIRLING, J.)

Re BROWN'S TRADE MARKS. (*a*)

Trade marks—Old marks—Change in the name of the firm and removal to new place of business—Leave to amend—Patents, Designs, and Trade Marks Acts 1883-1888, *s.* 92.

The owner of certain trade marks registered as used before the 13*th Aug.* 1875 *asked for leave to alter them by striking out certain names and addresses and either leaving the spaces blank or filling in the applicant's present firm, name, and business address. The Comptroller objected so far as it was proposed to leave blanks.*

The Court gave leave to amend by striking out as proposed, with the substitution proposed by the applicant.

IN the year 1876 Edward Henry Brown, on behalf of himself and his partner Frederick Charles Brown, trading as E. Brown and Sons at 67, Princes-street, Leicester-square, London, registered certain trade marks in Class 50 as having been used previously to the 13th Aug. 1875.

In 1891 Edward Henry Brown registered another trade mark in the same class as used by him and his predecessors in business before the 13th Aug. 1875.

The business was originally established by E. Brown, who carried it on at 25, Broad-street, Golden-square. Frederick Charles Brown retired from the business in 1884, and E. H. Brown, who obtained the retiring partner's interest in the goodwill and trade marks, thenceforth carried on the business as E. Brown and Son. At a date after the year 1876 the business was moved to 7, Garrick-street, Covent Garden, and a branch established at 26, Rue Bergère, Paris.

(*a*) Reported by J. SANDERSON, Esq., Barrister-at-Law.

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In March 1894 E. H. Brown gave notice of motion for leave to alter the said trade marks in different ways, the effect being to strike out the names and substitute the name of E. Brown and Son, or leave the space blank, and to strike out the addresses and substitute the present place of business, or the branch establishment in Paris as the case might be, or leave blank spaces.

John Cutler, for the motion, cited *Re Burham* (or *Burnham*) *Brick, Lime, and Cement Company's Trade Marks* (W. N. (1892) 134; 9 R. P. C. 422), as showing that sect. 92 of the Patents, Designs, and Trade Marks Acts 1883-1888 applies to old marks.

Ingle Joyce, for the Comptroller-General of Patents, raised no objection to the alterations asked if the court thought they should be made, but stated that the Comptroller objected to the leaving of blank spaces.

Cutler was willing that the blank spaces should be filled up as stated in the notice of motion.

STIRLING, J. gave leave to strike out of the trade marks what the applicant proposed by the notice of motion to strike out, and substitute what he proposed to substitute, the Comptroller's costs to be paid by the applicant.

Solicitors: *C. Urquhart Fisher; The Solicitor to the Board of Trade.*

House of Lords.

June 21, 22, *and Aug.* 3.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, ASHBOURNE, MACNAGHTEN, and RUSSELL.)

SMURTHWAITE AND OTHERS *v.* HANNAY AND OTHERS. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Practice—Parties—Joinder of plaintiffs—Different causes of action—Order XVI., r. 1—Order XVIII., rr. 1 and 2.

Order XVI., r. 1, deals only with the parties to an action, and has no reference to the joinder of several causes of action.

The several shippers or consignees of different shipments of goods shipped on board the same ship for carriage from and to the same places, joined as plaintiffs in one action against the shipowners on the bills of lading claiming damages for short delivery.

Held (reversing the judgment of the court below), that they were not entitled so to join under the Judicature Rules.

Booth *v.* Briscoe (2 *Q. B. Div.* 496) *distinguished.*

THIS was an appeal from a judgment of a majority of the Court of Appeal (Lord Esher, M.R. and Kay, L.J., Bowen, L.J. dissenting), reported in 69 L. T. Rep. 677, and (1893) 2 Q. B. 412, who had reversed an order of the Divisional Court (Day and Collins, JJ.), who had reversed an order of Mathew, J., made at chambers, refusing to direct a stay of proceedings in an action brought by the respondents against the appellants under circumstances which appear in the head-note above, and are fully set out in the judgments of their Lordships.

Bigham, Q.C., *J. Walton*, Q.C., and *Pickford*, Q.C. appeared for the appellants and argued that, in order to join in one action, every plaintiff must have an interest in the right claimed. Order XVIII., r. 1, provides that different causes of action may be joined, subject to the restrictions therein laid down, but, if Order XVI., r. 1, has the construction put upon it by the respondents, Order XVIII., r. 1, is unnecessary. Order XVI., r. 1, must be confined to one cause of action. This is not "the same transaction," but many different transactions. There is no common ground of action; each plaintiff here has a separate ground of action, and the defendants may have separate defences to each one of them. Order XVI., r. 1, was intended to remove any difficulty arising from misjoinder, as Bowen, L.J. points out in his judgment. The rule ought not to be carried further than this: where a contract is made with several persons they may join as plaintiffs, though it may not be a joint contract. So also in tort where the tort is one affecting several persons. *Burstall* v. *Beyfus* (26 Ch. Div. 35) and *Sandes* v. *Wildsmith* (1893) 1 Q. B. 771), are authorities against the respondents' contention.

Finlay, Q.C. and *T. G. Carver*, for the respondents, contended that the judgment of the Court of Appeal was right. Order XVIII., checks any possible abuse of Order XVI. The appellants' argument is, that Order XVI. does not extend further than the provisions of the Common Law Procedure Act of 1860; but the true view is, that any number of plaintiffs may be joined subject to the power of the court under Order XVIII. to prevent any abuse of its process. The effect of the appellants' contention would be to increase greatly the costs of preparing for trial, and then in the end all the cases would eventually be tried together. [Lord HERSCHELL, L.C.—On your contention I do not see the object of Order XVI., r. 3.] *Booth* v. *Briscoe* (2 Q. B. Div. 496) and *Gort* v. *Rowney* (17 Q. B. Div. 625) support the view taken by the Court of Appeal.

Bigham, Q.C. was heard in reply.

At the conclusion of the arguments, their Lordships took time to consider their judgment.

Aug. 3.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell).—My Lords: The appellants are the owners of a vessel called the *Castleton*. The respondents shipped certain cotton on board that vessel for carriage from a foreign port to Liverpool. On arrival at that port it was found that the marks of eighteen bales had been obliterated, and that, taking these into account, the total number which arrived was less by thirty-three than the number which, according to the bills of lading, had been shipped. Thereupon the present action was brought, the plaintiffs being the several holders of the bills of lading, either as shippers or as indorsees from shippers, who had not received delivery of the number of bales specified in their bills of lading respectively. Upon the question whether such an action can be maintained there has been a great difference of judicial opinion. Mathew, J. refused to stay the action. Day and Collins, JJ., in the Queen's Bench Division, took a different view, but

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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their judgment was reversed by the Master of the Rolls and Kay, L.J., the late Lord Justice Bowen dissenting. It is admitted that the claims of the plaintiffs are several, that they have no joint cause of action or claim to relief, and that before the Judicature Act they could not have been joined as plaintiffs in such an action as the present; but it is contended that Order XVI., r. 1, justifies the course which has been pursued in making them co-plaintiffs. The argument of the learned counsel for the respondents went this length, that the rule sanctions the joinder of any number of plaintiffs, however distinct the causes of action in respect of which they are suing, subject only to this, that any defendant alleging that several causes of action have been united which cannot conveniently be disposed of together may, under Order XVIII., r. 8, apply for an order confining the action to such of the causes of action as can be conveniently disposed of together. If the argument be a sound one it cannot, in my opinion, stop short of the point to which the learned counsel pressed it. The Master of the Rolls thought a more limited construction might be put upon the rule, that, large as the words of the rule were, if the causes of action vested in the plaintiffs respectively were not merely separate causes of action, but were in respect of utterly distinct and different transactions, then the plaintiffs could not join in one action in respect of them. I am unable, with all deference, to find anything in the language of the rule to justify drawing such a line, nor can I see how it could in practice be drawn. Take the facts of the present case as an illustration. In what sense can it be said with accuracy that the different causes of action all arise out of the same transaction? The claim is in each case in respect of a breach of a separate contract to deliver the goods shipped. Whether the goods, the non-delivery of which is complained of, were in fact shipped depends in each case upon a different set of circumstances. The several consignments may have been and probably were delivered to the shipowner by different persons, at different times, and under different circumstances. They were, it is true, delivered for carriage in the same ship and were goods of the same description. But I cannot see that this makes the transaction one any more than if goods consigned by different persons had been intended for carriage by different ships and had been of a different description. Precisely the same controversy, requiring just the same proof, might have arisen in the one case as in the other. And if the one case be within the rule I see nothing in its terms to exclude the other. Order XVI., r. 1, purports to deal merely with the parties to an action, and has, I think, no reference to the joinder of several causes of action. This subject is dealt with in Order XVIII. Yet, if I correctly understand the argument of the respondents, the construction they put upon Order XVI. necessarily deals with the joinder of several causes of action, and confers, without reference to any other order or rule, the right "to unite in the same action several causes of action." For, if it sanctions the joining of plaintiffs having separate and distinct causes of action, this involves of necessity the union in one action of several causes of action. The rule provides that "all persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative." This conveys to my mind the idea that the relief claimed by the plaintiffs who are joined is to be the same relief, especially when I consider that the rule only relates to the parties to an action, and that the right to join more than one cause of action is regulated by another rule. But for the use of the word "severally," I do not think any doubt would have been entertained that this was the true construction. There was naturally much discussion as to the meaning and effect of that word. In construing these rules it must always be borne in mind that before the passing of the Judicature Act the practice and procedure of the Court of Chancery and the courts of common law differed in many respects. It was a leading object of the rules framed under that Act to formulate a code of procedure which should in general be applicable to the Common Law and Chancery Divisions of the High Court alike. Now, there can be no doubt that in the Court of Chancery there were many cases in which co-plaintiffs might severally be entitled to the same relief, and might, before the Judicature Act, have been properly joined, although their claim was neither joint nor alternative. There is, therefore, no difficulty in satisfying every word of the rule by the construction which I have suggested, and it, I confess, appears to me the natural one. It cannot be doubted that, whatever construction is put upon the rule I have been considering, must be applied equally to rule 4 of the same order. The result of the respondents' contention would be that any number of plaintiffs might join together to sue any number of defendants in respect of causes of action not common to either plaintiffs or defendants. There are other rules of Order XVI. which seem to me to militate against this contention. It is difficult to understand how there could ever be a "misjoinder" if such a procedure were authorised. And what is the use of rule 6, which enables a plaintiff, "at his option, to join as parties to the same action all or any of the persons severally or jointly and severally liable on any one contract," if the previous rules have the effect contended for? I do not pause to discuss the question whether the construction contended for by the appellants or by the respondents would be found to provide the more convenient procedure. I have endeavoured to construe the rule apart from such considerations, but this much I may say, that I am far from satisfied that the balance of convenience is, as the respondents contend, on their side. I cannot accede to the argument urged for the respondents that, even if the joinder of the plaintiffs in one action was not warranted by the rule relied on, this was a mere irregularity of which the plaintiffs, by virtue of Order LXX., could not now take advantage. If unwarranted by any enactment or rule, it is, in my opinion, much more than an irregularity. Before concluding I ought to refer to the case of *Booth* v. *Briscoe* (2 Q. B. Div. 496) which was much relied on by the respondents. The plaintiffs who were joined in that action sued in respect of a libel impugning the management of an institution of which they were the trustees. No objection was taken to the constitution of the action. They recovered joint damages. In the Court of Appeal Bramwell, L.J. intimated an opinion that their causes of action were several, and that the damages should have

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been several also. But he thought that they might, nevertheless, under the circumstances, properly be joined. It is not necessary to determine whether that case was rightly decided. It is enough to say that it was a very different one from the present. I think that the judgment of the Court of Appeal should be reversed, and the judgment of the Queen's Bench Division restored, and that the respondents should pay the costs, here and below.

Lord ASHBOURNE concurred.

Lord RUSSELL.—My Lords: In this case the respondents, the plaintiffs below, sue the appellants, the defendants below, for non-delivery of certain bales of cotton shipped in the defendant's steamship *Castleton* at Galveston for carriage to Liverpool. The plaintiffs consists of sixteen firms or persons, nine of whom are alleged to have been shippers and seven consignees of the cotton in question. The defendants have pleaded several defences, the principal defence apparently being that the bales of cotton claimed were never shipped, or received for shipment, on board the defendants' ship. The facts alleged in the pleadings, so far as they are material, are as follows: Each of the nine shippers shipped bales of cotton, in varying quantities, on board the *Castleton*, receiving separate bills of lading therefor. The facts common to all the shipments were: that the shipments consisted of bales of cotton; that they were laden on board the same ship (which was a general ship); that they were consigned to the same port; and that the bills of lading were similar in all respects material in this case. When the ship arrived at Liverpool it was found that the total number of bales landed fell short of the total number in the bills of lading by eighteen. Further, it was found in the case of fifteen of the landed bales that their distinctive marks and numbers had been obliterated, and that they were unidentifiable. Those fifteen bales had been sold, and it is stated that their proceeds have been distributed proportionately amongst the several consignees. In this state of things the plaintiffs joined in bringing the present action. The defendants objected to the joinder of the plaintiffs in one action, and contended that each plaintiff was bound to bring a separate action in respect of his shipment or consignment, as being a separate and distinct cause of action. On the 1st June 1893 Mathew, J. made an order refusing an application to stay the action; but on appeal from that refusal Day and Collins, JJ. on the 30th June 1893 made an order that all further proceedings should be stayed, or the action dismissed, on the ground that the plaintiffs should have brought separate actions in respect of their respective claims, and further ordered that the plaintiffs should elect as to the claim to be proceeded with. Upon appeal had from the last-mentioned order, the Master of the Rolls and Kay, L.J. (Bowen, L.J. dissenting) gave judgment reversing the order of the Divisional Court, and thereby allowed the action to proceed. From that judgment the present appeal is brought. The question thus raised before your Lordships turns upon the proper construction of Order XVI., r. 1. That rule provides that: "All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitled to relief, unless the court or a judge in disposing of the costs shall otherwise direct." The Master of the Rolls thought that, grammatically construed, the order was wide enough in its terms to permit of the joining of any number of plaintiffs, although their causes of action related to entirely distinct and different transactions; but he thought that, in order to prevent the absurdity which he considered might arise from that wide construction, the rule ought to be construed with this limitation: namely, that although several plaintiffs with different and distinct causes of action might be joined together in one action, their causes of action must arise out of the same transaction. Further, he arrived at the conclusion that, although the plaintiffs in this case have different causes of action, they are causes of action which did arise out of the same transaction, and that therefore the plaintiffs were here properly joined. It seems to me that a serious ambiguity lies in the use of the words "same transaction" as here applied. I think that the causes of action here did not arise out of the same transaction. They arose out of similar but entirely distinct transactions, creating similar but entirely distinct legal liabilities. The goods of the several plaintiffs were, no doubt, sent in the same ship from the same port of shipment to the same port of discharge, and in that sense the plaintiffs may be said to have been parties to the same transaction, but in that sense only. The property in the goods was distinct in the case of each shipper, and the contracts of carriage were likewise distinct. There was no community of interest or of property as between the plaintiffs. In truth, the transaction was not one and the same. There were several transactions, similar indeed, but different and distinct from one another. Kay, L.J. was of opinion that if Order XVI., r. 1, stood alone, the joining under one writ here attempted of several plaintiffs with distinct and separate causes of action was not authorised by the rule; but he thought that Order XVIII., r. 1, did authorise such joining, subject to the power of the court or of a judge to intervene where considerations of convenience justified it. I cannot assent to this view. Order XVI. is conversant with a subject-matter different from that dealt with by Order XVIII. Order XVI. (principally in rules 1 and 4) deals with the parties to an action; but, in my judgment, Order XVIII. deals and deals only with the causes of action which may be joined together in an action properly constituted, as to parties, under Order XVI. Bowen, L.J. dissented from the view taken by the other members of the court, and I concur both in the reasons of that learned judge and in the conclusion at which he arrived. I cannot agree with the Master of the Rolls in the limitation which, to avoid an absurdity, he introduces in the construction of rule 1 of Order XVI.—namely, the limitation that the plaintiffs shall have been concerned in the same transaction. I find no such words of limitation either in rule 1 of Order XVI., dealing with plaintiffs, or in rule 4 of the same order, dealing with defendants; and, therefore,

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it seems to me that the only two possible constructions are those which were, in fact, the contentions of counsel at the bar for the appellants and for the respondents respectively. For the respondents it was broadly contended that any number of plaintiffs, with any number of distinct causes of action, might join in one action within the meaning of the rule, subject only to the control of the court or of a judge. I must dissent from this view. Indeed, if rule 1 is to have this wide construction, rule 4 must receive an equally wide construction. That rule provides as follows: "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found liable, according to their respective liabilities, without any amendment." According to this broad contention, therefore, it would be possible to join any number of plaintiffs with distinct causes of action against any number of defendants charged on distinct grounds of liability. On the other hand, it was contended for the appellants that the plaintiffs, who alone can be joined in one action under Order XVI., r. 1, are plaintiffs in whom, or in some of whom, not any, but the right to any relief claimed is alleged to exist. In my judgment, this is the true construction. In other words, the rule applies to cases where it is doubtful in which of the plaintiffs, or in what number of the plaintiffs, and whether jointly or severally, the legal right to relief exists, and also to cases (more frequent in the Chancery than in the common law courts) in which several plaintiffs having separate rights claim the same relief. This view is strengthened by the fact that several of the rules, following rules 1 and 4 of Order XVI. and rule 1 of Order XVIII., would have been unnecessary were the true construction the wide one contended for by the respondents. It is not unimportant to observe that rule 11 of Order XVI., which deals with misjoinder, only enables the court or a judge to deal with the names of parties "improperly joined"; but it is difficult to see, if the construction of rule 1 contended for by the respondents be right, how there could be a misjoinder of plaintiffs. On the other hand, Order XVIII., r. 11, dealing with joinder of causes of action, gives the court or a judge power to limit the joinder of causes upon considerations of convenience alone. It was suggested at the bar that, if this action were not allowed to proceed as now constituted, each plaintiff suing separately would be placed in a position of difficulty, because, it was urged, the defendants might attribute the unmarked bales, or a sufficient number of them, to the particular plaintiff suing, and so meet his claim. But this is not so. When the bales became unidentifiable, the several owners of cotton became, in point of law, owners in common of them in proportion to their respective interests, and the shipowner could only attribute such proportion in answer to any claim for non-delivery: (*Spence* v. *The Union Marine Insurance Company Limited*, L. Rep. 3 C. P. 427.) The argument of convenience was strongly pressed upon your Lordships. I am by no means certain that that argument has, in the facts of this case, much weight; but whether it has or has not, it cannot be regarded if, as I think, the orders and rules do not authorise that joinder of plaintiffs which has been here attempted. A brief reference to the authorities is sufficient. As to the case of *Booth* v. *Briscoe* (2 Q. B. Div. 496), it is only necessary to say that, assuming that case to have been rightly decided, which it is not necessary to determine here, it differs widely from the present one, and it is no authority for the respondents' contention. That was a case in which the plaintiffs, managers of an asylum, brought an action in respect of a libel which did not reflect upon them individually or by name, but upon the management. They brought a joint action, and recovered joint damages. No objection was taken to the constitution of the action until the matter came before the Supreme Court after trial, and Lord Bramwell came to the conclusion, in the circumstances I have mentioned, that, as the complaint was of one and the same wrong, they might be joined as co-plaintiffs. In *Gort* v. *Rowney* (17 Q. B. Div. 625) two plaintiffs suing together claimed relief in respect of separate and distinct causes of action. No objection was taken to the constitution of the action, which was referred to arbitration upon the terms that the costs were to abide the event; and the sole point to be determined was the question what was the event upon which the costs depended. Certain dicta of the Master of the Rolls in that case were relied upon by the respondents before your Lordships. But those dicta were not assented to by Bowen, L.J., and were, in fact, not necessary for the decision of the question at issue. A further point was taken at the bar on the part of the respondents, namely, that the joinder of the plaintiffs in a way not authorised by Order XVI. was a mere irregularity, and that the appellants came too late to take advantage of it. This objection is not, in my judgment, well founded. In my judgment such joinder of plaintiffs is more than an irregularity; it is the constitution of a suit as to parties in a way not authorised by the law and the rules applicable to procedure; and, apart altogether from any express power given by the rules, it is fully within the competence of the court to restrain and to prevent an abuse of its process. On the whole, therefore, I come to the conclusion that the judgment of the Court of Appeal should be reversed, and judgment entered for the appellants with costs.

The LORD CHANCELLOR.—My Lords: I am requested to state that Lords Watson and Macnaghten, who were present during the argument of the case, but are not able to be here to-day, concur in the judgment which has been been proposed.

Judgment of the Court of Appeal reversed; judgment of the Queen's Bench Division restored; respondents to pay the costs in this House and below.

Solicitors for the appellants, *Rowcliffes, Rawle, and Co.*, for *Hill, Dickinson, Dickinson*, and *Hill*, Liverpool.

Solicitors for the respondents, *Wynne, Holme*, and *Wynne*, for *H. Forshaw* and *Hawkins*, Liverpool.

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May 1 *and June* 4.

(Before the EARL of SELBORNE, Lords WATSON, MACNAGHTEN, MORRIS, and SHAND.)

COBB v. THE GREAT WESTERN RAILWAY COMPANY. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Railway company—Negligence—Duty to passenger—Refusal to stop train—Overcrowding—Robbery of passenger.

It is not the legal duty of a railway company to delay a train in order to give a passenger who has been robbed the opportunity of giving the alleged thief into custody.

The appellant was a passenger by the respondents' railway. While the train was at a station a gang of men forced their way into the carriage in which the appellant was seated, and assaulted and robbed him. The appellant complained to the station-master, and asked him to detain the train in order that the police, of which there was a sufficient force in the station, might take the men into custody and search them. The station-master refused to do this, and started the train. If the men had been arrested and searched at once, the property might have been recovered.

The appellant brought an action against the company alleging negligence in not delaying the train, and in allowing the carriage to be overcrowded.

Held (affirming the judgment of the court below), that the statement of claim disclosed no cause of action on either ground.

Pounder *v.* North-Eastern Railway Company (65 *L. T. Rep.* 679; (1892) 1 *Q. B.* 385) *discussed and doubted.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Bowen and Smith, L.JJ.), reported in 68 L. T. Rep. 483; (1893) 1 Q. B. Div. 459, affirming a judgment of the Divisional Court (Day and Collins, JJ.) reported in 68 L. T. Rep. 122, upon a point of law raised by the pleadings, and ordered to be disposed of under Order XXV., r. 2.

The point of law was, whether the statement of claim disclosed any cause of action.

The facts appear sufficiently from the headnote above, and from the reports in the courts below. The judgments below were in favour of the defendants, the present respondents, on this point.

R. W. Harper (*Robert Wallace* with him) for the appellant.—There was a duty on the company to detain the train for the purposes of justice, and for the breach of this duty they are liable. [The EARL of SELBORNE.—There is no allegation that it was safe to stop the train under the circumstances; the statement of claim is too vague.] As to the liability of a railway company for the property of passengers in their trains, see *Bunch* v. *The Great Western Railway Company* (55 L. T. Rep. 9; 13 App. Cas. 31). See also *Marshall* v. *York, Newcastle, and Berwick Railway Company* (11 C. B. 655), which lays down that there is a duty on the company to carry a passenger safely; and that case was approved in *Austin* v. *Great Western Railway Company* (16 L. T. Rep. 320; L. Rep. 2 Q. B. 442). [The EARL of SELBORNE.—If *Pounder* v. *North-Eastern Railway Company* (65 L. T. Rep. 679; (1892) 1 Q. B. 385) did not give rise to a cause of action, I cannot conceive what would do so.] There is a duty, independent of contract, to any person lawfully in the railway station. See the American case, *New Orleans Railway Company* v. *Burke* (24 American Rep. 689). The second point is the overcrowding: it need not be the only cause of the injury if it materially contributed to it, as in this case, in giving facilities for the robbery. The fact that the railway authorities had allowed the carriage to be overcrowded threw a greater duty on them to assist the appellant. The transit was not at an end. He was still a passenger.

Cripps, Q.C. and the Hon. *A. Lyttelton* for the respondent.—The statements of claim shows no breach of duty on the part of the railway company. *Pounder's* case and the American case referred to were very different from this case. No legal cause of action against the company is disclosed here. What the plaintiff is in fact asking for is not protection against, but detection of, the thieves. As to the overcrowding, there is no allegation that the men were put in by the company's servants. In any case the damage was not the direct consequence of the overcrowding, and is too remote.

Harper was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

June. 4.—Their Lordships gave judgment as follows:—

The EARL of SELBORNE.—My Lords: The plaintiff, appellant here, claims damages from the Great Western Company for the loss of 89*l.* 1*s.*, which was stolen from his person while travelling in one of their trains in May 1892, by all or some of a body (described in his pleading as a gang) of about sixteen persons, whom the company (as he alleges) "caused or permitted to enter" a compartment of one of their carriages in which he was seated, constructed to carry ten passengers. His claim is founded on a charge of negligence against the company on two grounds: the first being, that he complained of the robbery to the company's station-master at Wellington, in Shropshire, where the train stopped and where the robbery was committed, and that the station-master "refused to detain the train to permit him to give the said men into custody and have them searched"; and, immediately after the complaint, gave the usual signal, on which the train left; "and the plaintiff was thereby prevented (without any negligence on his part) from having the said men searched, and his property recovered." He avers, "that there was in and about the said station, at the time of the robbery, as the station-master well knew, a large force of police ready and willing to effect the said arrest for him, and search those arrested"; but that they were prevented from doing so by the station-master's action in starting the train; that the money stolen was "still in the aforesaid compartment of the carriage" when he made his complaint; and that it might and would have been recovered if the station-master had afforded time for the necessary search. The other ground was, that the company "was negligent in permitting the said "carriage to be overcrowded, and so facilitating the hustling and robbing of the plaintiff." The question, whether any case of actionable negligence was shown against the company upon the plaintiff's

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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statement of claim, was argued on the 16th Jan. 1893 before a divisional court, consisting of two judges (Day and Collins, JJ.), who held that no cause of action was shown, and ordered judgment to be entered for the defendants. On the 6th Feb. 1893 that judgment was unanimously affirmed by the Master of the Rolls, and Bowen and Smith, L.JJ. in the Court of Appeal. Two of the five learned judges who so agreed (Collins, J. and Smith, L.J.) referred to a recent decision of *Pounder* v. *North-Eastern Railway Company* (reported in 65 L. T. Rep. 679; (1892) 1 Q. B. 385) by Smith, L.J. when a judge of the Queen's Bench Division, and Mathew, J. How far they may have considered it an authority to govern the case before them, I cannot say; but for my own part, if I thought it necessary in the present case to consider the correctness of that decision, I doubt whether I should be prepared to follow it. It seems to me, as at present advised, that the facts proved in that case were sufficient to bring it within the principle of another decision cited at the bar from the 24th volume of the American Reports (p. 689), in which a different view of the duty of a railway company towards its passengers appears to have been taken, and one which more commends itself to my judgment. The facts, as I understand them, were, that the servants of the North-Eastern Company, having distinct notice that the plaintiff was, on reasonable grounds, apprehensive that an assault would be committed on him by certain other passengers by the same train if he were compelled to travel in the same carriage with them without protection, he was nevertheless compelled so to travel, and was left unprotected; with the result that the apprehended assault was committed. I am unable at present to see any distinction satisfactory to my own mind between such a case and that which the Master of the Rolls justly distinguished from the present, when he said that (in this case) it "was not alleged that the plaintiff was being ill-used or assaulted in the train, and that, the fact being made known to the defendants' servants, they did not interfere to prevent it." The present case is quite different; the plaintiff's complaint was made, not before, but after he had been robbed. It is not alleged that there was any failure to "protect him in person and property," down to the time when he made that complaint, unless the mere fact of "permitting the carriage to be overcrowded" was such a failure. As to this, I do not think it necessary to say more than that, on the plaintiff's pleading, it is not shown that the overcrowding of the carriage did, in fact, conduce in any way, directly or indirectly, to the robbery; and, on the assumption that, under some possible circumstances this might have been actionable negligence, it would, in my judgment, be indispensable, for that purpose, to state and prove some actual connection between the overcrowding and the loss. It is not, in my opinion, enough to suggest (as the plaintiff does) that to suffer such overcrowding was to "facilitate the hustling and robbing of the plaintiff." As the case is stated by him, nothing turns upon the fact that the robbery was committed by a "gang" of more than nine persons. The substantial question, therefore, is whether it was, as contended by the plaintiff, in his pleading, "a breach of the duty owed by the company to the plaintiff as a passenger on their line," to start the train at the time appointed for that purpose, without waiting till the plaintiff could give the men whom he charged with robbery into custody, and have them searched. None, I should think, of your Lordships will hesitate to say that it would be right for any station-master, in such circumstances as those alleged, to do whatever he reasonably can for the purposes of justice, when informed that a robbery, or any other crime, has been committed in one of the company's carriages; and a contrary course of conduct would be highly censurable, if no reasonable explanation of it could be given. In the present case your Lordships cannot tell what the facts really were, or what explanation of them might be given; you must take them for the purpose of your decision as they are stated by the plaintiff. I will not criticise minutely his form of statement, which certainly does not exclude the supposition that the station-master may have had reasonable ground for thinking that the immediate starting of the train was necessary or important. But, taking it in the manner most favourable to the plaintiff, I cannot myself hold that starting the train in the ordinary course was "opposing an obstacle to the recovery of the plaintiff's property" of such a kind as to make the company responsible, in the same way as if their negligence had caused or contributed to the robbery. If it was a duty to give opportunity for the arrest and search of the persons charged with the crime, that was, in my opinion, not a duty of the company to the plaintiff as a passenger on their line, but a duty to public justice, for failure in which, by one of their station-masters or any other person in their employment, the company are not liable in an action for damages. My conclusion is, that the order appealed from is right, and that the appeal ought to be dismissed with costs.

Lord Watson.—My Lords: I have had no difficulty in coming to the conclusion that the appellant's statement of claim does not disclose any cause of action against the respondent company; and I fully concur in the reasons which have been assigned for it by the Earl of Selborne. I do not express any opinion with respect to the judgment of the Divisional Court in *Pounder* v. *North-Eastern Railway Company*. That was a case of overcrowding during transit known to the company's officials, a circumstance which does not occur here; and the effect of overcrowding was not the only or the main question at issue. The decision of the case necessarily involved the further, and to my mind the more delicate, question, whether any, and if so what, duty a railway company owe to a passenger who is so obnoxious to other persons using the railway, that he runs the obvious risk of being assaulted by them. I prefer to reserve my opinion upon a case of that kind until it arises for decision.

Lord Macnaghten.—My Lords: I also agree in the judgment proposed, but with Lord Watson I should prefer to reserve my opinion upon *Pounder's* case until the question comes before the House for consideration in a case directly raising it.

Lord Morris.—My Lords: I agree in the judgment moved. I consider it is not the duty of, nor is there any legal obligation upon, a railway com-

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pany to stop and detain a train for the purpose of a passenger being enabled to give another passenger or any other person into custody. No authority for such a proposition has been cited, and I believe none exists. Under certain circumstances the railway company by their servants ought to do so, and might be morally censurable for not doing so; but that is a very different question from the company being legally bound to do so and being liable to an action for not doing so. As to the question of overcrowding, there is no allegation of facts connecting the robbery with the overcrowding, and making the overcrowding a *causa causans* of what occurred to the plaintiff. I agree that it is unnecessary for the decision of this case to consider the correctness of the decision of *Pounder* v. *North-Eastern Railway Company*; but, as at present advised, I should be disposed to dissent from it.

Lord SHAND.—My Lords: I agree in holding, for the reasons stated by the noble and learned Earl, that the appeal ought to be dismissed. As to the overcrowding of the carriage, if this is to be regarded as a separate ground of action because it is said to have facilitated the robbery of the plaintiff by persons described as "a gang," the damage is, I think, of a kind too remote to be regarded as the direct or natural consequence of the company's act. It is not alleged that the company's servants were aware that the persons who were allowed to overcrowd the carriage were known as thieves, or suspected of any felonious design, and there was nothing to suggest that the overcrowding of the carriage, to which no doubt the plaintiff was entitled to object, would cause more than serious discomfort to the plaintiff. In regard to the other grounds of action, it is not alleged that the plaintiff intimated that he was prepared to give the persons who had entered the carriage, or either of them, in charge to officers of police who were in attendance and ready to deal with the charge without delay. His complaint is, "that the station-master refused to detain the train to permit the plaintiff to give the said men into custody and have them searched," while in a subsequent part of his statement he alleges: "The said 89*l.* 1*s.* was still in the aforesaid compartment of the carriage at the time when the plaintiff complained to the said station-master, and might and would have been recovered had he afforded time for the necessary search." By these statements I understand that the plaintiff required the train to be stopped and his fellow passengers searched, if the police were entitled to do this, and it would depend on the result of this search whether he might give his fellow passengers, or some of them, into custody on a charge of robbery or not. I agree in thinking that the station-master, who, as representing the company, was bound to have in view the interests of the passengers generally, in regard to the time of starting the train, was not bound under the plaintiff's contract of carriage to accede to the plaintiff's request. The robbery had been completed, but the plaintiff was not in a position to make a charge against his fellow passengers which could at once and without delay be dealt with, and at all events he did not make such a charge. I refrain from making any observations on the case of *Pounder*, because, in any view which may be taken of the grounds of judgment in that case, the present case on its facts is clearly distinguishable from it.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Steadman, Van Praagh, Sims,* and *Co.*, for *W. L. Wilmshurst*, Huddersfield.

Solicitor for the respondents, *R. R. Nelson.*

Nov. 9, 10, 16, 1893, *and June* 5, 1894.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, HALSBURY, and SHAND.)

PALMER v. WICK AND PULTENEYTOWN STEAM SHIPPING COMPANY. (a)

ON APPEAL FROM THE SECOND DIVISION OF THE COURT OF SESSION IN SCOTLAND.

Contribution between joint tort-feasors—Law of Scotland—Quasi-*delicts.*

The rule laid down by the case of Merryweather *v.* Nixan (8 *T. R.* 186), *that there can be no right of contribution between joint tort-feasors, does not apply to the law of Scotland.*

In Scotland a right of relief exists and is available for a co-delinquent whose acts or omissions are not tainted with fraud or other moral delinquency.

Judgment of the court below affirmed.

THIS was an appeal fron a judgment of the Second Division of the Court of Session in Scotland, consisting of the Lord Justice Clerk (Macdonald), Lords Young, Rutherfurd-Clark, and Trayner, who had reversed a decision of the Lord Ordinary (Lord Wellwood) in an action brought by the respondents against the appellant.

The case is reported in 20 Ct. of Sess. Cas., 4th series, 275, and 30 Sc. Law Rep. 343.

The respondents were the owners of the steamship *Fergus*, and the appellant was a stevedore who was employed by them in 1891 to unload a cargo of pig-iron from the ship. A workman named Fowlis, who was employed by the appellant in the discharge of the cargo, was accidentally killed in consequence of some of the tackle giving way during the unloading. The personal representatives of Fowlis brought two actions, one against the appellant and one against the respondents, alleging negligence in them both in employing weak and insufficient tackle, whereby the accident was caused.

The two actions were tried together, and the jury found against both the defendants, and gave a verdict for the plaintiffs for 600*l.* damages and costs.

The costs were afterwards taxed at 237*l.* 19*s.* 9*d.*, and the respondents paid to the plaintiffs their damages and costs in full. They then took an assignment of the judgment against the appellant, and brought an action against him to recover contribution of a part of the sums paid by them.

The Lord Ordinary (Wellwood) dismissed the action on the ground that the respondents had no claim for relief against the appellant, being joint wrong-doers with him; but his judgment was reversed, as above mentioned.

Sir *R. Webster*, Q.C. and *T. Shaw* (of the Scotch Bar) appeared for the appellant, and

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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argued that the rule laid down by *Merryweather* v. *Nixan* (8 T. R. 186) applies in Scotland as well as in England, and that the action would not lie. The Scotch authorities are all negative as to this alleged right of contribution. See

Smith v. *O'Reilly*, Hume's Decisions, 605;
Western Bank v. *Douglas*, 22 Ct. Sess. Cas., 2nd series, 447;
Western Bank v. *Baird*, 24 Ct. Sess. Cas., 2nd series, 859.

The right to relief is only where a creditor has a right to assignation of the debt. The assignation affects the whole question: (see Bell's Dictionary of the Law of Scotland, "Assignation.") The rule has been applied in the following English cases:

Farebrother v. *Ansley*, 1 Camp. 343;
Wilson v. *Milner*, 2 Camp. 452;
Adamson v. *Jervis*, 4 Bing. 66;
Colburn v. *Patmore*, 1 C. M. & R. 73;
Shackell v. *Rosier*, 2 Bing. N. C. 634;

and in America:

Churchill v. *Holt*, 41 American Rep. 191.

The *Solicitor-General for Scotland* (Asher, Q.C.), *Salvesen* (of the Scotch Bar), and *T. F. D. Miller*, for the respondents, contended that the judgment of the court below was right, and that the rule in question was not a rule of Scotch law. See

Erskine v. *Manderson*, Morr. Dict. Dec. 1386;
Kames' Equity (edit. 1800), p. 89;
Stair's Institutes, lib. 1, c. 9, ss. 4, 5.

[Lord WATSON referred to *Anderson* v. *Blackwall*, Morr. Dict. Dec. 3354.] See also

Bell's Principles of the Law of Scotland, s. 62;
Bell's Dictionary, "Delict";
Digest, lib. ix., tit. 3, 1, and lib. xxvii., tit. 3, 1.

The rule has not been extended either in America (see *Armstrong County* v. *Clarion County*, 5 American Rep. 368, and the cases there cited), or in courts of equity in England:

Attorney-General v. *Wilson*, 4 Jurist, 1174;
Ashurst v. *Mason*, L. Rep. 20 Eq. 225;
Ramskill v. *Edwards*, 53 L. T. Rep. 949; 31 Ch. Div. 100;

and the late Scotch case of

Croskery v. *Hendrie*, 17 Ct. Sess. Cas., 4th series, 697.

At any rate, the rule cannot apply to a case like the present where there was no moral delinquency.

Sir *R. Webster*, Q.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

June 5.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell).—My Lords: The question raised in this case is a somewhat novel one. On the 17th March 1892, in two conjoined actions, in which Mrs. Fowlis and others were pursuers, and the present appellant and respondents were the defenders, the Court of Session decerned and ordained the defenders jointly and severally to make payment of sums amounting to 600*l.* On the 24th May 1892 a similar decree was made as regards the sum of 239*l.* 4*s.* 1*d.*, the pursuers' costs of the action. The pursuers, as they were entitled to do, sought payment of the entire sum of 839*l.* 4*s.* 1*d.* from the present respondents, who were, by the decrees, made severally as well as jointly liable. The respondents paid the entire amount, but took from the pursuers an assignation of the judgment, and of the moneys thereby secured. The respondents thereupon commenced an action to recover one-half of the amount so paid by them from the appellant. This action, the appellant maintained, was incompetent on the ground that there is no contribution between wrong-doers, that the judgment had been satisfied, and that the assignation of it to the respondents was in effectual to confer on them any right to recover in this action. The first of the two conjoined actions was instituted by Mrs. Fowlis on behalf of herself and some of her children, and by others of her children who were majors, against the respondents, to recover damages for the loss of her husband and the father of the children, whose death was alleged to have been due to the negligence of the defenders. His death was occasioned by the fall of a part of the tackle which was being used in the discharge of a vessel belonging to the defenders. They denied the negligence imputed to them, and alleged that if there had been any negligence it was that of the appellant, a stevedore employed to discharge the ship. The pursuers thereupon brought an action against him also, and the two actions were by order conjoined. The jury found negligence on the part of both the defenders. The decree of the 17th March, of which mention has already been made, was the decree applying this verdict. The decree of the 24th May related to the costs. We have before us in the present action only the pleadings and verdict in the conjoined actions. It is at least consistent with these that the jury may have found their verdict of negligence against the shipping company, not on the ground of any personal default on the part of the company or its managers, but by reason of some negligence imputable to the master of the vessel. It is important to bear this in mind. The learned counsel for the appellant did not contest the proposition that in general where one of two co-obligants discharges the entire debt he is entitled, unless there be some equity to the contrary, to call for an assignation of it, and to use such assignation for the purpose of enforcing payment of the share of his co-obligant. It is no answer to such an action to say that the whole of the debt has been discharged, and that there was therefore nothing to assign. There can be no doubt that the decrees of the 17th March and 24th May created joint and several debts. Why then should a co-debtor, who has paid the entire sum due and received an assignation (it is unnecessary to inquire whether he could have demanded it), when he seeks to recover the share of his co debtor, be subject more than other co-obligants to the answer that, the entire debt having been discharged, nothing remains due on the judgment, and that it can therefore no longer be proceeded on? The only answer, as it seems to me, must be that the joint debt resulted from a joint wrong, and that the law will not permit or assist any wrong-doer to recover contribution from another. It will be observed, however, that this is to allow the defender to set up his own wrong by way of answer, for the pursuer makes out a *primâ facie* case by the production of the judgment and assignation. He has no need to rely on the joint wrong, or to go behind the judgment and

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assignation. On principle I can see no reason why, when a joint judgment debt has resulted from a joint wrong, each co-debtor should not pay his share, or why, if one be compelled by the creditor to pay the whole debt, the other should be enabled to go free by setting up his own wrong. Suppose a settlement were arrived at before the case was tried, and the wrong-doers gave a joint and several bond in discharge of the pursuer's claim, can it be doubted that, if one of them were forced to pay the whole, he could recover from the other his share? Why should the case be different where the issue is a decree that they shall jointly and severally pay? The learned judges in the Inner House, differing from the Lord Ordinary, have decided in favour of the pursuers in the present action. I am not disposed to dissent from their conclusion unless it can be clearly shown to be contrary to the established law of Scotland. There is certainly no express decision on the point. The appellant relied mainly on a dictum of Baron Hume. That learned judge said: "It is all *unum negotium* in regard to those who are so far engaged in the wrong as to be liable for the consequences; and there is no principle here, as in the case of cautioners binding for the same debt, on which to imply any tacit agreement among them for mutual relief or division of the loss. Nor is the law at all inclined to distribute the damages out of tenderness to the delinquents:" (*Smith* v. *O'Reilly*, Hume's Dec. 605.) The observation that there was no right to mutual relief was not in any way necessary to the decision. It was a mere dictum. On the other hand, Lord Bankton and Lord Kames have both indicated views favouring the right to relief by a person bound *ex delicto* against his co-obligant. It is not necessary in this appeal to decide whether there can be any right to contribution in the case of a delict proper when the liability has arisen from a conscious and therefore moral wrong, nor even whether in every case of *quasi-delict* a delinquent may obtain relief against his co-delinquent, though I see, as at present advised, no reason to differ from the opinion which I gather that Lord Watson holds, that such a right may exist. In circumstances such as those with which your Lordships have to deal I cannot but think that equity and justice are in favour of the conclusion arrived at by the Inner House, and there seems to be no authority compelling a contrary decision. It was urged that the person seeking relief might be the more culpable of the delinquents; but it is just as likely that he should be the less culpable. In selecting from which of his co-debtors he will obtain payment, the creditor would be guided usually by considerations wholly independent of the relative culpability of those from whom he may recover it. Much reliance was placed by the learned counsel for the appellant upon the judgment in the English case of *Merryweather* v. *Nixan* (8 T. R. 186). The reasons to be found in Lord Kenyon's judgment, so far as reported, are somewhat meagre, and the statement of the facts of the case is not less so. It is now too late to question that decision in this country; but when I am asked to hold it to be part of the law of Scotland, I am bound to say that it does not appear to me to be founded on any principle of justice or equity, or even of public policy which justifies its extension to the jurisprudence of other countries. There has certainly been a tendency to limit its application even in England. In the case of *Adamson* v. *Jervis* (4 Bing. 66) Best, C.J., in delivering the judgment of the court, referred to the case of *Phillips* v. *Biggs* (Hard. 164), which he said was never decided. "but the Court of Chancery seemed to consider the case of two sheriffs of Middlesex where one had paid the damages in an action for an escape, and sued the other for contribution, as like the case of two joint obligors." He then proceeded as follows: "From the inclination of the court in this last case, and from the concluding part of Lord Kenyon's judgment in *Merryweather* v. *Nixan*, and from reason, justice, and sound policy, the rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act." If the view thus expressed by the Court of Common Pleas be correct (and I see no reason to dissent from it) the doctrine that one tort-feasor cannot recover from another is inapplicable to a case like that now under consideration. For these reasons I move your Lordships that the interlocutor appealed from be affirmed and the appeal dismissed with costs.

Lord WATSON.—My Lords: The respondent company are owners of the steamship *Fergus*, which, in April 1891, carried a cargo of pig-iron from Middlesborough to Grangemouth, where it was discharged by the appellant. In the course of that operation, David Fowlis, one of the workmen in his employment, was killed by the fall of a block, which formed part of the ship's tackle used in unloading. The family of the deceased brought an action of damages against the company, in which, besides alleging that the ship's tackle was of slighter make than is usually employed in vessels built for carrying pig-iron, they attributed the fall of the block to the defects of an iron hook to which it was attached. They raised a second action of damages against the appellant, in which they repeated some of these averments, and further alleged that it was the obvious duty of the appellant either to reject the tackle, or to use it with great caution; and that, in breach of such duty, he recklessly subjected the tackle to severe and unnecessary strains, by putting loads upon it which would have been sufficiently heavy for tackle made for the express purpose of unloading pig-iron. The cases were sent to trial together, when the jury found against each of the defenders, that the fall of the block, and its fatal consequences, were due to their fault; and they assessed the total damage sustained by the pursuers at 600*l*. There is certainly room for speculation as to the process of reasoning by which the jury arrived at that double result; but I can find nothing in their verdict, or in the record from which the issue was taken, which can be held to impute personal fault to the company or its directors, in this sense, that they knew of any flaw in the tackle of the *Fergus*, or were affected by any other knowledge which could make them conscious wrong-doers. The Court applied the verdict, by decerning against the parties to the present appeal, jointly and severally, for the full amount of the damages fixed by the jury, and found the pursuers entitled to expenses in both actions. These were subsequently taxed at

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237*l.* 19*s.* 9*d.*, for which sum the pursuers obtained a joint and several decree. They extracted both decrees, and gave a charge to the respondent company, who paid their demands in full, and took an assignation to the decrees. The appellant having declined to relieve them of any part of the sums thus paid by them, the company brought this action, in which they ask decree against him for a moiety of these sums. The Lord Ordinary (Wellwood) dismissed the action, on the ground that the company, being joint wrong-doers with the appellant, had no claim of relief. Their Lordships of the Second Division unanimously recalled his judgment, and gave the company decree as craved. At the bar of the House, the appellant mainly relied on the proposition, which he endeavoured to establish by authority, that by the law of Scotland, there can be no right of contribution among persons who are jointly responsible for the civil consequences of any delict or *quasi*-delict. Delicts proper embrace all breaches of the law which expose their perpetrator to criminal punishment. The term *quasi*-delict is generally applied to any violation of the common or statute law which does not infer criminal consequences, and does not consist in the breach of any contract, express or implied. Cases may and do often occur in which it is exceedingly difficult to draw the line between delicts and *quasi*-delicts. The latter class, as it has been developed in the course of the present century, covers a great variety of acts and omissions, ranging from deliberate breaches of the law, closely bordering upon crime, to breaches comparatively venial and involving no moral delinquency. In considering the authorities which were cited on both sides of the bar, as bearing more or less directly upon the present case, it is necessary to distinguish between these two points: (1) The right of the party injured to select any one or more of the co-delinquents, and to exact full reparation from him or them, without making the rest parties to the suit; and (2) the right, if any, of the co-delinquent who pays to recover a contribution from those persons who are under the same responsibility as himself. In the case of delicts proper, the first of these points has been established in the law of Scotland from a very early period. Before, and for a considerable time after Lord Stair wrote, the Court of Session was very familiar with claims of reparation for manslaughter, spulzie, and other grave delinquencies; whilst claims of damage in respect of breach of duty by persons in a position of trust and in respect of the negligence of servants, which in recent years have occupied so much of its time, were practically unknown. The result is that the early text-books refer almost exclusively to delicts proper. But the same rule of procedure has been extended to claims arising *ex quasi delicto*, and a recent instance of its application is to be found in *Croskery* v. *Hendrie and others* (17 Ct. Sess. Cas., 4th series, 697), a case to which I shall have occasion to refer hereafter. The enforcement of the rule in all cases falling within the wide category of *quasi*-delict, has led to consequences which, in my opinion, are inconvenient, if not absurd. Thus, if a body of private trustees commit a wilful breach of directions given by the truster to the great detriment of the trust estate, all its members must be made parties to any suit for reparation, because they are held, in that case, to be liable *ex contractu*; whereas, if the same body commit a comparatively venial breach of duty in violation of the general law regulating trust administration, any member may be sued for the whole loss resulting because he has been guilty of a *quasi*-delict. The second point, which is of crucial importance in this case, has never been the subject of judicial decision; and the authorities which have any direct bearing upon it are somewhat conflicting. Lord Brankton and Lord Kames both affirm, in the widest terms, that a right of relief *inter se* is competent to all persons concerned in and responsible for the civil consequences of the same delict—a rule which must apply *à fortiori* in the case of *quasi*-delicts. Lord Brankton, after referring to the rule that each co-delinquent is liable, and may be separately sued for the whole, goes on to say (Lib. 1, c. 10, s. 4), "yet payment and reparation by one liberates the rest, and in equity he ought to have relief against them proportionably, since by his money they are freed from the obligation." In his treatise upon the principles of equity, Lord Kames adopts the same doctrine. He discusses (edit. 1800, p. 89) the principle of mutual relief between co-cautioners, and points out that the same principles are equally applicable to *correi debendi*, adding "and it makes no difference whether the *correi debendi* be bound for a civil debt, or be bound *ex delicto*, for in both cases equally it is the duty of the creditor to act impartially, and, in both cases equally, equity requires impartiality." Baron Hume, in commenting upon *Smith* v. *O'Reilly and others* (Hume's Dec. 605), expresses a different view. That case raised no question of relief. A band of young men, acting in concert, had broken a number of street lamps. They were brought before the sheriff upon a complaint by the contractor to whom the lamps belonged, with concurrence of the fiscal, and were found jointly and severally liable in a fine of 5*l.* payable to the fiscal, and in 30*l.* of compensation to the private prosecutor. In so far as it related to the fine the sheriff's decree was plainly erroneous, because conjunct and several liability is unknown to the criminal law. The cause was carried by the accused to the Court of Session, where a fine of 1*l.* 5*s.* each was substituted for the penalty awarded by the sheriff, and the compensation reduced to 20*l.* No objection was taken except to the quantum of the decree for damages. In the course of his remarks the learned baron says: "It is all *unum negotium* in regard to those who are so far engaged in the wrong as to be liable for the consequences; and there is no principle here, as in the case of cautioners binding for the same debt, on which to imply any tacit agreement among them for mutual relief or division of the loss. Nor is the law at all inclined to distribute the damages out of tenderness to the delinquents. On the contrary, what the law mainly considers on such occasions is the convenience of the injured party, that he may recover his damages as speedily and certainly, and with as little trouble and expense as may be." It is possible that the observations of the learned baron were directed to the form of the decree which the judge ought to give to the party injured, when, as in that case, all the delinquents are sued for reparation. If he obtains a joint and several decree against them all, it can in nowise obstruct his convenience in recovering, that the delinquent who pays him should have

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relief from the rest. I do not think it necessary to cite in detail the passages in Lord Stair's Institutions (Lib. 1, c. 9, s. 5), which were relied on by both parties. They deal with the question, whether one co-delinquent can be sued for the whole, which his Lordship states to be not clear in equity, though settled by positive law; and such expressions as might be held to refer to the right of relief are, in my opinion, susceptible of different constructions. It is, however, material to note that Lord Stair expressly limits the operation of the rule to those persons who have either taken an active share in committing the delict, or knowingly sanctioned its commission. Mr. Erskine (Lib. 3, c. 1, s. 15), after stating the rule of procedure, says, "As soon as the damage is repaired or made up to the party hurt by any of them, the obligation is extinguished as to the rest, for an obligation founded upon damage cannot possibly continue after the damage ceaseth to exist." That is certainly true, in so far as the injured party is concerned. His claim is "founded upon damage," the claim of relief rests, not upon any injury sustained by the claimant, but upon the fact, as Lord Bankton puts it, that by the use of his money the rest have been freed from their obligation—a circumstance which, in ordinary cases, is sufficient according to the law of Scotland to raise a right of relief. Nor do I consider it necessary to refer in detail to the observations made by the late Lord President (then Lord Justice Clerk) in *Liquidators of Western Bank* v. *Douglas and others* (22 Ct. Sess. Cas., 2nd series, 447). That was an action against directors, based on gross and wilful malversation, and on gross habitual and total neglect of duty, in which all were participant, and, alternatively, on fraudulent concealment, or fraudulent misrepresentation, or gross negligence in which all of them were implicated. Some of these allegations, if proved, would have amounted to delict. The defenders pleaded that the action could not proceed until an official of the bank, who appeared on the face of the record to be a co-delinquent, was called as a party. The court rejected the plea upon the ground that the action was founded upon delict or *quasi*-delict. The observations of the Lord President, upon which the appellant relied, do not appear to me to carry the doctrine beyond that limit; and it is necessary to notice in connection with them the views expressed by the learned judge, at a subsequent stage of the same case, in *Liquidators of Western Bank* v. *Baird* (24 Ct. Sess. Cas., 2nd series, 859). His Lordship said: "In an ordinary action, brought against trustees or managers, or mandatories acting under authority from others where liability is sought to be enforced simply on the ground of gross neglect or omission, it may be fairly questioned whether all the parties implicated ought not to be called, so that, although liable, it may be, conjunctly and severally, they may yet, *inter se*, be entitled to relief. The effect of gross neglect may be to deprive trustees of the protection expressly conferred by the trust deed, or, as in this case, by contract, against liability for omission or for each other. But it does not follow that their liability on that ground, although each may be subjected *in solidum* for loss caused by the gross neglect of all, is of such a nature as to deprive the trustee, who is made liable, of his relief against co-trustees equally culpable with himself." These remarks appear to me to indicate that, in the opinion of the learned judge, the rule of procedure applicable to delicts had, in the case of some *quasi*-delicts, been carried beyond equitable limits, and also that the nature of a *quasi*-delict may be such that one co-delinquent, upon whom liability has been fixed, may have relief against the rest. An opinion to the same effect was expressed by Lord Shand in the subsequent case of *Croskery* v. *Hendrie and others*, already referred to. The action was one of damages against trustees, and was held by the court to be founded not upon contract but upon *quasi*-delict. In repelling the plea that all the co-delinquents had not been called as defenders, Lord Shand said: "If I thought that by so holding we were prejudicing the question whether, when one of the trustees has been found liable for a breach of trust duty, and there has been no fraud, he could claim a contribution from those who have not been called but were also parties to the acts of negligence or violation of duty which created the liability to the beneficiaries, it might have been different. But when a pursuer has reasons for selecting one defender rather than another, there can be no prejudice suffered, as amongst the trustees themselves, in the subsequent question whether those who have not been called, but were, it may be, equally to blame, must bear a share of the loss to the estate." From these authorities, which are to some extent conflicting, and in other respects are not so definite as one could wish, I think the following conclusions may be derived. They are at variance in so far as they directly relate to the existence or non-existence of a right of relief among those persons who have incurred civil liability by acting together in the perpetration of an offence against the criminal law. But it does not appear to me that the dicta of those writers who negative the existence of such a right can be held to contemplate every case of *quasi*-delict, whatever be its nature. They *primâ facie* refer to proper delicts, and may *ex paritate rationis* be extended to every *quasi*-delict which, according to the phraseology of Scotch law, *sapit naturam delicti*; but they cannot, in my opinion, be fairly read as referring to *quasi*-delict, which involve no moral offence on the part of the delinquent. The opinions expressed by Lord President Inglis, and more recently by Lord Shand, point strongly to that interpretation. These opinions refer, no doubt, to persons who, in their trust capacity, have been guilty of acts or omissions injurious to the estate under their charge, and amounting to *quasi*-delict; but it is obvious that the exception which they suggest cannot be founded on the circumstance that the co-delinquents were trustees, but must rest on the principle that a right of relief exists and is available to a co-delinquent whose acts or omissions are not tainted with fraud or other moral delinquency. I do not find it necessary for the purposes of this appeal to determine whether, and how far, the doctrine of Bankton and Kames, or that laid down by Baron Hume, ought to be accepted. I have already indicated my opinion that the circumstances of this case bring the respondent company within the scope of the principle just stated, which I do not hesitate to affirm upon its own merits, whether it be regarded

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as an exception from the general rule or not. There is weighty and recent authority in its favour; there is no possible or tangible authority against it; and it appears to me to be founded on substantial considerations of equity. Owing to the novelty of the questions which it involves, I have been led to discuss this branch of the case with, it may be, unnecessary detail. But I desire also to rest my decision upon another and in some respects a broader ground, which is very shortly and forcibly stated in the judgment of Lord Rutherfurd-Clark. This is not an action brought by one delinquent against whom decree has passed, in order to obtain contribution from his co-delinquent who has not been sued. The respondent company do not require to allege and prove either delict or *quasi*-delict as the foundation of their claim, which rests upon a decree constituting a civil debt against the appellant as well as against themselves. There might be some principle in a court of law refusing to permit a suitor to aver and prove his own crime or moral delinquency as the medium of recovering from one whom he alleges to have been a co-delinquent. But the case is very different where the injured party's claim of damage is liquidated by a joint and several decree against all the delinquents. In that case, which is the present case, the sum decreed is simply a civil debt, and the meaning which the law attaches to a decree constituting a debt in these terms is, that each debtor under the decree is liable *in solidum* to the pursuer, and that *inter se* each is liable only *pro ratâ*, or, in other words, for an equal share with the rest. In this case it is the appellant who seeks to escape from the natural import of the decree by going behind it in order to establish his own co-delinquency. It was urged for the appellant that, seeing it is impossible to determine the exact proportion of the total damage attributable to the fault of each debtor, the whole loss must fall upon the debtor against whom the creditor chooses to enforce the decree; otherwise contributors might have to pay in excess of their real share. I cannot appreciate the force of that reasoning. The creditor is not bound to recover the whole from one; he may take it from all in what proportions he chooses: and that right of selection is not given to him in order that he may assess the damage due by each, but for his own convenience and in order that he may get in his money with the least possible trouble. And I fail to see how any inequality in contribution, such as the appellant suggested, could be redressed by the adoption of a rule which would practically leave it to the creditor to determine whether his damages should be borne by one or more or all of the debtors, and if by all in what proportions. The result of the rule, in many cases, would be that the whole loss would fall upon the debtor who had the least share in causing the injury. I have not hitherto noticed the English case of *Merryweather* v. *Nixan* (8 T. R. 186), assuming it to be an authority establishing the general rule for which the appellant contends—a proposition which seems to admit of doubt—I can only regard it as a positive rule of the common law of England, which is inconsistent with, and ought not to override, the law and practice of Scotland. The merits of the rule are not, in my opinion, such as to commend it to universal acceptation. For these reasons I am of opinion that the interlocutor appealed from is right and ought to be affirmed with costs.

Lord HALSBURY.—My Lords: I concur with the proposition that the case of *Merryweather* v. *Nixan* has been so long and so universally acknowledged as part of the English law, that even if one's own judgment did not concur with its principle it would be now too late to question its applicability to all cases in England governed by the principle therein enunciated; but I am not prepared to differ from the views entertained by the Lord Chancellor and Lord Watson when dealing with the jurisprudence of Scotland. The difficulty which has arisen is, I think, one of words. The word "tort" in English law is not always used with strict logical precision. The same act may sometimes be treated as a breach of contract and sometimes as a tort. But "tort" in its strictest meaning, as it seems to me, ought to exclude the right of contribution which would imply a presumed contract to subscribe towards the commission of a wrong. It seems to me, therefore, that the distinction between classes of torts or *quasi*-delicts and delicts proper, is reasonable and just, though I doubt whether, in dealing with an English case, one would be at liberty to adopt such a distinction. It becomes unnecessary to consider the form of the suit, but I think that in England the transmutation of the cause of action into a judgment would not prevent the application of the principle of *Merryweather* v. *Nixan*.

Lord SHAND.—My Lords: I also am of opinion that the appeal in this case should be dismissed. and having had an opportunity of reading and considering the opinions which have just been delivered by the Lord Chancellor and Lord Watson, I have nothing to add to the reasons which have been given by them.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Parker* and *Ponsford*, for *Macpherson* and *Mackay*, Edinburgh.

Solicitors for the respondents, *Thomas Cooper* and *Co.*, for *Boyd, Jameson*, and *Kelly*, Leith.

Supreme Court of Judicature.

COURT OF APPEAL.

July 3 and 4.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

ROYAL BANK OF SCOTLAND *v.* TOTTENHAM. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Cheque—Post-dated cheque—Payable on demand—Valid cheque—Stamp—Penny stamp sufficient—Holders for value—Bankers—Stamp Act 1891 (54 & 55 *Vict. c.* 39), *ss.* 32, 38—*Bills of Exchange Act* 1882 (45 & 46 *Vict. c.* 61), *ss.* 13, 73.

A post-dated cheque for any amount payable to order and bearing a penny stamp, issued as a negotiable instrument before the day of its date, is a valid cheque upon which an action can be brought after the date which it bears.

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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When a customer hands a cheque to his bankers in order that it may at once be placed to his credit, and it is so placed to his credit, the bankers become holders for value of the cheque.

This was an appeal by the defendant from the judgment of Wills, J., at the trial without a jury in Middlesex.

The plaintiffs brought this action, as holders of a cheque for 250*l.* drawn by the defendant, to recover the amount thereof.

This cheque was drawn by the defendant on the 3rd Aug. in favour of H., and was sent by him to H., so that it reached H. on the 8th Aug. The cheque was dated the 10th Aug., and bore a penny stamp.

On the 8th Aug. H. indorsed the cheque to M., who on the same day paid it into the plaintiffs' bank. The plaintiffs credited M. with the amount of the cheque, and permitted her to draw against it before the 10th Aug.

Payment of the cheque was stopped by the defendant, and it was not paid. The plaintiffs thereupon debited M. with the amount of the cheque, and there was then a balance due from M. to the bank of 142*l.* At the time this action was brought there was a balance due from M. to the bank of more than 250*l.*

The defendant alleged that the cheque had been obtained by fraud, and that no consideration had been given for it; and that neither M. nor the plaintiffs gave any consideration for it. He also contended that the plaintiffs could not recover upon the cheque, because it was a post-dated cheque and did not bear an *ad valorem* stamp.

The Stamp Act 1891 (54 & 55 Vict. c. 39) provides:

Sect. 32. For the purposes of this Act the expression "bill of exchange" includes . . . cheque. . . .

Sect. 38, sub-sect. 1. Every person who issues, indorses, transfers, negotiates, presents for payment, or pays any bill of exchange or promissory note liable to duty, and not being duly stamped, shall incur a fine of ten pounds, and the person who takes or receives from any other any such bill or note either in payment or as a security, or by purchase or otherwise, shall not be entitled to recover thereon, or to make the same available for any purpose whatever.

First schedule.—Stamp duties on instruments:

Bill of exchange—payable on demand or at sight, or on presentation, 1*d.* Bill of exchange of any other kind whatsoever (except a bank note) drawn or expressed to be payable, or actually paid, or indorsed, or in any manner negotiated in the United Kingdom . . . an *ad valorem* duty.

The Bills of Exchange Act 1882 (45 & 46 Vict. c. 61) provides:

Sect. 13, sub-sect. 1. Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be.

Sub-sect. 2. A bill is not invalid by reason only that it is ante-dated, or post-dated, or that it bears date on a Sunday.

Sect. 73. A cheque is a bill of exchange drawn on a banker, payable on demand.

Except as otherwise provided in this part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque.

At the trial before Wills, J. without a jury in Middlesex, the learned judge gave judgment for the plaintiffs.

The defendant appealed.

Channell, Q.C. and *Montagu Lush* for the appellant.—The plaintiffs cannot recover upon this cheque, because it was not sufficiently stamped. A cheque is a bill of exchange, and is to be stamped as a bill of exchange. [This point was argued upon the provisions of the Stamp Act 1870 (33 & 34 Vict. c. 97), sects. 48, 54. That Act, however, was repealed by the Stamp Act 1891 (54 & 55 Vict. c. 39), sects. 32 and 38 of which are the same as sects. 48 and 54 of the Act of 1870.] Sect. 38 of the Stamp Act 1891 provides that "every person who issues, indorses, transfers, negotiates, presents for payment, or pays any bill of exchange . . . not being duly stamped, shall incur a fine, . . . and the person who takes or receives from any other any such bill . . . shall not be entitled to recover thereon, or to make the same available for any purpose whatever." A bill of exchange "payable on demand" is liable to a duty of one penny, but other bills require an *ad valorem* stamp. A post-dated cheque, which is issued as a negotiable instrument before the day of its date, is a bill of exchange payable on a future day, and must, therefore, bear an *ad valorem* stamp:

Forster v. *Mackreth*, 16 L. T. Rep. 23; L. Rep. 2 Ex. 163.

Where Kelly, C.B., says: "So far as regards its practical effect, a post-dated cheque is the same thing as a bill of exchange at so many days date as intervene between the day of delivering the cheque and the date marked upon the cheque." [Lord Esher, M.R. referred to *Emanuel* v. *Robarts*, 17 L. T. Rep. 646; 9 B. & S. 121. Kay, L.J. referred to *Bull* v. *O'Sullivan*, 24 L. T. Rep. 130; L. Rep. 6 Q. B. 209.] Those cases were decided before the Stamp Act of 1870, which made a difference in the law. In *Gatty* v. *Fry* (36 L. T. Rep. 182; 2 Ex. Div. 265) the decision was based upon the ground that no evidence could be given as to the date of the cheque or of its delivery; but the provisions of sect. 13, sub-sect. 1, of the Bills of Exchange Act 1882, showing that the date of a bill shall, "unless the contrary be proved," be deemed to be the true date, were not referred to; those provisions show that the true date may be proved by evidence:

Field v. *Woods*, 7 A. & E. 114;
Clarke v. *Roche*, 37 L. T. Rep. 633; 3 Q. B. Div. 170.

Sect. 13, sub-sect. 2, of the Bills of Exchange Act, says that a bill is not invalid "by reason only that it is post-dated;" but it may be invalid upon other grounds. A cheque post-dated and issued as a negotiable instrument before the day of its date is now invalid, under the Stamp Act, unless it bears an *ad valorem* stamp, and is not available for any purpose:

Misa v. *Currie*, 35 L. T. Rep. 414; 1 App. Cas. 554.

[Kay, L.J. referred to *Hitchcock* v. *Edwards*, 60 L. T. Rep. 636; and *Carpenter* v. *Street*, 6 Times Rep. 410.] The plaintiffs are not holders for value of this cheque; they gave no consideration for it. It was obtained by fraud; it was negotiated in fraud of the drawer; no consideration was given at any stage. The plaintiffs, therefore, cannot recover. Even if the plaintiffs are holders for

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value, they can recover only 142*l.*, the amount due to them from M. after the cheque was dishonoured. If they recover more than that amount they recover as trustees for M., and any defence good against M. will be good against the plaintiffs:

Thornton v. *Maynard*, 33 L. T. Rep. 433; L. Rep. 10 C. P. 695.

R. M. Bray, and *J. F. P. Rawlinson* for the respondents.—There was no fraud at all. The defendant did not draw the cheque without consideration. There was consideration between M. and the plaintiffs; the cheque was handed to the bank that it might be placed to the credit of M., and it was placed to M.'s credit; the bank thereby gave consideration:

Ex parte Richdale; Re Palmer, 46 L. T. Rep. 116; 19 Ch. Div. 409.

The plaintiffs can recover the whole amount, because at the time this action was commenced there was a balance of 250*l.* due from M. to them. As to the stamp objection, no appeal will lie. Order XXXIX., r. 8, says that, "a new trial shall not be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp." This rule applies where the action has been tried by a judge without a jury:

Blewitt v. *Tritton*, 67 L. T. Rep. 72; (1892) 2 Q. B. 327.

No possible objection can now be taken to the validity of a post-dated cheque:

Fry v. *Gatty* (*ubi sup.*);
Hitchcock v. *Edwards* (*ubi sup.*);
Carpenter v. *Street* (*ubi sup.*).

Channell, Q.C. in reply.—This is not a mere stamp objection; the cheque is not available for any purpose whatever. A cheque is not invalid merely because it is delivered before its date; it may then be an inchoate instrument like an escrow; if, however, it is treated as a negotiable instrument before its date, then the objection under the Stamp Act arises.

Lord Esher, M.R.—So many points have been raised in this case that I think I ought to restate the law as to negotiable instruments, and as between bankers and their customers. First, then, as to the law respecting negotiable instruments, whether bills of exchange or cheques, and I will deal especially with cheques. The first axiom of law is that, when a man has signed a cheque, if a person produces that cheque at the trial of an action to recover the amount thereof, he has only to prove that he is the holder of the cheque and the signature of the defendant, and he need not give any more evidence as to how he got the cheque, or what he gave for it. The defendant cannot meet that case unless he proves some legal defence. What are the legal defences? If the signature was procured by fraud, then the drawer is not liable to the person who procured his signature by fraud. But by the law of negotiable instruments it is not enough to prove that, as against a holder who has given value for the cheque without notice of the fraud. In such a case how much must the defendant prove? The first step is to prove that the signature was procured by fraud, and then the onus is upon the holder to show that someone gave value for the cheque without notice of the fraud. Whether the signature was procured by fraud is a question of fact to be determined at the trial, and I think that the learned judge was right in deciding that no fraud was committed upon the drawer in this case. No onus of proof as to being a holder for value without notice was thrown upon the plaintiffs. Then there is a second defence, that the cheque was given in order that the cheque itself, or its proceeds, should be given to certain persons; that the cheque was given for a specific purpose, and that it was used for other purposes contrary to the undertaking that it should be used for the specific purpose. No undertaking to use the cheque or its proceeds for such specific purpose was proved, and therefore that defence fails. Then it was said that the cheque was given without any consideration, and that neither the holders nor any intermediate persons gave any consideration for it. Now this was not an accommodation bill, and I think that M. did give consideration for it. As to the bankers, I am prepared to hold, so as not to fetter the business of bankers, that when a person pays money or a cheque into a bank in order that the bank may give him credit in his account, if the bank accepts the money or cheque on those terms and undertakes to give the customer credit therefor, the bank gives value for the money or cheque. The law is so stated by Jessel, M.R. and myself, in *Ex parte Richdale* (*ubi sup.*), and I now repeat what I said in that case. That being so, as soon as the bankers gave credit for the cheque to their customer, they gave value for it. Those are all the usual legal defences to an action upon a cheque. Then there is the objection as to the stamp upon this cheque. A cheque is a contract between the parties, and it is for the judge at the trial to construe that contract by reading what is written upon it. Reading this cheque, upon its face it is dated the 10th Aug., and is payable to order. What is the true construction of that contract upon reading it? It is simply an order to pay 250*l.* upon demand. It is said that this is not the proper construction under the circumstances, because the cheque was signed on the 3rd Aug., and handed over to the payee upon the 8th Aug., being dated the 10th Aug. It is said that the cheque was, therefore, a post-dated cheque. Upon those facts being proved before the judge, what ought he to do? Must he say that, in construing this written document, because it was handed over before the day of the date written upon it, he must put a different construction upon it and say that it is not a bill payable upon demand, but a bill payable two days after the day of its issue or negotiation? I have never heard of a cheque being so construed, and the argument of the appellant is entirely fallacious. It is said that, by reason of the provisions of the Stamp Act 1891 (54 & 55 Vict. c. 39), the judge was bound so to construe the cheque. But the Bills of Exchange Act 1882 says that post-dating shall not render a bill or cheque invalid; that is, that it shall be valid according to its purport and effect. If the provisions of the Stamp Act 1891 had said that a post-dated cheque was invalid, the court would have to accept that law. It is not denied that, by the Bills of Exchange Act 1882, a post-dated cheque is not made invalid; but it is said that it is made invalid by the Stamp Act 1891. Is that proposition correct? I cannot see anything to that effect in the Stamp Act 1891. The true

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construction of the Stamp Act 1891 is that the question of stamp must be determined at the trial by the judge, unless the statute expressly declares that the document shall be invalid. This Stamp Act does not in express terms say that the document shall be invalid. The objection as to post-dating a cheque is therefore now an obsolete and useless objection. If a cheque is dealt with as a bill of exchange before the date which it bears, then it becomes a bill of exchange in the ordinary sense; but it is not in any way an escrow. All the defences and objections are futile and must fail, and the appeal must be dismissed.

Kay, L.J.—I am of the same opinion. This action was commenced on the 25th Sept. 1893, by the plaintiffs, as holders of a cheque dated the 10th Aug. 1893, against the defendant as the drawer of the cheque. If the bankers were holders for value without notice of any defect, that is a complete answer to many of the points raised by the defendant. The cheque was drawn on the 3rd Aug. and dated the 10th Aug., and handed over to the payee on the 8th Aug. It was indorsed by the payee to M. on the 8th Aug., and she on the same day gave it to the plaintiffs, who placed the amount to her credit at her request, so that she could draw against it. The cheque then became the property of the bankers, and they gave value for that cheque. The law is so stated in *Foley* v. *Hill* (2 H. L. Cas. 28), by Lord Cottenham. The Bills of Exchange Act 1882, in sect. 27, says that, "valuable consideration for a bill may be constituted by (*a*) any consideration sufficient to support a simple contract." That shows that there was ample consideration for making this cheque the property of the bankers. That very question has been decided in this court in *Ex parte Richdale* (*ubi sup.*), where all the Lords Justices held that there was, under such circumstances, ample consideration for making the cheque the property of the bankers. Therefore, reason and authority concur in showing that the bankers gave sufficient consideration to make them holders for value of the cheque. I agree that no fraud or want of consideration has been shown at all. Then as to the stamp objection. It is said this cheque was a post-dated cheque, and was therefore not sufficiently stamped, because it was not payable on demand according to the provisions of the Stamp Act 1891; and that consequently no proceeding could be taken upon it. In the Bills of Exchange Act 1882 this kind of cheque is mentioned; sect. 73 says that, "a cheque is a bill of exchange drawn on a banker payable on demand. Except as otherwise provided in this part, the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque;" and sect. 13, sub-sect. 2, provides that, "a bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday." What does "post-dated" mean? If the cheque was not issued before the day of its date it is not post-dated at all. "Post-dated" means that the cheque is issued before the date which it bears. This, then, was a post-dated cheque. The Bills of Exchange Act, in sect. 13, sub-sect. 2, says that it is not invalid by reason of its being post-dated. That is, it is a good and valid cheque which may be dealt with as such, though it is not then payable. If it is not an invalid cheque, then it is right and proper to deal with it as a valid cheque, though it may not be yet payable. I think that the words of the statute are quite clear as to that. It is said that the law is not so, because by the Stamp Act 1891 this cheque, not being payable on demand, required an *ad valorem* stamp, and not being so stamped, is not available for any purpose. If that were so, there would be a conflict between the Stamp Act and the Bills of Exchange Act; but there is no such conflict, for the argument as to the meaning of the Stamp Act is not correct. This very point has been carefully considered in *Gatty* v. *Fry* (*ubi sup.*), where it was held that the Stamp Act 1870 had not the effect of making a post-dated cheque invalid. That case was followed in two later cases: in *Hitchcock* v. *Edwards* (*ubi sup.*) it was decided that "a post-dated cheque, bearing a penny stamp, is a valid and negotiable instrument, and is complete and regular upon the face of it;" and in *Carpenter* v. *Street* (*ubi sup.*) the decision was the same. The time at which to consider whether a bill or cheque is properly stamped is the time when the action is brought. Here the action was brought after the 10th Aug., the date of the cheque, and the cheque upon its face appeared to be payable on demand. This objection can only be raised by adducing evidence that the cheque was issued before the date which it bore, and the objection is therefore only a stamp objection. I agree that the two statutes can be reconciled, and that the true meaning of the Stamp Act is not that contended for by the appellant. The history of the stamp legislation makes the matter perfectly clear. All the previous Stamp Acts were repealed in 1870, and the Stamp Acts of 1870 and 1891 make no mention of post-dated cheques. I think that it was intended to leave it to the judge at the trial to decide whether a cheque was properly stamped. If an action were brought on a post-dated cheque before the day of its date, perhaps the stamp objection would be fatal. This cheque, therefore, is not invalid because it was post-dated and bears only a penny stamp. It was argued that the cheque had been paid to the extent of 110*l*, but the facts show that more than the whole amount is due to the bankers. The appeal therefore fails, and must be dismissed.

Smith, L.J.—This was an action against the drawer of a cheque held by bankers, which they had taken from a customer, and placed to her credit. The ordinary defences have been set up, that the signature was obtained by fraud, and that no consideration was given for it, and that the holders took it without giving value and with notice of the defects. There was no fraud, and the cheque was given for a consideration. Even assuming there was no consideration, yet the bankers are holders for value by reason of the way in which they dealt with the cheque. There is abundant authority for that proposition, and *Ex parte Richdale* (*ubi sup.*) is conclusive upon the point. Then it is said that the cheque was not properly stamped; that a penny stamp was not sufficient, an *ad valorem* stamp being necessary. The argument is that a post-dated cheque for a sum exceeding 10*l*. must be stamped with an *ad valorem* stamp. Where is such a provision to be found? All the Stamp Acts were repealed in 1870, and the Stamp Act of 1870 has been superseded by the Act of 1891. What does that Act say? There were questions in respect of post-dated

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cheques before that Act, and, if payable to bearer, they were void. Since 1870 there has been no such provision as to post-dated cheques. In the Act of 1891 the only provisions are those of sect. 32, which say that, "for the purposes of this Act the expression 'bill of exchange' includes . . . cheque," and those of sect. 38, which provide that a person dealing with a "bill of exchange" not duly stamped shall be liable to a penalty, and that the person who takes such bill shall not be entitled to recover thereon, or make it available for any purpose. That is all. What, then, is the proper stamp for a post-dated cheque? The schedule to the Act says, "bill of exchange, payable on demand, one penny." There can be two kinds of post-dated cheques, one kind payable after some specified time, and the other kind payable on demand. This cheque is payable on demand. There are three reported cases—*Gatty* v. *Fry* (*ubi sup.*); *Hitchcock* v. *Edwards* (*ubi sup.*); and *Carpenter* v. *Street* (*ubi sup.*)—which all say that a post-dated cheque is in order, and that a penny stamp is sufficient if it is payable on demand. I agree that the proper time to ascertain whether a document is duly stamped is the time when the document is put in evidence and examined by the court, except in such a case as *Clarke* v. *Roche* (*ubi sup.*). It is said that only 142*l.* can be recovered; but when this action was brought the whole amount of 250*l.* was due to the bankers, and therefore it cannot be said that the cheque was partly paid.

Appeal dismissed.

Solicitors for the appellant, *P. J. Gordon* and *Son.*

Solicitors for the respondents, *Minet, Harvie,* and *Co.*

Monday, July 30.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

PRINTING AND TELEGRAPH COMPANY *v.* DRUCKER. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Evidence—Evidence taken in another cause or matter—Notice to read such evidence—When such evidence can be read—Rules of the Supreme Court, Order XXXVII., r. 3.

Order XXXVII., r. 3, *provides that, "an order to read evidence taken in another cause or matter shall not be necessary, but such evidence may, saving all just exceptions, be read on* ex parte *applications by leave of the court or a judge, to be obtained at the time of making any such application, and in any other case upon the party desiring to use such evidence giving two days' previous notice to the other parties of his intention to read such evidence."*

This rule does not make that evidence which would not before have been evidence, but only does away with the necessity for a formal order in cases in which an order to read evidence taken in another matter would formerly have been made; that is, where the issue was the same, and the proceedings were between the same parties or their privies.

THIS was an appeal by the plaintiffs from an order of the Divisional Court (Wills and Williams, JJ.), affirming an order of the judge at chambers, for a commission to take the evidence of witnesses in Paris.

The plaintiffs sued the defendant in this action to recover the amount due in respect of calls made upon the defendant as a shareholder in the plaintiff company.

The defendant alleged that he had been induced to take the shares by the fraudulent misrepresentations of the plaintiffs. Upon that issue he obtained an order to take the evidence of certain witnesses in Paris.

In an action by the plaintiffs against another defendant to recover the amount due in respect of calls the same defence was pleaded, and the evidence of these same witnesses was taken upon commission in Paris.

The plaintiffs objected to the order in this action to take the evidence of these witnesses in Paris, upon the ground that the defendant might, in this action, read the evidence of these witnesses taken in the other action, by giving notice under Order XXXVII., r. 3.

The Rules of the Supreme Court, Order XXXVII., provide:

Rule 3. An order to read evidence taken in another cause or matter shall not be necessary, but such evidence may, saving all just exceptions, be read on *ex parte* applications by leave of the court or a judge, to be obtained at the time of making any such application, and in any other case upon the party desiring to use such evidence giving two days' previous notice to the other parties of his intention to use such evidence.

The judge at chambers affirmed the order of the master, and an appeal by the plaintiffs was dismissed by the Divisional Court (Wills and Williams, JJ.).

The plaintiffs appealed.

Buckley, Q.C. and *E. Ford* for the appellants.

Horne Payne, Q.C. and *Bremner* for the respondent.

Lord ESHER, M.R.—This action was brought against the defendant to recover from him an amount due for calls made upon him as a shareholder in the plaintiff company. The defence is that he was induced to take the shares by fraudulent misrepresentations upon which he acted. By that plea the defendant admits that he is a shareholder, but says that he is entitled to have his agreement to take shares cancelled. There is, then, one issue, upon which the defendant will have to prove several facts. The defendant alleges that there are witnesses in Paris whose evidence is necessary to enable him to prove those facts, and he gives their names, and says that they are material witnesses. He has obtained an order for a commission to examine those witnesses in Paris. The plaintiffs say that no commission ought to issue, because these witnesses have been examined as against the plaintiffs in another action by them against another defendant, and because an order ought to be made that that evidence shall be used as evidence in this action. In my opinion the court has no power to make any such order, and the case is not within Order XXXVII., r. 3. The parties in this action are not the same as in the other action, and the issues are not the same. The depositions taken in that action could not be read as evidence in this action. No order can be made to make that evidence which is not evidence at all according to

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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the ordinary rules of evidence. This case, therefore, is not within Order XXXVII., r. 3. The passage which has been read by Smith, L.J., makes the case still more clear. It is impossible to say that the defendant in this action can be bound by the cross-examination of witnesses made in his absence. I have come clearly to the conclusion that the case is not within the rule at all, and that we have no power to make such an order as the plaintiffs ask us to make. The appeal must be dismissed upon the ground that we have no jurisdiction to make such an order.

KAY, L.J.—A commission to examine witnesses in Paris has been ordered to issue upon the application of the defendant. The plaintiffs say that the order was wrong because, in an another action between other parties, these witnesses have been examined upon this issue, and the defendant can therefore obtain leave to use the evidence then taken in this action. According to the Chancery practice, when the parties were the same and the issue the same, or the second action was between the privies or representatives of the parties in the first action, the court would make an order to allow the evidence taken in the first action to be used in the second action. Such an order was never made except under such circumstances. Order XXXVII., r. 3, was made only for the purpose of obviating the necessity of obtaining a formal order in such cases. The rule is in these terms: "An order to read evidence taken in another cause or matter shall not be necessary, but such evidence may, saving all just exceptions, be read on *ex parte* applications by leave of the court or a judge, to be obtained at the time of making any such application, and in any other case upon the party desiring to use any such evidence giving two previous days' notice to the other parties of his intention to read such evidence." I am very clearly of opinion that that rule was not intended to make that evidence which would not before have been evidence. A party cannot read such evidence now unless it is such evidence as the court would formerly have made such an order in respect of. In such an action as this is, I think that such an order never would have been made. The provisions of Order XXXVII., r. 3, were not intended to alter the rules of evidence, but only to do away with the necessity of obtaining a formal order in cases in which an order would formerly have been made. This appeal fails, and must be dismissed.

SMITH, L.J.—In this case the master at chambers, the judge, and the Divisional Court, have all held that the defendant is entitled to a commission to examine these witnesses in Paris, and the plaintiffs have appealed to this court. In my opinion the case is answered as soon as it is stated. In an action by these plaintiffs against Lord Windsor the evidence of these witnesses was taken on commission, and the action was ultimately settled. It is said that the defendant ought to be satisfied with the evidence taken in that action when he was not present. In *Humphreys* v. *Pensam* (1 My. & Cr. 580) the rule is thus stated by Lord Cottenham: "Depositions can only be read for or against those who are parties or privies to the suit in which the depositions were taken; and they cannot be read for a party, unless they could also be read against him." That being the rule, could this evidence have been read for or against the defendant? Clearly not. Order XXXVII., r. 3, was made only for the purpose of doing away with the necessity for a formal order; it only applies to that which is legal evidence, and not to that which is not evidence at all. The appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Beyfus* and *Beyfus*.

Solicitors for the respondents, *Ashurst, Morris, Crisp*, and *Co.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

June 6 and 7.

(Before CHITTY, J.)

Re EARNSHAW-WALL. (*a*)

Solicitor — Bill of costs — Taxation — Solicitors' Remuneration Act 1881 (44 & 45 *Vict. c.* 44)—*General Order* 1882, *schedule I., part* 1—*Conveyance of freehold property—Advowson in gross.*

A solicitor, employed in the purchase of an advowson in gross, was allowed, on the taxation of his bill by the taxing master, costs according to the scale prescribed by schedule I. to the General Order under the Solicitors' Remuneration Act 1881.

Held, on an application to review the taxation, that the taxing master's certificate must be affirmed, there being no distinction between corporeal and incorporeal property for the purposes of the schedule, as there was deduction of title in both cases, and an advowson in gross being freehold.

Re Stewart (60 *L. T. Rep.* 737; 41 *Ch. Div.* 494) *discussed and distinguished.*

SUMMONS.

The facts and arguments appear fully from the judgment of Chitty, J.

Chester for the solicitor.

Ryland for the client.

CHITTY, J.—On the purchase of an advowson in gross for the sum of 1400*l.*, the taxing master has allowed the purchaser's solicitor his costs according to the scale prescribed by schedule I. to the General Order. The solicitor says that the case does not fall within that schedule, and that he is therefore entitled to remuneration in the ordinary way according to the old system as altered by schedule II. The material words in the order are "freehold, copyhold, or leasehold property," on which words I have heard a learned and elaborate argument. The first observation which I have to make is that the expression used is not a term of ancient art, and there would be danger in applying old learning to ascertain the meaning of a modern term like this. The word "property" is discussed in Williams on Real Property: that is the title of the book, and incorporeal hereditaments are found under this title of real property. There is a well-reasoned explanation of the term "property" at pp. 3 and 4, in the 17th edition of that work, which shows that it is used in three different senses, two of

(*a*) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

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which I should call the leading senses of the word. "Property" may denote the thing to which a person stands in a certain relation, that of proprietor; it may also denote the relation in which the person stands to the thing. The term as used in the schedule may be used in both or either of those senses, but I ought not to apply too strict a reasoning to the interpretation of the words of the schedule. The argument used against the master's certificate is, that the property in the schedule means land, *i.e.*, corporeal tenements, and that an advowson in gross, no less than an advowson appendant, is not land, and therefore is not within the schedule. But I do not find the term "land" used, and I see no reason for cutting down the word "property" in the schedule so as to confine it to land, as I am asked to do. The main object of the rule prescribing scale charges was to avoid disputes which might arise between solicitor and client in regard to certain work. The object was to lay down a definite scale to which solicitor and client could refer, and particularly that a client might know at once what he would have to pay. On reading schedule I., with no wish to decide anything that does not arise for decision in the case, I find this to be the leading idea, I might almost say principle, running throughout it. The property referred to in the schedule appears to be property in respect of which title is deduced, and in respect of which there is a conveyance. In some matters, as in the sale of a chattel, there is no deduction of title, but there is no difference as regards deduction of title between a corporeal and an incorporeal hereditament, an advowson appendant or an advowson in gross. I ought not to make any such sweeping distinction between corporeal and incorporeal property for the purposes of the schedule as is contended for. Moreover, as was argued by Mr. Ryland, an advowson in gross is freehold. It is a subject of tenure, and may be held by homage, fealty, and escuage; it was also devisable under the statute of Hen. 8: (see *Cleer* v. *Peacock*, Cro. Eliz. 359.) Again, if property is used in the schedule in the sense of the interest which a man has in a thing, he can have any freehold interest in an advowson, for there may be an estate for life with remainder in tail, with an ultimate remainder in fee simple. Again, a man may have a leasehold interest in an advowson in the proper sense of the word, of which a render or rent is not necessarily an incident, and a term of years—*i.e.*, a lease for a term of an advowson. I cannot see on what ground I should be justified in saying that I ought to make a distinction between corporeal and incorporeal property here —*i.e.*, for the purpose of settling, as between solicitor and client, whether the solicitor's remuneration is to be by scale or not. Every argument for the scale in the one case applies in the other. In both cases there is ordinarily deduction of title. That being so, and for the reasons which I have already given, I think that the court ought to affirm the taxing master's certificate. I pass by all definitions contained in Acts of Parliament other than that under which this order was made, getting nothing there of any use to me here. I endeavour to give the fair modern meaning to the word "property" in the schedule. The case of *Re Stewart* (60 L. T. Rep. 737; 41 Ch. Div. 494) is said to be opposed to the taxing master's view. The subject of the decision there was business done in respect of purchases by and grants to a corporation of rights or easements, which were acquired by the corporation under their statutory powers, and Kay, L.J. (then Kay, J.) held that the statutory charges did not apply. I should have followed Kay, L.J. had I thought that he held there that "property" in the schedule does not include incorporeal hereditaments. His words had reference to the particular circumstances of the case before him—*i.e.*, that of a grant of easements *de novo*. He said: "Can the grant of an easement like this be considered a conveyance of freehold, copyhold, or leasehold property, within the meaning of schedule I., part 1? I confess it seems to me difficult so to hold. Obviously the schedule contemplates *primâ facie* conveyances of land held as freehold, copyhold, or leasehold property, and the scale is fixed upon the purchase money which is paid when such property changes hands. When a mere easement is granted there is no change of property in that sense, and the purchase money is comparatively trifling in amount." So apparently Kay, L.J. was not dealing with the general question, nor with the question of passing by conveyance. It was said that the passage which I have read means that the schedule contemplates the conveyances mentioned, and no other conveyances; but Kay, L.J. did not say so, nor does he appear to me to mean so. I think that he was not dealing with the matter generally, and did not express any opinion on the point before me now, and that I am free. The result is, that I hold the taxing master to be right.

Solicitors: *Earnshaw-Wall*; *Belfrage* and *Co.*, agents for *Byrch* and *Cox*, Evesham.

May 23 *and June* 12.

(Before CHITTY, J.)

Re RYMER; RYMER *v.* STANFIELD. (*a*)

Will—Construction— Charitable gift—Particular charity — Charity ceasing to exist before testator's death—Cy-près—*Lapse.*

A testator, by his will made in Aug. 1883, *gave various charitable legacies, and among them one in the following terms: "To the rector for the time being of St. Thomas's Seminary for the Education of Priests in the diocese of Westminster, for the purposes of such seminary,* 5000*l.*; *and I direct that the said rector shall at his discretion make a settlement thereof by deed in the name of proper trustees, so as to make the same a permanent fund; and I direct that the candidates to be educated out of this bequest shall be nominated from time to time by the rector for the time being of such seminary; and I request, but not as a condition of this bequest, that a yearly mass for the repose of my soul may be said at the said seminary in perpetuity, and that a yearly mass for the same object may be said during life by each of the priests who may have been educated wholly or in part in this foundation." The testator died in June* 1893. *At the date of the will there existed at Hammersmith a seminary for the education of Roman Catholic priests for the diocese of Westminster, known as St. Thomas's Seminary, having a rector and vice-rector, and*

(*a*) Reported by G. WELBY KING, Esq., Barrister-at-Law.

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a complete staff of professors and teachers. This seminary was closed in March 1893, *and the buildings were sold, the students being removed to the seminary at Oscott near Birmingham, which had a rector and a vice-rector, and a staff of professors and teachers of its own.*

Held, that St. Thomas's Seminary which existed at the date of the will, had ceased to exist at the testator's death; that the bequest was not a general charitable gift, but a gift to a particular institution; and (following Fisk *v.* Attorney-General, 17 *L. T. Rep.* 27; *L. Rep.* 4 *Eq.* 52) *that the legacy was not to be applied* cy-près, *but lapsed and fell into the residue.*

HORATIO RYMER by his will dated in Aug. 1883, after bequeathing certain specific and pecuniary legacies, devised and bequeathed all his estate to trustees upon trust to pay his funeral and testamentary expenses, and to pay and appropriate the legacies thereinbefore and thereinafter given, and he directed that his trustees should stand possessed of various legacies which were settled as therein mentioned, and declared that all duty payable to Government on any legacies thereinbefore given should be paid out of the residue of his estate, and the will then proceeded as follows:

Subject to and after payment and satisfaction of the before-mentioned legacies and the duties thereon, I give the following charitable legacies to the following institutions and persons respectively, all subject to legacy duties; that is to say, to the rector for the time being of St. Thomas's Seminary for the Education of Priests in the diocese of Westminster for the purposes of such seminary, 5000*l.*, and I direct that the said rector shall at his discretion make a settlement thereof by deed in the names of proper trustees so as to make the same a permanent fund, and I direct that the candidates to be educated out of the income of this bequest shall be nominated from time to time by the rector for the time being of such seminary; and I request, but not as a condition of this bequest, that a yearly mass for the repose of my soul may be said at the said seminary in perpetuity, and that a yearly mass for the same object may be said during life by each of the priests who may have been educated wholly or in part in this foundation.

Then followed various other charitable legacies, including a legacy of 2000*l.* to His Eminence Cardinal Manning, or the Archbishop of Westminster for the time being, to be applied for the purposes of the Westminster Diocesan Education Fund. And the testator directed that the charitable legacies should be paid exclusively out of such part of his personal estate as by law could be given by will for charitable purposes, but that his estate should be so marshalled and applied that, in case of a deficiency of assets, the legacies not being charitable should be paid in priority to those which were charitable and he directed that the residue of his estate should be held by his trustees upon the trusts therein declared concerning the same, and he appointed the plaintiffs trustees and executors of his will.

The testator died on the 5th June 1893, having made two codicils to his will, dated respectively the 14th April 1890 and the 10th May 1893, neither of which affected the bequests contained in the will.

At the date of the will there existed at Hammersmith a seminary for the education of Roman Catholic priests for the diocese of Westminster. It was established there in the year 1869, and it was carried on there without break from the time of its establishment until March 1893, when it was closed. The seminary had a rector and a vice-rector and a complete staff of professors and teachers. It was supported partly by payments made by or on behalf of the students and partly by the income of funds belonging to the Roman Catholic diocese of Westminster and applicable to the purpose. For some time previously to its being closed it had been found that the expenses of carrying on the seminary were heavier than the resources available could discharge. It was also found that the situation was unhealthy for students, and not suitable for the prosecution of their studies and training to the best advantage. When the seminary at Hammersmith was closed the property was sold. The students were removed to the seminary at Oscott, near Birmingham, but the staff of professors and teachers was not transferred to that institution. The seminary at Oscott then and at the testator's death had a rector (the Bishop of Birmingham), a vice-rector, and a staff of professors and teachers of its own. Since the removal of the students from St. Thomas's the Oscott institution had carried on the education of priests for the diocese of Westminster and also (as previously) for the diocese of Birmingham and other Roman Catholic dioceses in England.

Cardinal Manning died in the lifetime of the testator, and at the testator's death the defendant, Cardinal Vaughan, was Archbishop of Westminster.

The executors of the will took out a summons to have the question decided whether, under the circumstances, the legacy of 5000*l.* to the rector for the time being of St. Thomas's Seminary had lapsed and fallen into residue, and if not, how the same was to be dealt with or disposed of?

Levett, Q.C. and *T. L. Wilkinson*, for the plaintiffs, the executors of the will, contended that the gift was to a particular institution which had ceased to exist at the testator's death, and that the legacy had therefore lapsed. They referred to

Fisk v. *Attorney-General*, 17 L. T. Rep. 27; L. Rep. 4 Eq. 521;
Re Ovey, 52 L. T. Rep. 849; 29 Ch. Div. 560;
Re Slevin, 64 L. T. Rep. 311; (1891) 2 Ch. 236.

Byrne, Q.C. and *Stokes*, for Cardinal Vaughan, claimed the legacy as being a gift for the general purpose of the education of priests for Westminster, and argued that the court would not allow the gift to fail because there was no trustee to take it.

Ingle Joyce (Sir *John Rigby*, A.-G. with him) for the Crown.—The bequest shows a general charitable intention, and the legacy ought to be applied *cy-près*. The cases of *Re Ovey* and *Fisk* v. *Attorney-General* are in conflict with the earlier authorities of *Marsh* v. *Attorney-General* (2 J. & H. 61) and *Loscombe* v. *Wintringham* (13 Beav. 87). *Re The Clergy Society* (2 K. & J. 615) and *Re Maguire* (L. Rep. 9 Eq. 632) are in my favour.

Levett, Q.C. in reply.

June 12.—CHITTY, J.—The substantial questions are, whether the legacy of 5000*l.* bequeathed to the rector for the time being of St. Thomas's Seminary has lapsed and fallen into the residuary estate, or whether it ought to be applied

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cy-près. The point taken at the bar, that there was a mere failure of the trustee, and that nothing was required except that the court should appoint a new trustee in the place of the rector, cannot be maintained, and it is not necessary to discuss it. [His Lordship here stated the facts, and continued:] It could not properly be said, and it was not argued before me, that the St. Thomas's institution migrated to Oscott, or that the only change which took place was a change in the local habitation of St. Thomas's institution, or that it was being still carried on under a change of name only. The legacy was not claimed on behalf of Oscott as the successor of St. Thomas's Seminary, or otherwise. It is a different institution, although one of its purposes was the same as that of St. Thomas's Seminary. In the result, I find, as a fact, that St. Thomas's Seminary, which existed in 1883, when the testator made his will, had ceased to exist at his death. On the construction of this gift, I hold that it is a gift to a particular charitable institution for the purposes of the institution. It was argued that the words "for the education of priests in the diocese of Westminster" show a general charitable intention for the education of priests for that diocese unconnected with St. Thomas's. But these words are, I think, merely descriptive of the particular institution, which was in fact a seminary for the education of such priests, and that the words are governed by what follows, namely, "for the purposes of such seminary." The rector, under the discretionary power conferred on him to make a settlement of the legacy in the names of trustees so as to make a permanent fund, could not have directed the income to be applied otherwise than for the purposes of the seminary. The direction that the candidates should be nominated by the rector of the seminary, and the request that yearly masses should be said "at the said seminary," and the reference to "this foundation" at the end of the gift, all tend to confirm the opinion that the benefit of the gift was confined to this particular institution. Now, the rule established by *Fisk* v. *The Attorney-General* (*ubi sup.*) is that, where a legacy is bequeathed to a particular charitable institution existing at the date of the will, and the institution has ceased to exist before the testator's death, the legacy fails and lapses in the same way as in the case of an individual. Counsel for the Attorney-General appeared to express some dissatisfaction with that authority. No doubt the Vice-Chancellor, in his judgment, stated that he was far from saying that the question might not some day or other require further consideration, but the decision, which was founded on what the Vice-Chancellor considered to be settled authorities, was pronounced in 1867, more than a quarter of a century ago, and, so far from its having been overruled by, or dissented from in, any subsequent case, it was followed in *Re Ovey* (*ubi sup.*), and, as I read the observations and judgments in *Re Slevin* (*ubi sup.*), it has been recently approved by the Court of Appeal. I have no alternative but to treat it as a binding authority. It is, I think, right in principle. Charity, no doubt, has been favoured in equity, it has been exempted from the rule against perpetuity, and it has been allowed the benefit of the *cy-près* doctrine. *Fisk* v. *Attorney-General* places what seems to me to be a reasonable limitation on that doctrine. Many a testator has made a bequest in favour of a particular charitable institution because he has been personally connected with it, because he approves of its system of management, or for other special reasons, who would not have been minded to make any other similar charitable institution the object of his bounty. The cases cited for the Attorney-General are consistent with *Fisk* v. *The Attorney-General*, and distinguishable. No doubt, in a bequest where a particular charity appears to be or is named, a general charitable intent or an intent extending beyond the limits of the particular institution may be discovered sufficient to justify the application of the *cy-près* doctrine. In *Loscombe* v. *Wintringham* (*ubi sup.*) the bequest was to the governors of a society instituted for the increase and encouragement of good servants. No such society could be found. From this it was not difficult to infer that the testator had no particular institution in his mind, and that his intention was generally the increase and encouragement of good servants. *Re The Clergy Society* (*ubi sup.*) was another similar case. The gifts were made to the "following" societies established or carried on in London, and amongst those enumerated was "The Clergy Society." There being no society answering that description a scheme *cy-près* was directed. In neither of these cases was there any institution shown to be in existence at the date of the will. In *Marsh* v. *Attorney-General* (*ubi sup.*) the bequest was to the trustees and president of the Deal Nautical School, in trust, to be invested in public funds, and the yearly interest to be applied for the instruction of youths in the practical part of navigation and nautical astronomy. The Deal Nautical School was discontinued for want of funds several months before the date of the testator's will. Consequently there was no such institution in existence when the will was made; and, further, the gift was not confined to the purposes of the particular school, but was generally for the instruction of youths in the subjects mentioned; if the school had continued to exist the trustees and president might have applied the income for instruction outside the school. These three cases of *Re The Clergy Society*, *Marsh* v. *Attorney-General*, and *Fisk* v. *Attorney-General*, were all decided by Wood, V.C., afterwards Lord Hatherley. *Re Maguire* (*ubi sup.*), decided in 1870, before James, V.C., afterwards James, L.J. (where the testator had given 200*l.* to the Church Pastoral Aid Society, in Ireland) was, as I read the judgment, rather a case of misdescription of the particular charitable institution intended; if not, it was a case of a gift to an institution which did not exist at the date of the will, and from this circumstance an intention to devote the money to a particular object of charity, such as pastoral aid in Ireland, was readily gathered. The Vice-Chancellor in his judgment referred to *Fisk* v. *Attorney-General*, and expressed no dissent from that case. In the case before me I am unable to extract any general or particular intention of charity for the education of priests in the diocese of Westminster unconnected with or severable from St. Thomas's Seminary. The case appears to be in principle undistinguishable from *Fisk* v. *Attorney-General*. A point was suggested, but not argued, and, as I understand, abandoned, turning on a codicil executed by the testator on the 10th May 1893. It is sufficient to say that

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a codicil, whether purporting to confirm the will or not, does not revive a legacy already lapsed by the death of the legatee. Nor does the codicil afford any ground for letting in the application of the *cy-près* doctrine. There was no evidence to show that the testator was aware on the 10th May 1893 that the seminary had ceased to exist. For these reasons I hold that the legacy has lapsed and fallen into the residue.

Solicitors: *Frank Richardson* and *Sadler*; *Witham, Lambert*, and *Roskell*; *Hare* and *Co.*

Wednesday, July 4.

(Before NORTH, J.)

BRINSDEN v. WILLIAMS. (a)

Trust—Investment—Insufficient security—Solicitor acting for mortgagor and mortgagee — Trust money handed to solicitor as agent for the purpose of obtaining title deeds—Liability of solicitor.

A solicitor acted both for mortgagor and mortgagee in respect of an improper investment of trust funds on mortgage of property which turned out to be an insufficient security for the money advanced. The solicitor introduced the security to the notice of the mortgagee, who was also the trustee of the trust funds, but did not advise the trustee as to the propriety or sufficiency of the security; and the trustee in making the advance acted upon his own judgment. After the advance had been decided upon, a cheque for the amount of the mortgage money was handed by the trustee to the solicitor for the purpose of paying it to the mortgagor's bankers with whom the title deeds of the property had been deposited as security for a temporary loan to the mortgagor, and obtaining the title deeds from them; but the solicitor paid the cheque into the bank of his firm to the firm's account, and on the following morning called at the mortgagor's bank, paid in a cheque of his firm for the amount of the mortgage money, and received the title deeds from the bank.

Held, that the solicitor was not liable to make good the loss of the trust funds occasioned by the improper investment.

THE action was brought by Louisa Brinsden, widow, who was entitled under the trusts of a marriage settlement to the fund thereby settled, the defendants being Isaac Williams, against whom judgment had been obtained, and Edward Henry Bartlett, of the firm of Ford, Lloyd, and Bartlett, solicitors. The claim, as against the defendant Edward Henry Bartlett, was to make him personally liable for loss expected to arise from an improper investment of the settled fund upon insufficient security.

By a settlement made in 1840 on the marriage of Charles Frederick Baxter and Louisa Baxter (then Louisa Tucker), the father and mother of the plaintiff, certain stocks, funds, and securities were assigned to trustees upon trust to raise 5000*l.* and invest the same upon Government or Parliamentary stocks or funds in Great Britain, or upon real securities, and to stand possessed of the investments and the income thereof upon trust for Charles Frederick Baxter, Louisa Baxter, and the issue of the marriage as therein mentioned.

In 1881 the defendant Isaac Williams consulted Messrs. Ford, Lloyd, and Bartlett, who had acted as his solicitors in previous matters, with a view of obtaining an advance on the security of certain freehold properties, one of which was a brickfield. Messrs. Ford, Lloyd, and Bartlett, who had also acted as solicitors for the trustees of Mr. and Mrs. Baxter's marriage settlement, informed Charles Frederick Baxter, the tenant for life of the settled funds, and Edward Baxter, the surviving trustee of the settlement, of this investment; and it appeared from the evidence that they, after an inspection of the properties, acting on their own judgment, and not upon any advice received from Messrs. Ford, Lloyd, and Bartlett, determined to lend 2500*l.* of the settled funds to the defendant Isaac Williams upon the security of his freehold properties.

The money was advanced in two sums of 1500*l.* and 1000*l.*, secured by two mortgage deeds dated the 9th Jan. 1882, under which Edward Baxter as the surviving trustee was the mortgagee. The sum of 1500*l.* was advanced upon the security of the freehold brickfield; and the mortgage deed provided that, notwithstanding the mortgage, it should be lawful for Isaac Williams to use the land for brickmaking without being liable for waste or being bound to account for any profit derived therefrom, unless and until Edward Baxter should enter into possession of or should give notice of his intention to sell the brickfield, or should commence a foreclosure action and obtain the appointment of a receiver. The remaining 1000*l.* was advanced under the other mortgage deed upon the security of freehold properties at Turnham Green and at Gloucester.

The title deeds of the mortgaged properties had been deposited with the title deeds of other property by Isaac Williams at his bankers, the National Bank, Bayswater Branch, as security for the repayment of money due to them; and it was arranged between the parties concerned in the transactions that the mortgage money should be handed to Messrs. Ford, Lloyd, and Bartlett, and that they should pay it over to the bankers and obtain the title deeds from them.

Accordingly, on Saturday, the 7th Jan. 1882, Edward Baxter handed to the defendant Edward Henry Bartlett, of the firm of Ford, Lloyd, and Bartlett, a cheque for 2500*l.* That cheque was paid in to the firm's bank to the credit of the firm's account; and on the following Monday, about 9.30 a.m., the defendant Edward Henry Bartlett went to the Bayswater branch of the National Bank, paid in a cheque of his own firm for 2500*l.*, and received the title deeds.

The mortgage deeds were executed on the 13th Jan. 1882.

Charles Frederick Baxter and Louisa his wife were dead, and the plaintiff Louisa Brinsden was the only child of their marriage, and as such was entitled to the settled funds. She was also the executrix of Edward Baxter, the survivor of the trustees of the marriage settlement, and the mortgagee in the transactions in question.

The plaintiff claimed judgment against the defendant Isaac Williams personally on his covenant for payment of the mortgage money, and this she had already obtained. She now sought to make the defendant Edward Henry Bartlett,

(a) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

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who was the only survivor of the firm of Ford, Lloyd, and Bartlett, personally liable for the loss occasioned by the improper investment of the trust funds, on the ground that he had acted as solicitor in the transactions in question, and had himself received the trust money and paid it into the account of his firm.

Swinfen Eady, Q.C. and *A. à B. Terrell* for the plaintiff.—The investment of the trust funds on the security of the brickfield was an improper investment. They referred to

Learoyd v. *Whiteley*, 58 L. T. Rep. 93; L. Rep. 12 App. Cas. 727.

Mr. Bartlett, who acted as solicitor to the trustees in respect of that investment, is liable for the loss which will be occasioned thereby, because he was negligent in his duty as the legal adviser of the trustees, and also because he actually received the trust funds, which he paid to the account of his firm at the firm's bankers, and under such circumstances he and his firm are liable for the trust funds until they can show that they have properly discharged themselves of such funds. They referred to

Blyth v. *Fladgate*; *Morgan* v. *Blyth*; *Smith* v. *Blyth*, 63 L. T. Rep. 546; (1891) 1 Ch. 337.

When trust moneys get into the hands of solicitors who, knowing that are trust moneys, allow them to be improperly dealt with, they are liable for the loss sustained. They referred to

Morgan v. *Stephens*, 4 L. T. Rep. 614; 3 Giff. 226.

Cozens-Hardy, Q.C., *S. Hall*, Q.C., and *Davenport* for the defendant Edward Henry Bartlett.—Mr. Bartlett and his firm acted in respect to the investment in question as agents, and not as solicitors advising the trustee as to the propriety of the investment. They had previously acted as solicitors to the trustees, and they had also acted as solicitors to the mortgagor. In respect of the investment in question they brought the trustee and the mortgagor together, and left the trustee to act on his own judgment in accepting or rejecting the security. As the trustee did not employ a separate solicitor, they acted for both parties, and simply carried out the instructions they received as agents. The case of *Blyth* v. *Fladgate*; *Morgan* v. *Blyth*; *Smith* v. *Blyth* (*ubi sup.*) is distinguishable from the present, as there there were no trustees, and the solicitors who acted so as to render themselves liable as constructive trustees had no client at the time. New trustees were afterwards appointed, and it is idle to say that the new trustees ratified what had been done, as the doctrine of ratification implies the relation of principal and agent at the time the act is done. The mortgage money was received by Mr. Bartlett simply as agent to enable him to obtain the deeds from the mortgagor's bankers. If the doctrine of constructive trusteeship should be carried so far as to make Mr. Bartlett liable as trustee on that account, it would be no longer possible for the business of trustees to be carried on as it has been for generations. None of the cases where persons have been held liable as constructive trustees go to such a length: (Lewin on Trusts, 9th edit., p. 723.) In *Re Barney*; *Barney* v. *Barney* (67 L. T. Rep. 23; (1892) 2 Ch. 165) it is decided that, to make a person constructive trustee *de son tort*, he must have the trust property either actually vested in him or so far under his control that he is in a position to require that it should be vested in him. The case of *Myler* v. *Fitzpatrick* (Madd. & G. 360) shows that a person must accept a delegation of the trust (if he does not fraudulently mix himself up with a breach of trust) in order to become a constructive trustee *de son tort*. The case of *Maw* v. *Pearson* (28 Beav. 196) is similar to the present case so far as regards the point that the money paid to the solicitor was not received by him as trust funds. In *Morgan* v. *Stephens* (*ubi sup.*) the solicitor received the money as trust funds, and allowed the tenant for life to misapply them. The cases of *Lee* v. *Sankey* (27 L. T. Rep. 809; L. Rep. 15 Ex. 204), *Barnes* v. *Addy* (30 L. T. Rep. 4; L. Rep. 9 Ch. App. 244), *Re Spencer*; *Spencer* v. *Hart* (45 L. T. Rep. 645), and *Re Blundell*; *Blundell* v. *Blundell* (58 L. T. Rep. 933; 40 Ch. Div. 370) are distinguishable from the present case, and are in our favour.

Swinfen Eady, Q.C. in reply.—The question comes to this—was the mortgage transaction carried out in such a way as to make the defendant Edward Henry Bartlett personally liable for the consequences? and we submit that it was.

NORTH, J.—Two questions are raised in this action. First, whether the investment of the 2500*l.* was a proper investment of trust money; and secondly, whether, if it was not a proper investment, Mr. Bartlett is responsible. As regards the first question, I do not think it necessary to decide whether the investment was proper or not; my impression is, looking at the facts of the case, that the investment was not a proper one. [His Lordship then, after referring to the facts and the evidence of the witnesses, assumed for the purpose of his decision that the investment was not a proper one, and continued:] Is, then, Mr. Bartlett liable? In my opinion he is not. I think that, except as to one particular, viz., that the money passed through Mr. Bartlett's hands, the Scotch case of *Rae* v. *Meek* (14 App. Cas. 558) in the House of Lords is very much in point. It is not a case of actual authority in this court, but one throwing much light on the question for decision, because the principles of Scotch law were in this respect similar to those of English law. In that case certain beneficiaries under a marriage contract sued one of the trustees of the marriage contract and a firm of law agents who were acting for the trustees at the date of the transaction in question. The point was, whether the trustee was personally liable either alone or jointly with the co-trustees and the law agents—the legal advisers of the trust—for the loss of 4500*l.*, part of the trust estate which had been invested in an insufficient security. Early in 1874 a sum of trust money was available for investment, and at a meeting of the trustees it was resolved to look for heritable securities of adequate value, and Mr. Hotson, one of the firm of law agents, was to be on the outlook for such and to report to the trustees any proposal he might receive. Then certain negotiations took place with respect to property at Glasgow. On the 5th May 1884 a meeting of the trustees was held at the law agents' office, and the minute of that meeting was that, "there were laid before the meeting rental and valuation of several heritable properties on which loans were wanted, after considering and com-

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paring which the trustees resolved to make a loan of 4500*l.* to Mr. William Anderson, one of the applicants, on the security of the building in Gallowgate, valued by Mr. Burnet, architect, at 6500*l.*, provided always, Mr. Hotson shall be satisfied with the title." The loan was made, and the interest paid until 1878, when the mortgagor was sequestrated, and the building had since been unsaleable. The action was brought in 1886, and averred that the sum of 4500*l.* was lost through the gross negligence and neglect of duty of the trustees who were present at the meeting of the 5th May 1874. and through the gross negligence and want of skill of the law agents, and concluded with a declaration that the defendants were conjointly and severally, or in such other way or manner as shall seem just, bound to make payment of the sum of 4500*l.* with interest, to be applied in conformity with the purposes of the trust. The judgment of Lord Herschell contains this passage: "I cannot see how the law advisers could in any view be held liable to restore to the trust fund the money lost, which was the claim against the other defender. If an action be maintainable against them at all, it could only be to compel payment of such damages as the appellants have sustained by reason of their failure of duty. And, considering the contingent nature of the appellant's interest in the fund, it is obvious that this must be something very different from the amount of the loss to the estate. Liability as against the defenders, with whose case I am now dealing, could, in my opinion, only be established by proof that they were employed to give advice either by the appellants or by some person on their behalf, and that, having undertaken this employment, they neglected their duty. Now, they certainly were not employed by the appellants, nor do I think they were employed on their behalf. The alleged duty, if it existed at all, was to the trustees, and not to the beneficiaries. If there has been a breach of it, the trustees and not the beneficiaries are the parties to sue. There may be cases where, if trustees failed to call to account those who were under liability in respect of acts injurious to the trust estate, the beneficiaries might compel them to do so, or even enforce the right themselves. But no such question is raised by the averments in the present action. And, further, I think it right to say that in my judgment the evidence does not establish that the law agents were employed to advise the trustees as to the sufficiency of the security, or that they acted on any such advice. It seems to me, therefore, that the case against these defenders entirely fails, and that the appeal as against them ought to be dismissed." There is some difference between that case and the present, as it does not appear that in that case the law agent actually handled the fund. [His Lordship then reviewed the verbal and documentary evidence in the case, and continued:] Leaving out Bartlett's conduct in respect of the cheques, it appears that his conduct was similar to that of the law agents in *Rae* v. *Meek* (*ubi sup.*). The trustee chose to act on his own knowledge. The solicitors did not advise the trustee that it was a proper investment. The solicitors were in the position of standing between the trustee and the mortgagor. The trustee did not employ a separate solicitor, but was content to leave the matter to Mr. Bartlett. In my opinion the trustee acted upon his own responsibility in considering whether the security was a good one. If the matter stopped there, it would be perfectly clear; but it is said that the solicitors are liable because they actually received the trust moneys. I do not think they did. They were directed to obtain the title deeds from the mortgagor's bank and to repay the loan by the bank out of a fund they were provided with for that purpose; but they did not incur any legal obligation to be personally responsible for the investment of the trust fund. What happened with respect to this was, that on Saturday Mr. Bartlett received a cheque for the purpose of enabling him to get the title deeds relating to the property from the bank which had a charge. He paid it into his firm's bank, and on the following Monday morning, before the cheque could have been cashed, he gave his own cheque to the bank and received the deeds, so that he did not even receive the trust money; but, if the amount had been given to him in bank-notes, he would not have been liable, simply because the trustee, who was acting on his own responsibility, employed him, Bartlett, as agent to get the deeds, and provided him with the means of getting the deeds from the bank. The money was supplied by the trustee to Mr. Bartlett to obtain the deeds from the bank, and it was so applied by him. He was a mere agent for the purpose of receiving the money and getting the deeds, and he did not in any sense assume the position of a trustee in such a way as to make himself personally liable as a trustee. The action must therefore be dismissed as against Mr. Bartlett.

Solicitors; *Fladgates*; *Ford, Lloyd, Bartlett*, and *Michelmore*.

Wednesday, May 2.

(Before STIRLING, J.)

Re MORRIS; MORRIS *v.* ATHERDEN. (*a*)

Will—Construction—Devise of real estate for life—Devisee appointed residuary legatee

After directing payment of his funeral expenses and his just and lawful debts, a testator gave his residence, describing it "as well as all my lands, tenements, and hereditaments," to my dear wife . . . for and during the term of her natural life, wheresoever and whatsoever real and personal;" then, after bequeathing some pecuniary legacies, the testator proceeded, "And to this my last will and testament I appoint and direct and make my dear wife . . . sole executrix to this my will, and also at the same time I appoint and make her my residuary legatee."

Held, that the widow took an estate for life only in the testator's real estate, which, subject to such life estate, passed to the testator's heir-at-law.

THIS was an action by Herbert Morris, as heir-at-law of Philip Morris, deceased, against Thomas Henry Atherden, as devisee under the will of Martha Emma Morris, deceased, for a declaration that, according to the true construction of the will of Philip Morris, his widow, the said Martha Emma Morris, took an estate for life only in his real estate, and that upon her death such real estate devolved upon the plaintiff as the heir-at-law of Philip Morris.

Philip Morris died on the 7th Jan. 1893, leaving

(*a*) Reported by J. SANDERSON, Esq., Barrister-at-Law.

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a will dated the 25th Nov. 1886. Martha Emma Morris died on the 12th May 1893, having by her will, dated the 18th Feb. in the same year, appointed the defendant the sole executor and trustee of the will, her residuary devisee.

The facts of the case and the terms of the will of Philip Morris are for the purpose of this report sufficiently stated in the judgment of Stirling, J.

Graham Hastings, Q.C. and *E. S. Ford*, for the plaintiff, contended that, under the will of Philip Morris, Martha Emma Morris took an estate for life only in his real estate, and subject thereto such real estate devolved on the plaintiff. They cited

Singleton v. *Tomlinson*, 38 L. T. Rep. 653; 3 App. Cas. 404;
Re Methuen-and Blore's Contract, 44 L. T. Rep. 332; 16 Ch. Div. 696; 50 L. J. 464, Ch;
Windus v. *Windus*, 28 L. T. Rep. O. S. 31; 6 De G. M. & G. 549;
Hughes v. *Pritchard*, 37 L. T. Rep. 259; 6 Ch. Div. 24; 46 L. J. 840, Ch.

Cozens-Hardy, Q.C. and *Ingle Joyce*, for the defendant, argued that the widow took the real estate absolutely. They referred to

Theobald's Law of Wills (3rd ed.) p. 147;
1 Jarman (5th ed.) 698;
Hughes v. *Pritchard*, 37 L. T. Rep. 259; 6 Ch. Div. 24; 46 L. J. 840, Ch.

STIRLING, J.—I confess I feel in the same position as some of the learned judges who decided some of the cases that have been cited to me, namely, that I have formed an opinion of my own on this will, but I cannot say it is so confident an opinion that I cannot imagine anybody else coming to a different conclusion. Such as it is, it seems clear what the testator meant in this case. The will is that of a gentleman who lived at a place called "The Hurst," in the county of Shropshire. He says, "First I direct that all my funeral expenses may be paid, and also all my just and lawful debts." I agree with Mr. Cozens-Hardy that that constitutes a charge of debts on the real estate. Then he says, "I leave, bequeath, and give this my residence called 'The Hurst,' as well as my lands, tenements, and hereditaments, to my dear wife, Martha Emma Morris, for and during the term of her natural life, wherever and whatsoever real and personal." The first point which it seems necessary to consider is, what is the effect of that gift. It is a gift of the residence called "The Hurst" specifically, as well as all my lands, tenements, and hereditaments, "to my dear wife Martha Emma Morris, for and during the term of her natural life." Down to that point there is a plain gift of the real estate to the wife for life. Then come the words "wherever and whatsoever real and personal." It is said that this must be read as conferring life interests on the wife in, not only the realty, but the general personal estate. I am not able to arrive at that conclusion. If I could, it would go a long way towards the direction in which Mr. Cozens-Hardy desires me to go. It seems to me I must read those words in connection with the subject of the gift, namely, "all my lands, tenements, and hereditaments," and, although it appears to be the fact that the testator was not entitled to any leaseholds at the date of the will, he expresses his desire that what was to pass to his wife was not to be confined to freehold or copyhold, but to extend to such land as might be of leasehold tenure, and consequently by law personal estate. I think that first gift is limited to the real estate and leasehold estate, if any, of the testator. He then proceeds to give some legacies, and he says: "My wish and desire is that 100*l.* be given to Miss Polly King, and to each of my indoor servants." He then proceeds after giving these legacies: "And to this my last will and testament, I appoint and direct and make my dear wife Martha Emma Morris sole executrix to this my will, and also at the same time I appoint and make her my residuary legatee." The question is, does this appointment of the wife as residuary legatee make her also devisee of the undisposed of real estate. In the first place, the rule is, that the words by themselves, *primâ facie*, do not extend to real estate. They may no doubt be extended to it by reason of the context, but I point out that the immediate context is against such a construction in this case, because the appointment comes in immediate connection with the appointment of the wife as sole executrix of the will. Is there any context which would enable me to say that in this case the words ought to be extended to real estate? Reading as I do the gift of "the Hurst," and all the testator's lands, tenements, and hereditaments as confined to the real estate and the leasehold, if any, it seems to me that I cannot come to that conclusion. The fact of the wife taking the real estate for life, and her estate being limited specifically to that, seems strongly against the conclusion that he meant by this gift to make her residuary devisee, and give her the whole property after he had only given it to her for life in the prior part of the will. My opinion is, that the title of the plaintiff as heir-at-law prevails, and I must make a declaration accordingly.

Solicitors for the plaintiff, *Rowcliffes, Rawle, and Co.*, for *Harrison* and *Winnall*, Welshpool;

Solicitors for the defendant, *Peacock* and *Goddard*, for *John Wollaston Montford*, Ludlow, Salop; *Cree* and *Son*.

Wednesday, June 6.

(Before STIRLING, J.)

Re BARNEY; HARRISON *v.* BARNEY.

Drainage expenses—Land in settlement—Owners of premises—Trustees—Public Health Act 1848 (11 *&* 12 *Vict. c.* 63), *ss.* 2, 49, 69, 90.

A testator, who died in 1846, *devised certain messuages in trust to permit his wife and his son S., and the survivor of them, to receive the rents, and after the decease of S., or the decease or remarriage of the widow (if S. should then be dead), in trust for the first and other sons of S. in tail, with divers equitable remainders over. He made a bequest of the residue of his estate, and declared in conclusion that "The parties beneficially entitled to the rents and profits of any of my houses or property should see that the same be kept, or that they should keep the same, in good and absolute repair, and properly insured against fire." The trustees having between* 1861 *and* 1869, *and during the life of S., expended some* 247*l. out of capital moneys of the testator's*

(a) Reported by J. SANDERSON, Esq., Barrister-at-Law.

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estate for drainage and other expenses under sects. 49 and 90 of the Public Health Act 1848 in respect of the devised messuages:

Held, that this was a proper payment, the trustees being owners within the definition clause of that Act; that the work in respect of which the expense was incurred did not fall within the repairs in the will mentioned, and the sums expended must therefore be treated as a charge on the property.

THIS was a summons taken out by Henry Francis Egbert Harrison as the executor of the will of Sarah Rennell Octavia Barney, deceased, and as the legal personal representative of John Barney, deceased, and of the estate of Sarah Rennell Octavia Barney, for the determination of the question (among others) whether the payment by the trustees for the time being of the will of John Barney, deceased, of sums amounting to 247*l.* 4*s.* 6*d.*, or any part thereof, for drainage expenses under the Public Health Act 1848, of premises devised by the said will, were proper payments respectively, or whether, according to the true construction of the said will or otherwise, the sums, or what part or parts thereof, were unauthorised and constituted a breach of trust.

The testator, John Barney, of Lysses House, Fareham, Hants, by his will dated Nov. 14, 1846, after making certain specific and pecuniary legacies and devising and bequeathing an advowson and other hereditaments upon trusts therein declared, devised and bequeathed to his trustees, their heirs and assigns, all his capital messuage or dwelling-place called Lysses House, situate in the parish of Fareham, with the appurtenances, upon trust to permit his wife, Eleanor Mary Barney, and his son, Stephen Barney, jointly and equally, and the survivor of them, to hold, occupy, and enjoy the same, and to receive and take the rents thereof, and after the decease of Stephen Barney or the decease or marrying again of the testator's wife (which last event did not happen), if Stephen Barney should be then dead, in trust for the first and other sons of Stephen Barney in tail, with remainder in trust for the testator's grandson, the defendant, John Douglas Barney, for life, and after his decease for his first and other sons in tail, with divers equitable remainders over. And the testator devised and bequeathed all the residue of his estate to his wife and Stephen Barney for their absolute use and benefit. The testator then appointed his wife, Stephen Barney, and Thomas Fox executors of his will, and concluded:

I declare that the parties beneficially entitled to the rents and profits of any of my houses or property should see that the same be kept, or that they should keep the same, in good and absolute repair, and properly insured from fire.

The testator, John Barney, died on the 15th Dec. 1846.

His widow, Eleanor Mary Barney, died on the 9th Aug. 1864.

Thomas Fox died on the 25th Sept. 1876.

By his will, dated July 22, 1878, Stephen Barney appointed his wife Sarah Rennell Octavia Barney executrix of his will. Stephen Barney died on the 29th June 1892. Between the years 1861 and 1869, and during the life of Stephen Barney, the trustees of the will of John Barney had expended the above mentioned sum of 247*l.* 4*s.* 6*d.*, the subject of the present summons, for drainage expenses in respect of premises devised by the will of John Barney as mentioned above.

Godefroi for the plaintiff.—Under the terms of Stephen Barney's will I cannot distribute the estate while there are any claims against me. Sects. 49 and 90 of the Public Health Act 1848 contain provisions as to drainage. There is very little authority as between tenant for life and remainderman in respect of parochial assessments and charges of this description. The tenant for life's reduction of income is fractional. I submit that the expenses incurred under the Act are not payable out of income, but have been properly paid out of capital.

Beaumont for John Douglas Barney, the present equitable tenant for life, and his infant son the tenant in tail in remainder.—A private improvement rate levied under sects. 49 and 90 would have worked itself out in thirty years. The trustees are the "owners" within the definition given in sect. 2 of the Public Health Act 1848. I submit that it would be reasonable to treat it as a charge on the property. He referred to

Re Crawley; Acton v. *Crawley*, 52 L. T. Rep. 460; 28 Ch. Div. 431; 54 L. J. 652, Ch.

J. A. Creed for another party.

STIRLING, J.—The trustees were, under the circumstances, the persons to receive the rack-rents of the messuages, and hand them over to the beneficiaries. I think they were owners within the definition clause in the Public Health Act 1848, it being their duty to receive the rents first. They were, in my opinion, entitled to pay this charge, and I think that the works were not repairs within the last clause of the will. The sums expended by the trustees must be treated as properly expended, and as a charge on the property.

Solicitors: *Alfred Peachey*, for *Frank Gillson*, Fareham, Hants; *Prior, Church*, and *Adams*; *Wynne* and *Son*.

June 8, 9, *and* 28.

(Before STIRLING, J.)

Re DAVID OWEN (deceased). (*a*)

Statutes of Limitation—Legacy charged on a contingent reversionary interest in real estate—"Present right to receive"—Real Property Limitation Act 1874 (37 & 38 *Vict. c.* 57), *ss.* 1, 2, 8—*Effect of charge—Remedy by mortgage and sale—Right of foreclosure.*

D. O., who died in 1823, *by his will devised his real estate, subject to certain trusts for the benefit of M. H. P. during her life (in the events which happened), to the four children of E. O. in equal shares as tenants in common in fee simple. M. H. P. died in* 1893. *E. O. the younger, one of the children of E. O., who died in* 1854, *by his will charged his debts on his real estate, and devised his real estate and his interest under the will of D. O. to his wife M. O. for life, and after her death he charged the same with a sum of* 8000*l.*, *which he bequeathed to his four children in equal shares. M. O. died on the* 10*th Feb.* 1880. *In this year* 1844*l. was paid to each of the four children on account of their*

(*a*) Reported by JOHN SANDELSON, Esq., Barrister-at-Law.

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respective legacies of 2000l. No steps were taken to realise the testator's interest under the will of D. O., nor was any further payment or acknowledgment made in respect of these legacies.

Held, that the "present right to receive" the 8000l. accrued in 1880; that, on the authorities, the charge created by the will of E. O. the younger gave a remedy by sale or mortgage, and not by foreclosure, and that the period of limitation was therefore defined by sect. 8 (and not by sects. 1 and 2) of the Real Property Limitation Act 1874.

Hugill *v.* Wilkinson (58 *L. T. Rep.* 880; 38 *Ch. Div.* 480; 36 *W. R.* 633) *distinguished.*

Possibly a testator may so express himself as to show that the owner of the charge created by a will is to have the like remedies as are conferred by statute on a judgment creditor.

THIS was a summons raising the question whether the claims of certain legatees, whose legacies were charged upon real estate to the exoneration of the testator's personal estate, were barred by the Statutes of Limitation.

The following statement of the facts of the case is taken substantially from the judgment of the learned judge:—

David Owen, who died in 1823, by his will dated in that year, devised his real estate upon certain trusts for the benefit of Mary Hannah Postlethwaite during her life, and after her death, in the event (which happened) of her not leaving issue, upon trust for the four children of his brother Edward Owen, in equal shares, as tenants in common in fee simple.

Mary Hannah Postlethwaite died on the 28th Feb. 1893, and upon her decease the devise contained in the will of David Owen in favour of the children of Edward Owen took effect in possession. One of these children was Edward Owen, the younger, who died on the 29th March 1854.

By his will, dated the 31st Oct. 1853, Edward Owen the younger gave certain personal estate to his wife exonerated from payment of his debts, which he charged upon his real estate. He then devised all his real estate, and also his contingent reversionary interest under the will of David Owen, to his wife Mary Owen for her life, and after her decease he charged the same with a sum of 8000l. which he bequeathed as follows: 2000l. to his son Edward Owen, 2000l. to his daughter Dorothy, 2000l. to his daughter May, and 2000l. to his daughter Ellinor, and subject and charged as aforesaid he devised all his said real estate and also his contingent reversionary interest under the will of David Owen to his son Edward Owen, his heirs, executors, administrators, and assigns. Then, after a direction that the legacy so given to his daughters should be settled, he further declared that, in case his real estate and contingent reversionary interest aforesaid should not, if sold, and after payment of debts, realise the sum of 8000l., each such legacy to his daughters should abate, so that his son should have an amount and share equal with his sisters in the amount that under the circumstances might be realised therefrom. He appointed his widow executrix of his will. There was not contained in the will any disposition of the testator's residuary personal estate. Mary Owen, the widow of Edward Owen the younger, died in the lifetime of Mary Hannah Postlethwaite on the 10th Feb. 1880.

From the contents of a deed dated Nov. 22, 1880, and executed by (among other persons) the son and three daughters of the testator, Edward Owen the younger, it appeared that the whole of the real estate of which Edward Owen the younger was in actual possession had been sold at the date of the deed, and that each of them, the son and daughters, had received out of the proceeds a sum of 1844l. in part payment and discharge of the said respective legacies of 2000l., leaving (as the deed recited) "each of them still entitled to receive a sum of 156l. each from the unrealised estate of the testator as the balance of the said legacy of 8000l." No steps were taken to realise the interest of the testator, Edward Owen, under the will of David Owen during the lifetime of Mary Hannah Postlethwaite. No further payment was made in respect of the sum of 8000l. charged by the testator's will on his real estate.

Part of the real estate of David Owen having been sold as above mentioned, and the proceeds paid into court under the Lands Clauses Consolidation Act, the question arose whether the claims in respect of the 8000l. were not barred by the Statutes of Limitation.

The only outstanding real or personal estate of Edward Owen consisted of the funds in court.

Graham Hastings, Q.C., and *Gaselee* in support of the summons.—The "present right to receive" the legacies did not accrue on the death of Edward Owen on the 29th March 1854, but on the death of Mary Owen, the tenant for life, on the 22nd Nov. 1880, when the legacies vested in the trustees and they could give a receipt. From that moment the statute of 1874 began to run. No exception is introduced by sect. 2, for that deals with realty. The legatees could not foreclose, but could only sue in equity. The rule is the same in the case of equitable charges created by deed:

Humble v. *Humble*, 30 L. T. Rep. O. S. 125; 24 Beav. 535.

That case was on the old law, but the sections are identical. The statute does not make any distinction between estates in possession and estates in reversion for this purpose. It was perfectly open to all the legatees as soon as the tenant for life died to take proceedings to have their legacies raised out of the reversion by sale or mortgage. The case of *Hornsey Local Board* v. *Monarch Investment Building Society* (61 L. T. Rep. 867; 24 Q. B. Div. 1; 59 L. J. 105, Q. B.) is a direct decision on the new statute. *Re Blachford; Blachford* v. *Worsley* (27 Ch. Div. 676; 33 W. R. 11), cited in chambers, turned upon a trust, and has very little to do with this matter. There is not a trust or trustee here. It is simply a devise of Blackacre to B. subject to a charge to A. *Re Johnson*; *Sly* v. *Blake* (52 L. T. Rep. 682; 29 Ch. Div. 964; 33 W. R. 502), which was a decision on the stat. 23 & 24 Vict. c. 38, decided that the present right to receive under a will or on an intestacy does not arise until the executor or administrator has assets. The statute was never intended to apply to that case. In both of these cases there was a trustee. [STIRLING, J. referred to *Re Davis*; *Evans* v. *Moore*, 65 L. T. Rep. 128; (1891) 3 Ch. 119.] The claim is barred by the statute, and it is no answer to say that

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there was no property against which the charge could be enforced. There has been no acknowledgment or payment.

T. R. Warrington for the legatees.—The court is not bound by the statute in this case to do an injustice and prevent these legatees recovering. We ask the court to infer that Edward Owen, who was entitled to the residue, agreed to postpone the sale:

Hugill v. *Wilkinson*, 58 L. T. Rep. 880; 38 Ch. Div. 480.

[STIRLING, J.—In the case of *James* v. *James* (L. Rep. 16 Eq. 153; 42 L. J. 386, Ch.) it was decided, following a previous decision of the Court of Appeal in *Pryce* v. *Bury*, which unfortunately had not been reported, that whether there was an agreement for foreclosure or not the remedy was foreclosure. If you can once make out that this was not a proceeding to recover a legacy but to recover land, then no doubt that would help you very much.] I am not aware of any case of a charge created by will being entitled to foreclosure, but I submit the principle is the same:

London and County Banking Company v. *Dover*, 11 Ch. Div. 205; 48 L. J. 336, Ch.;
Backhouse v. *Charlton*, 8 Ch. Div. 444; 26 W. R. 504,

where North, J. applied the principle. Kekewich, J., in a recent case (*Sadler* v. *Worley*, 70 L. T. Rep. 494; (1894) 2 Ch. 170), held debenture-holders with a general charge entitled to foreclosure. [STIRLING, J.—Still, that all arises out of contract.] Yes. I rely upon this as being a legacy, and time did not begin to run until there were assets. Whether there is a charge by will or by deed, that is an assignment of so much of the land as to entitle the legatee to bring an action to recover the land, or so much as may be necessary to satisfy the legacy. If this is a legacy it is payable out of the residuary personal estate, on the principle of *Earle* v. *Bellingham* (No. 2) (30 L. T. Rep. O. S. 162; 24 Beav. 448). There was no legal personal representative after the death of the tenant for life, but merely an administrator of Mary Owen. Throughout the will the testator speaks of the gifts as legacies, and although no doubt they were primarily payable out of the real estate, they were payable out of the personal estate if the real estate was insufficient. The proper means of obtaining the legacy was to take proceedings to which the executor was a party. If this had been a reversionary interest in personal estate which had come to the hands of the executor, there could be no question:

Smith v. *Hill*, 38 L. T. Rep. 638; 9 Ch. Div. 143.

It is an extraordinary thing that because this happens to be real estate the right is barred. The question is whether the principle is the same in the case of an equitable charge by will as in the case of an equitable charge by memorandum of deposit or contract. [STIRLING, J.—There ought to be some authority on that point.] All the authorities are as to the rights of the equitable chargee to foreclose:

Fisher on Mortgages, 4th ed., p. 480 *et seq.*

That statement is not quite accurate since the decision of North, J. in *Hugill* v. *Wilkinson* (*ubi sup.*). But the legacies were to abate if the real estate was insufficient. That disposes of the argument founded on *Earle* v. *Bellingham* (*ubi sup.*) and the other cases. *Tennant* v. *Trenchard* (20 L. T. Rep. 856; L. Rep. 4 Ch. App. 537) merely went on the duty of the trustee. *Cur. adv. vult.*

June 28.—STIRLING, J. (after stating the facts of the case) proceeded as follows:—The question has arisen whether all claims in respect of the 8000*l.* were not barred by the Statute of Limitations. It was contended in opposition to this view that the recitals in the deed of Nov. 22, 1880, were evidence of an agreement that payment of the balance of the 8000*l.* should be postponed until the death of Mary Hannah Postlethwaite. I am unable to come to this conclusion. There appears to be nothing in the deed which could prevent any of the legatees from requiring at any time that the interest of the testator under the will of David Owen should be sold, and the proceeds applied in satisfaction of the unpaid balance. I am also of opinion that this sum of 8000*l.* was not a legacy payable out of the personal estate of the testator, but constituted simply a charge on his real estate and on his interest under the will of David Owen. I have not therefore to consider the case of a legacy payable by a legal personal representative to whose hands assets sufficient to answer the legacy came for the first time on the death of Mary Hannah Postlethwaite; and consequently the decision is not governed by such cases as *Adams* v. *Barry* (2 Coll. 285, 290, 294); *Re Johnson*; *Sly* v. *Blake* (52 L. T. Rep. 682; 29 Ch. Div. 964; 33 W. R. 502); and *Re Davis*; *Evans* v. *Moore* (65 L. T. Rep. 128; (1891) 3 Ch. 119), or the principles there laid down. It is enacted by the Real Property Limitation Act 1874 (37 & 38 Vict. c. 57), sect. 8, that no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same." The words "present right to receive" are to be read according to their ordinary meaning in the English language: (*Hornsey Local Board* v. *Monarch Investment Building Society*, 61 L. T. Rep. 867; 59 L. J. 105, Q. B.; 24 Q. B. Div. 1; 38 W. R. 85.) Now the present right to receive accrued in 1880; in fact, a part was then received by each of the persons to whom it was payable, and the balance might have been raised by sale or mortgage of the interest of the testator under the will of David Owen. In my opinion, the right to recover the balance is barred by this enactment. In opposition to this conclusion there was cited the case of *Hugill* v. *Wilkinson* (58 L. T. Rep. 880; 38 Ch. Div. 480), where it was held that a person having an equitable charge on a reversionary interest in land was not debarred from asserting his claim against the land until the expiration of twelve years from the time when the reversionary interest fell into possession. When the grounds of that decision are examined they are found to be these: first, that an equitable mortgagee has a remedy against the land by way of foreclosure; secondly, that an action for foreclosure is not an action to recover money charged upon land, but to recover land itself: (*Harlock* v. *Ashberry*, 46 L. T. Rep. 356; 19 Ch. Div. 539; 51 L. J. 394, Ch.; *Pugh* v. *Heath*, 46 L. T. Rep. 321; 6 Q. B. Div. 345;

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7 App. Cas. 235; 51 L. J. 367, Q.B.) And, thirdly, that the time within which an action for the recovery of land may be brought is regulated not by sect. 8, but by sects. 1 and 2 of the Real Property Limitation Act 1874. The question then arises whether any such reasoning applies to the present case; and it appears to me that it does not apply, unless the persons entitled to the benefit of these charges on the land have in respect of them a right of foreclosure. No case has been cited in which the owner of a charge on land created by will has been held entitled to foreclose. The grounds on which the court grants foreclosure are explained by Wigram, V.C. in *Sampson* v. *Pattison* (1 Ha. 533). There was there a conveyance of an estate to A. in trust that the same should stand chargeable with a sum of money and interest, and subject thereto in trust for B., with a power of sale by A. upon nonpayment, and it was held that A. was not entitled to foreclose, but was entitled to the aid of the court in effecting the sale. At p. 535 the Vice-Chancellor says: "The only question is, what are the terms of the contract. They are simply that a certain sum of money and interest shall be a charge on the estate, and if the same be not paid at a particular time, the party entitled to the money shall have power to sell the estate. There is no right of foreclosure arising out of such a contract. Where a charge is created by mortgage the condition of which is that, if the money be not paid at a certain day, the estate of the mortgagee shall be absolute at law, this court says that the failure in payment at the day shall not work a forfeiture, notwithstanding the express words of the contract; and upon the bill of the mortgagee a further time for payment is appointed: if the money be not then paid, the court refuses again to interfere and leaves the parties to their legal rights. The frame of the instruments under which the parties claim in this case do not bring them in any respect within the principle that the decree of foreclosure proceeds upon. *Jenkins* v. *Row* (18 L. T. Rep. O. S. 204; 5 De G. & Sm. 107) is a similar decision. It is settled that the relief to which an equitable mortgagee of real estate by deposit of the deeds is entitled is foreclosure and not sale: (*James* v. *James*, L. Rep. 16 Eq. 153; 42 L. J. 386, Ch.) The reason appears to be, that the court treats the deposit as evidence of an agreement to execute a legal mortgage. See the judgment of Lord Cottenham in *Parker* v. *Housefield* (2 My. & K. 419; 4 L. J. 57), and of Sir George Jessel, M.R., in *Carter* v. *Wake* (4 Ch. Div. 605; 46 L. J. 841, Ch.). It appears to be the better opinion that, under the statute 1 & 2 Vict. c. 110, s. 13, a judgment creditor was, prior to the passing of the statute 27 & 28 Vict. c. 112, entitled to foreclosure on the ground that the former statute places the judgment creditor in the same position as regards remedies in equity as if the judgment debtor had by writing under his hand agreed to charge the hereditaments against which judgment is sought to be enforced. See the judgment of Turner, L.J., in *Ex parte Boyle* (3 De G. M. & G. 515, 530). In *Tennant* v. *Trenchard* (20 L. T. Rep. 856, 857; L. Rep. 4 Ch. App. 537, 542) Lord Chancellor Hatherley says: "Although some of the authorities appear to conflict with each other, it seems on the whole to be settled that, if there is a charge *simpliciter*, and not a mortgage or an agreement for a mortgage, that the right of the parties having such a charge is sale and not foreclosure." Possibly a testator might so express himself as to show that he intended the owner of a charge created by his will to have the like remedies as are conferred by statute on the judgment creditor; but I do not think, having regard to the authorities to which I have referred, that such an intention can be inferred from the language of the will of the testator. I think, therefore, that the remedy in the present case is to have the sum mentioned raised by sale or mortgage, and not by way of foreclosure, and consequently that the period of limitation is defined by sect. 8 (and not by sects. 1 and 2) of the Real Property Limitation Act 1874.

Solicitors: *Paterson, Snow, Bloxam*, and *Kinder*, for *Longueville*, Oswestry; *Kingsford, Dorman*, and *Co.*, for *Arnold* and *Son*, Birmingham.

March 20, *April* 4 *and* 5.

(Before KEKEWICH, J.)

Re WOOD; TULLETT *v.* COLVILLE. (*a*)

Will—Gravel pits—Direction to carry on business until gravel pits worked out and then sell—Remoteness—Perpetuity.

By his will, made Feb. 1872, *a testator directed his trustees to carry on his business of a gravel contractor until his gravel pits were worked out, and then to sell them, and to hold the proceeds of sale in trust for such of his children then living, and such issue living of any child or children then deceased as should being sons attain twenty-one, or being daughters attain that age or marry, in equal shares,* per stirpes; *and until such sale his sons should continue to be employed in the business. The testator died in March* 1872, *leaving children. The gravel pits were worked out in* 1878.

Held, that the direction to sell the gravel pits, and the trusts of the proceeds were void for remoteness.

BY his will, made the 29th Feb. 1872, William Wood, gravel contractor, devised and bequeathed all his real estate and all the residue of his personal estate unto and to the use of William Tullett and George Wood, upon trust to dispose thereof according to the direction thereinafter declared, and he directed his trustees to carry on his said business of a gravel contractor until his gravel pits were worked out, and then to sell the said gravel pits, and the freehold land on which the same were situate, and the horses, carts, and other stock-in-trade employed in the same, by public auction, either together or in lots, and subject to such conditions and generally in such manner as his trustees might think expedient, with full power for testator's sons, or any of them, to bid at such sale. And he directed the trustees to hold the proceeds of such sale "in trust for such child or children of mine then living, and such issue living of any child or children then deceased, as shall being a son or sons attain the age of twenty-one years, or being a daughter or daughters attain that age or marry, in equal shares, but so that the issue of my deceased children may take the share or the respective

(*a*) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

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shares only that the parent or respective parents would have taken if living." And until such sale the testator wished that his sons, or such of them as should be willing to do so, should continue to be employed in the business as theretofore at the usual wages, and the testator gave his ultimate residue to his children equally. The testator died on the 24th March 1872 leaving children, and the issue of one daughter who died before the date of the will. The gravel pits were about six acres in extent, and were nearly worked out. In May 1878 the pits were worked out, and the trustees sold the horses, carts, and stock-in-trade, and from time to time portions of the land.

An originating summons was taken out to determine among other questions whether or not the direction for the sale of the gravel pits, and the trusts of the proceeds of sale, were void for remoteness.

C. E. E. Jenkins for the trustees and executors, one of whom was a son of the testator.—The will creates no perpetuity; it is simply a settlement of the property. The case is distinguishable from *Re Dawson*; *Johnston* v. *Hill* (59 L. T. Rep. 725; 39 Ch. Div. 155). If the gift is bad it falls into the residue:

Jee v. *Audley*, 1 Cox, 324.

Aldred Rowden for W. E. Colville, son of the daughter of the testator, who died before the date of the will.—I submit that the gift does not offend the rule against perpetuities. The testator knew that the gravel pits would be shortly worked out. There is a good gift to a class of ascertainable persons:

Sibley v. *Perry*, 7 Ves. 522.

It appeared from the evidence that the pits could have been worked out in three or four years from the testator's death; therefore the direction to sell should be treated as within the legal limit:

Wood v. *Drew*, 33 Beav. 610.

In any case, if the beneficial interest in the proceeds of sale does not offend the rule against perpetuities, the court will give effect to the gift:

Oddie v. *Brown*, 4 De G. & J. 179;
Re Daveron; *Bowen* v. *Churchill*, 69 L. T. Rep. 752; (1893) 3 Ch. 421;
Goodier v. *Edmunds*, (1893) 3 Ch. 455.

Warrington, for the defendant, Richard Wood, representing all the testator's children living at the date of the will, took the same view as to the question of remoteness.

Benn for the defendant, Thomas Wood, a grandson, and representing grandchildren other than W. E. Colville.—The gift is void for remoteness, because the persons to take cannot be ascertained within the legal limit of time. There was no certainty that the pits would be worked out within the proper time from the testator's death:

Jee v. *Audley*, 1 Cox, 324;
Lord Dungannon v. *Smith*, 12 Cl. & F. 546;
Blight v. *Hartnoll*, 45 L. T. Rep. 524; 19 Ch. Div. 294;
Re Dawson, 59 L. T. Rep. 725; 39 Ch. Div. 155;
London and North-Western Railway Company v. *Gomm*, 46 L. T. Rep. 449; 20 Ch. Div. 562.

I submit the gift is void, and falls into the residue

Aldred Rowden, in reply, referred to

Curtis v. *Lukin*, 5 Beav. 147.

KEKEWICH, J. — The testator in this case was a gravel contractor, and it appears that he had gone a long way towards working out certain gravel pits belonging to him; but at his death some portion of them still remained to be worked out. The date of his will was the 29th Feb. 1872, and it was proved in April of the same year, so that he did not live long after the date of his will; and it appears from the evidence that at the time of his death there was so little gravel remaining to be worked out, that some few years would have been sufficient to work them out entirely at the same rate of working within the limit of remoteness. And it also appears that he contemplated it as possible that the gravel would be worked out, while his sons would be able to take a large part in his business, because he says that until the sale of the gravel pits, "my sons, or such of them as may be willing to do so, shall continue to be employed in the said business as heretofore at the usual wages." But he does, in the most general terms, direct his trustees "to carry on my said business of a gravel contractor until my gravel pits are worked out, and then to sell the said gravel pits." Standing alone that direction appears to me to offend against the rule of perpetuities in two respects; that is to say, the direction to carry on the business for an indefinite time is bad. and the direction to sell after the gravel pits are worked out is bad. I do not see any possible answer to that, unless evidence is admissible, and is sufficient to prove that the gravel pits would be worked out within the prescribed time. If there were evidence going as far as this—namely, that it was physically necessary that they should be worked out within the prescribed period, it would be a different case; but the evidence before me only shows that men working out the pits in the ordinary way would work it out in a short time. There is nothing to prevent the trustees declining to work the pits for a very long time, in the hope and intention, for instance, of making a larger market hereafter. And it might be that the pits might fall in, and for that reason might not be able to be worked out for a very long time. In my opinion this direction must be construed as it stands, and transgresses the limit allowed by law. But then the testator goes on to dispose of the proceeds of sale, and I have two recent authorities on the point which show that I may regard the persons entitled to the proceeds of sale, when the property is sold, as beneficiaries of the property itself, notwithstanding that the direction or trust for sale is invalid. These are cases decided in 1893 before Chitty, J., and Stirling, J. In one case, *Re Daveron* (69 L. T. Rep. 752; (1893) 3 Ch. 421), there was a direction to sell upon the expiration of a lease; and in the other, *Goodier* v. *Edmunds* (1893) 3 Ch. 455), a direction to sell after the death of the longest liver of the testator's daughter, his son, and any widow of his son. Stirling, J. saw his way to holding that, although the trust for sale was bad, yet the trust for the beneficiaries was good, inasmuch as there was a direction to pay the rents and profits until sale to the persons to whom the whole of the proceeds of sale were given. Can I find, as those judges did, that these persons were, or are, at any time entitled to the proceeds of sale? Supposing this property were sold to a railway company, or under an order of the court, could I say that such and such persons are entitled. or can I tell exactly who are entitled to this money? Two cases were cited to which

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that principle was applied, as limiting the rule against perpetuities, entitling a testator to escape it on the ground that the persons were ascertainable. One is *Wood* v. *Drew* (33 Beav. 610), to which I only refer because Mr. Rowden relied on it; but it seems to me that the Master of the Rolls based his reasoning upon this—that the persons to take were all ascertained. When once this can be done, the persons to take may be regarded, for the shares are vested; you know who the persons are. It matters little—I have not to deal with that—what shares they take. If you know who must take the property, then you care less whether the time for selling has arrived. I now turn to the other case, *Oddie* v. *Brown* (4 De G. & J. 179), because I have there a statement by a careful and learned judge, Turner, L.J. In that case there was a direction for accumulation, and Stuart, V.C., held that the bequest was void for remoteness, because the accumulation would extend beyond the period allowed by law. Turner, L.J. deals with the point in this way. After stating that he did not think the dispositions of the will were void for remoteness, he says, at page 195 of 4 De G. & J.: "The Vice-Chancellor, as I collect from his judgment, has considered them to be so because the 3000*l.* might not be accumulated within the period allowed by law for the vesting of interests"—that is precisely in the same way that a sale might not necessarily take place within the period allowed by law for a sale. Then he goes on: "but in arriving at this conclusion he proceeds upon the footing that nothing vests in interest until the 3000*l.* is accumulated." Turner, L.J. satisfied himself that there was a vesting of interest within the proper limits, and then, finding that, he says it is quite immaterial whether there is or is not any direction as to when the accumulations are to stop, because you have the persons entitled to take these accumulations, which are only directed for their benefit, and they can stop what is only for their benefit. Can I find that on this will? Can I adopt that construction here, or the construction in the cases before Chitty, J. and Stirling, J.? I would, but for one difficulty. Under this will the testator directs the proceeds of the sale to be divided among his children "then living." The only point of time to which that can possibly refer is the time when the gravel pits are worked out, and the power of sale arises. Therefore, I must read this trust as a trust "for such children of mine as are living when my gravel pits are worked out," a point of time which, as I have held, is too remote. The testator also provided for the death of any child in the interim. He says, "and such issue living of any child or children then deceased, as shall being a son or sons attain the age of twenty-one years; or being a daughter or daughters attain that age or marry." That is to say, these persons to take must be persons—if you can find out who they are—who have attained twenty-one, or are married; there is no doubt about that. But these persons must also be living at the same particular point of time; that is to say, when the pits come to be sold, and when the proceeds are to be divided. That is too remote. It is impossible, on the language of this will, to say who now are to take, or at any particular point of time will take. Consider the date of the testator's death: it would take an indefinite time from that date to work out the pits. Which of his sons will then be living; that is, when the pits are worked out? Can anyone say which of his children will be then living, or which of them will be then dead leaving issue then living? No one can answer that question. Therefore, I decide, though with extreme reluctance, that the gift is too remote, because it is impossible to say, at the date of the testator's death, at what point of time the shares would vest in interest in ascertained persons. They could not be ascertained until the happening of the event which is too remote. It might possibly be that no one of the persons indicated would ever take at all. I hold, therefore, that the gift is too remote.

Solicitors: *Snow, Snow,* and *Fox*; *Pownall* and *Co.*

Friday, May 25.

(Before KEKEWICH, J.)

Re COGHLAN; BROUGHTON *v.* BROUGHTON. (*a*)

Marriage settlement—Covenant to settle after-acquired property—Coverture—Death of husband—Recital.

By their marriage settlement, made in 1839, *a husband and wife covenanted with the trustees that if at any time after the solemnisation of the said intended marriage, and "during the life" of the wife, any personal estate should be given, or bequeathed, or come to, or devolve, upon the wife or the husband in her right, then they would do all things necessary to vest such after-acquired property in the trustees upon the trusts of the settlement. The husband died in* 1850, *and in* 1892 *the wife became entitled to personal estate under the intestacy of a cousin.*

Held (following the case of Re Edwards, 29 *L. T. Rep.* 712; *L. Rep.* 9 *Ch. App.* 97), *that in the absence of any expressions showing that a covenant of this nature was intended to have a more extended operation, it was to be construed as if the usual words "during the said intended coverture" had been inserted. As the language of the covenant was ambiguous, the court was entitled to read the recital; but either with or without the recital, the covenant did not bind this particular property.*

BY an indenture of settlement dated the 15th May 1839, and made between the defendant, Fanny Maria Hardress Lawson (then and therein described as Fanny Maria Hardress Broughton, spinster), of the first part, Stephen Lawson of the second part, and James McAlpine and Robert McAlpine (the trustees) of the third part, being a settlement which was made in contemplation of a marriage then intended and shortly afterwards solemnised between the said Stephen Lawson and Fanny Maria Hardress Lawson, it was agreed and declared that the trustees should stand possessed of certain sums of Consols and of the investments from time to time representing the same, upon trust to pay the income of the said funds to F. M. H. Lawson during her life, for her separate use and without power of anticipation, and after her death the trustees should stand possessed of the said funds in trust for her children as she should by deed or will, and whether covert or sole, appoint, and in default of and subject to such appointment, in trust for her children.

(*a*) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

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And after reciting that, under the settlement made the 28th March 1800 on the occasion of her parents' marriage, the said F. M. H. Lawson or the said Stephen Lawson in her right would on the death of her father Thomas Delves Broughton be entitled (subject to the power of appointment given to him by the same settlement) to a share of certain moneys, stocks, funds, and securities, and that it had been agreed that the said Stephen Lawson and F. M. H. Lawson should covenant in the manner thereinafter mentioned as to such share and also as to any other moneys and personal property which, during the joint lives of the said Stephen Lawson and F. M. H. Lawson, should be given or bequeathed to her or to the said Stephen Lawson in her right, it was witnessed and the said Stephen Lawson and F. M. H. Lawson thereby jointly and each of them thereby severally covenanted with the trustees of the settlement that, if at any time after the solemnisation of the then intended marriage, and during the life of the said F. M. H. Lawson, any moneys or other personal estate should be given or bequeathed or come to or devolve upon the said F. M. H. Lawson or the said Stephen Lawson in her right, either under or by virtue of her said parents' marriage settlement or otherwise howsoever, then and so often as the same should happen the said F. M. H. Lawson and Stephen Lawson respectively, and their respective executors and administrators, would at the expense of the said F. M. H. Lawson, her executors or administrators, make, do, or execute, or cause or procure to be made, done, and executed, all such acts and assurances as the trustees of the settlement, their or his counsel, should think proper for effectually vesting such moneys or other personal estate in the said trustees upon the trusts and in the manner following; that was to say, in trust for the separate use of the said F. M. H. Lawson during the joint lives of herself and the said Stephen Lawson, and after the decease of either of them in trust for the survivor, and after the decease of the survivor upon and for such and the same trusts, intents, and purposes, and subject to such powers and provisoes as were thereinbefore expressed and declared of and concerning the funds hereinbefore mentioned as having been settled by the said F. M. H. Lawson and the income thereof, and which were to take effect upon her decease. Stephen Lawson also covenanted that, if at any time thereafter any moneys or other personal estate should be given or bequeathed or come to or devolve upon him, then he would convey such property to the trustees upon the trusts of the settlement.

Stephen Lawson died on the 4th May 1850.

There were four children of the marriage, some of whom attained vested interests.

The respondents, Thomas William Hensley, and Charles William Selby Lowndes, were the present trustees of the said indenture of settlement.

On the 24th Nov. 1892 Henry Thomas Coghlan, a cousin of the said F. M. H. Lawson, died intestate, and his personal estate was being administered in the action.

By a certificate made in the action on the 30th Nov. 1893, the chief clerk certified that four persons, whereof F. M. H. Lawson was one, were the only next of kin according to the statutes for the distribution of intestates' estates of the said Henry Thomas Coghlan living at the time of his death.

By an order made in the action on the 26th Feb. 1894 certain funds and securities were carried to the credit of a separate account entitled, "The account of the defendant Fanny Maria Hardress Lawson, widow, or the trustees of her marriage settlement." This was a summons taken out by the defendant, F. M. H. Lawson, that the funds and securities by the order of the 26th Feb. 1894, directed to be carried to a separate account as aforesaid, be transferred and delivered to the said F. M. H. Lawson.

Renshaw, Q.C. and *Creed* for Mrs. Lawson.—The covenants were only meant to meet the case of property acquired during the coverture:

Re Edwards, 29 L. T. Rep. 712; L. Rep. 9 Ch. App. 97;
Dickinson v. *Dillwyn*, 8 Eq. 546;
Carter v. *Carter*, 21 L. T. Rep. 194; L. Rep, 8 Eq. 551;
Godsal v. *Webb*, 2 Keen, 99;
Reid v. *Kenrick*, 1 Jur. N. S. 897; 24 L. J. 503, Ch.;

[KEKEWICH, J.—*Fisher* v. *Shirley*, 61 L. T. Rep. 668; 43 Ch. Div. 290.] As there is an ambiguity in the covenant, we are entitled to read the recital:

Re De Ros; *Hardwicke* v. *Wilmot*, 53 L. T. Rep. 524; 31 Ch. Div. 81.

It is clear from the recital that the covenant was restricted to the coverture.

Marten, Q.C. and *De Morgan* for the trustees of the settlement.—This case is distinguishable from the cases cited. Here we have the words "during the life" of the said Fanny Maria Hardress Lawson. Next of kin are not within the marriage consideration:

Paul v. *Paul*, 43 L. T. Rep. 239; 15 Ch. Div. 580.

The husband's covenant is not cut down at all, and there is no provision for a second marriage. Mr. Renshaw relies on the recitals, but if there is no ambiguity, the recitals cannot prevail against the operative part. In *Re De Ros*; *Hardwicke* v. *Wilmot* (*ubi sup.*) Kay, J., found there was an ambiguity; here there is no ambiguity. In *Re Edwards*, James, L.J. held that in the absence of any expressions showing that a covenant of this nature was intended to have a more extended operation, it was to be construed as if the usual words "during the said intended coverture" had been inserted. Here the covenant was intended to have a more extended operation, namely, "during the life."

Warmington, Q.C. and *W. F. Hamilton* for persons taking beneficially under the settlement and a deed of appointment.—This is a settlement to give the children of the marriage as much money as the parents can command. The children are the prime consideration of the covenants by the husband and wife to that effect. The covenant by the husband is that, "if at any time hereafter" any moneys, &c., shall come to him: the inference is that the wife's covenant was not intended to be restricted to coverture. It is not an ordinary settlement, it binds the parents at all hazards, the children are the prime object of the settlement. *Re Edwards* has been criticised:

Re Michell, 38 L. T. Rep. 462; 9 Ch. Div. 5;
Holloway v. *Holloway*, 25 W. R. 575.

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Jessel, M.R. said he did not agree with the decision in *Re Edwards*.

KEKEWICH, J.—I consider myself bound by authority. The two cases before Malins, V.C., are as much in point as any cases can well be in point in a matter of this kind. If they had stood alone it would have been my duty to examine and see how far the Vice-Chancellor's reasoning, though now old, applied to the case before me, and how far even it commended itself to my mind as sound and according to the new principles. But I must not do even that. The very point has been before the Court of Appeal; at any rate, the second case decided by Malins, V.C., has been before the Court of Appeal in *Re Edwards*, and the judgment of the Court of Appeal there is of greater importance, because, coming as it did before James and Mellish, L.JJ., they thought it right to consult the Lord Chancellor, and they had the concurrence of the Lord Chancellor in coming to a conclusion in that case. And the Lord Chancellor, Lord Selborne, agreed with them in the opinion that, in the absence of any expressions showing that a covenant of this nature was intended to have a more extended operation, it is to be construed as if the usual words "during the said intended coverture" had been inserted. "A covenant of this nature." The covenant there was that, in case after the marriage the husband and wife, or either of them in her right, should become entitled, and so on, without any limit touching the duration of the coverture, the duration of joint lives, or the duration of either of them; and it was of course capable of argument that a covenant such as I have, which is strictly limited to the life of the wife, is not a covenant of this nature. To my mind that is hypercritical. A covenant of this nature means a covenant, as Chancery lawyers and conveyancers call it, for the settlement of after-acquired property of the wife. I cannot read the words as intended to mean a covenant which has no express reference to time if it does not mention coverture. I think it must, in the mouths of such men as those judges who used the expression, mean a covenant of that character for settling the after-acquired property of the wife. It is said it is in the absence of those words to have a more extended operation and ought to be the same as if after-acquired property had been mentioned. I do not think I can fine it down, and say it is not a covenant of that nature for that purpose, and that there are words giving to it a more extended operation. Before turning to the covenant I should mention also that both cases before Malins, V.C., and the case before the Court of Appeal were before Stirling, J. in *Fisher* v. *Shirley*, at page 290 of 43 Ch. Div. He not only quotes the words at length, but gives, in his own remarks for distinguishing the case there, the reason for the conclusion at which the Lords Justices arrived in language which is deserving of attention. I am told here to-day that Sir George Jessel in another case of *Holloway* v. *Holloway* criticised *Re Edwards*. I share the regret expressed by Mr. Warmington that that case has not got into the regular reports, where we might have the benefit of having more pregnant criticism on it. But it is impossible for me to put that by the side of the other decision, as it throws no obscurity on the decision of the Court of Appeal. Here no doubt the covenant is of a peculiar character. It is a covenant that, "if at any time after the solemnisation of the intended marriage and during the life of Fanny Maria Hardress Lawson," the wife. Do those words show as against the general intention, which at law is presumed, a more extended operation? It seems to me that it is perfectly legitimate, having regard to the way in which these documents are intended to be construed, to read it in this way: "That if at any time after the solemnisation of the said intended marriage, but provided the wife be still alive." If you may read it in that way (this of course is only hypercritical for the purpose of testing it) you would, according to the cases, immediately read it also: "That if at any time during coverture provided the wife be still alive." I am aware that would introduce an absurd collocation of language; it could not be continuous coverture if the wife were not alive, but I think it illustrates what was intended. The settlement is not drawn on the most perfect lines. It is not a most finished conveyancing work, and it seems to me there has been a little multiplication of words here, and perhaps a little surplusage. But whether that be so or not, whether that is worthy of attention or not, the authorities, to my mind, bind me, and bind me to hold that these words are not sufficiently extensive to extend the operation beyond the coverture. Now, beyond the mere meaning of the words and the cases—I have not referred to other authorities, though they are not forgotten—I think there are two observations I ought to deal with. In the first place, my attention has been called to-day particularly to the covenant by the husband, and the covenant by the husband is in a different form and certainly it is very peculiar. The covenant by the husband is: "That if at any time hereafter any moneys or other personal estate shall be given or bequeathed or come to or devolve" upon him, then that shall be conveyed; and I am asked to draw some inference respecting the intention of the parties as regards the covenant by the wife, because the covenant by the husband is conceived in different language. It has just now been pointed out that the covenant of the husband might operate to bind property which did not fall within the covenant by the wife, because it did not come to her during her life. That may or may not be the case, seeing that the covenant by the wife binds property coming to the husband in her right. That is a covenant as regards that property. But, at any rate, this is a peculiar covenant inserted for some reasons which, I suppose, entered into the minds of the contracting parties. It is quite right to look at it; but to say that because the husband's covenant is in one form, a form peculiar, that therefore the wife's covenant should be differently construed is, I think, a straining of the criticism, if it is to be made useful in argument, which I do not think I ought to adopt. Then there is another point which certainly must not be passed over. There is an introductory recital, and, if I am at liberty to look at that recital, it is of great value in construing this covenant. Up to this time I have construed the covenant independently of the recital. There are two recitals, or two branches of it. There is a recital that the lady, the wife, and the husband in her right, will on the death of a certain person be entitled, subject to the power of appointment, and

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by the said settlement, to a share of and in certain moneys, stocks, funds, and securities; "and it hath been agreed" that the husband and wife "should covenant in the manner hereinafter mentioned as to such shares, and also as to any other moneys and personal property which during the joint lives of the said Stephen Lawson and Fanny Maria Hardress Lawson should be given or bequeathed to her," or to the said husband in her right. I am not dwelling on the giving and bequeathing to her, nor for the present purpose do I wish to make anything of the fact that this property was not either given or bequeathed to her, but came to her as next of kin of the person dying intestate. But this is to be observed: that it is personal property, which, during the joint lives, shall come to them. That is a contemplated time. May I look at that? If I may, certainly it indicates a strong intention on the part of the contracting parties that the property should only come to the wife during the joint lives, that is, during the coverture. It is said that I may only do that when there is ambiguity, and that the case before Kay, J. recognises that (the case of *Re De Ros*; *Hardwicke* v. *Wilmot*), and does not contravene the rule. I do not think it does, because he thought there there was ambiguity, and the rule is well settled. Why is there not an ambiguity here? I quite agree that, if I am obliged or at liberty to read this covenant grammatically, there is no ambiguity at all. If I am at liberty to read this covenant according to its exact language, as the words are used in ordinary parlance, if I am at liberty to say when the covenant speaks of what shall come to the wife during her life it means so long as she is alive in the flesh, there is no ambiguity at all. But the authorities tell me that is by no means the case. Whether my construction of the covenant on the present occasion is right or wrong the authorities at any rate go so far as this: that these expressions are of a dubious character, and may mean one thing and may mean another. If it is controlled by the context it may mean only during the coverture, or possibly it may have a more extended character. According to the legal authorities this is not a plain use of language, about which a lawyer reading the document can have no doubt respecting the meaning. Any lawyer fairly instructed in the authorities on this branch of the law must know, "I must consider that." He would mark it as a passage to be considered and understood. And directly you have got as far as that, and have got the ambiguity raised by the decisions, then also you have this power of referring to the recital, and the recital strongly assists the conclusion at which I have arrived. Therefore, whether reading the covenant without the recital, still more reading the covenant with the recital, I think that, as the law stands, the covenant does not bind this particular property. If these authorities are to be reversed—and the matter is one of some importance—they must be reversed by higher authority than mine.

Solicitor, *C. W. Stevens.*

Saturday, June 23.

(Before KEKEWICH, J.)

Re READ. (*a*)

Solicitor — Costs — Conveyance of property — Completion of conveyance—Purchase and sub-sale—Scale fee—Taxation—Plan, charge for preparation of—Solicitors' Remuneration Act 1881 (44 *&* 45 *Vict. c.* 44).

Where a purchase and a sub-sale by the original purchaser of a portion of the property are completed by means of a conveyance by the original vendor to the sub-purchaser of portion of the property and a second conveyance by the original vendor to the original purchaser of the remainder of the property, the solicitor of the original purchaser, having acted for him in the whole transaction, is entitled to charge the scale fee as on a purchase by his clients for the whole amount of the original purchase money, and also the scale fee as on a sale by his clients for the amount paid by the sub-purchaser.

A solicitor is not entitled to charge his client with the costs of a plan, the preparation of which does not involve the skilled labour of a surveyor; such a charge is covered by the scale fee.

Re Lacey and Son (49 *L. T. Rep.* 755; 25 *Ch. Div.* 301), *considered.*

ADJOURNED SUMMONS.

Messrs. Bullman and Crye, who had purchased some land from a building society for the sum of 2550*l.*, employed a solicitor to act for them in the matter of the purchase. The solicitor prepared the contract of purchase, and perused the abstract of title delivered by the vendors. Before the purchase was completed, Messrs. Bullman and Crye sold a portion of the land purchased by them to a Mr. Pruddah for 1800*l.* The solicitor prepared the contract with Mr. Pruddah, and delivered to him an abstract of title consisting of the abstract of title furnished by the building society, together with an abstract of the equitable title of Messrs. Bullman and Crye. The transaction was carried out by two deeds, which were practically contemporaneous; one being a conveyance by the building society, by the direction of Messrs. Bullman and Crye, direct to Mr. Pruddah, in consideration of 1800*l.* paid to the building society, of portion of the land agreed to be sold to Messrs. Bullman and Crye; the other deed being a conveyance by the building society to Messrs. Bullman and Crye, in consideration of 750*l.*, of the residue of the same land.

The former of these deeds was not prepared by Messrs. Bullman and Crye's solicitor, but was perused and approved by him on their behalf; the other deed was prepared by him. The solicitor delivered two bills of costs to Messrs. Bullman and Crye: one for the scale fee under the Solicitors' Remuneration Act 1881, as for a purchase by his clients for 2550*l.*; the other bill being for the scale fee for a sale by his clients for 1800*l.* The bills were taxed by the district registrar, and he reduced the charges by allowing a scale fee in respect of a contract for 750*l.* only, on the ground that, according to *Re Lacey and Son* (49 L. T. Rep. 755; 25 Ch. Div. 301), the solicitor had not perused and completed a conveyance for more than 750*l.*, and therefore had not, as to the rest of the work done by him, done

(*a*) Reported by J. H. BAKEWELL, Esq., Barrister-at-Law.

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the whole work of "deducing title, and perusing and completing the conveyance," as mentioned in the Rules under the Solicitors' Remuneration Act 1881, schedule I., part 1.

One of the solicitor's bills of costs also contained an item of 10*s.*, for estimated amount of law stationer's charges for the preparation of a plan indorsed on one of the deeds. This plan was only a copy of a plan already in existence, and did not require to be prepared by a surveyor. The registrar disallowed this item also, on the ground that the charge was covered by the scale fee.

This was a summons on behalf of the solicitor for the review of the taxation.

Warmington, Q.C. and *P. O. Lawrence* for the summons.

O. L. Clare for the purchasers.

KEKEWICH, J.—This case is simple enough. The property was sold by the original vendors for 2550*l.*, and before completion of the purchase the purchaser resold part of it for 1800*l.* The whole transaction was completed by two deeds which were practically contemporaneous; by one deed part of the property was conveyed to the sub-purchaser for 1800*l.*, and the original vendors conveyed it direct by the direction of the original purchasers. The balance of the purchase money, namely, 750*l.*, was also paid to them, but they conveyed the other portion of the property to the original purchaser. Now, was the conveyance to the sub-purchaser a conveyance by the original vendors to the original purchasers? I think so. The purchasers are entitled to have the property conveyed as they please and to whom they please, provided that by so doing they do not throw additional cost on the vendors, and such conveyance is a conveyance to the original purchasers. The result is, that the whole 2550*l.* is found by the original purchasers. It is not that the sub-purchaser steps into the shoes of the first purchasers. It is a sub-contract, and they are independent vendors. Supposing this was carried out by independent deeds—first, a conveyance to the original purchasers, then they themselves convey to the sub-purchaser—no question at all would arise. Both sides rely on the case of *Re Lacey and Son* (*ubi sup.*), but in that case it was part of the contract that no abstract of title should be delivered, and the Lords Justices say that you cannot deduce a title, because there is none to deduce, and therefore the solicitors cannot charge under schedule I. of the Rules under the Solicitors' Remuneration Act 1881. Here, however, the solicitor's contract was to do whatever was necessary for the completion of the conveyance. As it happened the clients did not require the preparation of the conveyance to the sub-purchaser with his own hands, but in substance he did prepare the conveyance. I understand *Re Lacey and Son* (*ubi sup.*) to decide that where work is in substance done it is sufficient. I think that the solicitor is entitled to the scale fee for acting for the purchasers on 2550*l.*, and for acting for them as the vendors on 1800*l.* As regards the copy of the plan on the conveyance, it is a copy of a plan which did not require the skill and labour of a surveyor to prepare. Such plans are done by law-stationers, and are intended to be covered by the scale. If the employment of a surveyor were necessary, it must be done; but, if it were done, I should inquire if such employment were necessary before allowing the charge.

Solicitors: *J. F. Read*, Liverpool; *F. Venn* and *Co.*, agents for *Thos. Etty*, Liverpool.

May 30 *and* 31.

(Before ROMER, J.)

GWYNNE *v.* DREWITT. (*a*)

Right of way—Closed by Act of Parliament—Repeal by subsequent Act—Effect of—Injunction.

By virtue of an Act of Parliament passed in 1819, *and which was to be in force for a limited period, certain roads and bridle-paths were stopped up and discontinued, in order that a new turnpike road might be made; and the sites of the old roads and bridle-paths were vested in the adjoining owners, in exchange for the lands given by them for the purposes of the Act. The Act of* 1819 *was repealed by an Act of* 1856.

Held, that there was no reviver of the old roads and bridle-paths, which were intended to be stopped for ever by the Act of 1819.

THE plaintiff, James Eglinton Anderson Gwynne, was the owner and in possession of a farm known as Wootton Farm, in the parishes of Folkington and Jevington, near Polegate, in the county of Sussex, and of an adjoining strip of land in the parish of Jevington. The defendants, William Drewitt and Jesse Drewitt, were labouring men, residing at Polegate, and working as brickmakers in the neighbourhood. The defendants claimed to be entitled to a right of way in the parish of Folkington, across Wootton Farm and the said strip of land, and thence to a roadway which crossed by a bridge over the railway from Brighton to Polegate into the high road from Lewes to Polegate; and in defiance of the plaintiff's objection they continued from time to time to make use of the alleged right of way. Accordingly on the 4th July 1894, the plaintiff brought this action to restrain the defendants from wrongfully entering upon or crossing over any part of the said farm or strip of land in assertion of any alleged right of way.

The main questions in the action were whether this way in question which had been stopped up by 59 Geo. 3, c. x., sect. 51, had been revived again by the repeal of that Act in 1856; and if it had been effectively stopped, whether there had been any re-dedication of it since the Act of 1856, as a common and public highway. By the Act 59 Geo. 3, c. x., power was given to trustees to straighten, improve, and make a new turnpike road from Lewes to Polegate, and from thence to Eastbourne, and from Polegate to Hailsham Common, in the county of Sussex. Sect. 51 of the Act recite that by the making of the new line of road several considerable parts of the then existing turnpike road, and also several other roads would become useless, and would, if not stopped up, be the means of enabling persons to evade the tolls thereby granted; and the section then enacted that immediately after the said turnpike road should be open, the said several highways therein mentioned should be stopped

(*a*) Reported by G. MACAN, Esq., Barrister-at-Law.

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up, and the same were thereby declared to be stopped up and discontinued, that was to say amongst others, "the bridle-way from Monkinpin, in the said parish of Wilmington, by Wootton, to Wannock Lane, in the parish of Jevington." And the sites of the various roads and bridle-ways so discontinued were vested in the adjoining owners in exchange for lands given by them for the purposes of the Act. So much of the said bridle-way from Monkinpin by Wootton to Wannock Lane, as lay in the said parish of Folkington, was declared to be vested in William Harrison, Esq. (the plaintiff's predecessor in title), in exchange for the lands taken and used for the purposes of the Act. The section further provided that after the said highways and bridleways should have been respectively stopped up and discontinued, it should not be lawful for any persons (except as thereinafter mentioned) to use or claim the use of the same highways and bridle-ways as a highway, bridle-way, or footway; and a penalty, not exceeding 40s., was imposed on anyone so offending. The section reserved to the owners and occupiers of lands adjoining the said highways or bridleways, or to their servants, the right of passing and repassing for the purposes of husbandry or occupation of the lands. Sect. 92 provided that this Act should commence upon, and have continuance from the 25th March 1819, for and during the term of twenty-one years, and from thence to the end of the then next session of Parliament. The turnpike road contemplated by this Act was in due course opened for traffic, and had continued in use ever since. The bridle-way mentioned above in sect. 51, and declared to be discontinued, formed part of and included the route which was the way claimed to be used by the defendants in this action.

By an Act of Parliament of the 19 & 20 Vict. c. xcvi. (passed on the 14th July 1856), after reciting the Act of 59 Geo. 3, c. x., and also that the term granted by the said Act, and continued from time to time by divers Acts of Parliament for continuing certain turnpike roads for limited periods, would expire on the 1st Nov. 1856, and that it was expedient that the said recited Act should be repealed; it was enacted that the Act of 59 Geo. 3, c. x., should be repealed, as from the 1st Nov. 1856, and a new constitution and body of trustees were given to the road, with fresh powers of levying tolls. This Act was to remain in force for twenty-one years, when it expired, and the road became a main road under 41 & 42 Vict. c. 77, and was maintained by the East Sussex County Council.

Neville, Q.C. and *Ingle Joyce* for the plaintiff.—The effect of the Act of 59 Geo. 3, c. x., was to completely discontinue the bridle-way in question, and the repeal of that Act by 19 & 20 Vict. c. xcvi., cannot have the effect of throwing the roads and bridle-ways open again. The sites of those old roads have become vested in the adjoining owners. Nor was it in the power of the owner of Wootton Farm to re-dedicate a public footpath over the highways or bridle-ways so closed.

Hopkinson, Q.C., and *T. D. Hart*, for the defendants, submitted the point as to the effect of the repealing statute of 1856 in reviving the old ways.

ROMER, J.—I do not feel any doubt upon this point myself. The Act of 1856, which repeals the Acts of 1819, had not, in my judgment, the effect at all of reviving the old ways which had been stopped up and discontinued. The effect of the Act of 1819, sect. 51, is this, that the old ways there referred to were stopped up and discontinued, in my opinion, for ever. The true construction of the Act is, I think, that the soil of those ways was vested in the persons referred to in the section free from any public way whatever. The Act of 1819 contained a variety of provisions which had to be continued from time to time, and, accordingly, the Act was continued only for a term under sect. 92; but the provision in sect. 51 was something which was done once for all, and was not intended to be undone at the expiration of the term referred to in sect. 92. Now, when the Act of 1856 was passed, and the Act of 1819 repealed, it was not in my opinion at all the intention of the Legislature, or the effect of the Act of 1856, to undo that which had been already done during the continuance of the prior Act, or to revive these ways which had been once for all discontinued, and put an end to as public ways by sect. 51. [His Lordship then heard the evidence to see whether there had been a re-dedication since 1856, and came to the conclusion that there had not. He therefore declared the route in question to be not a public way, and granted a perpetual injunction restraining the defendants from trespassing on it, and ordered them to pay the costs of the action.]

Solicitors for the plaintiffs, *Rowcliffes, Rawle*, and *Co.*, for *Raper* and *Ellman*, Battle.

Solicitors for the defendants, *Frederick Hatton*, for *F. L. Lewis*, Eastbourne.

QUEEN'S BENCH DIVISION.

Wednesday, May 2.

(Before CHARLES and COLLINS, JJ.)

HEWISON AND ANOTHER v. RICKETTS. (a)

Contract— Agreement— Hire-and-purchase — Instalments—Default in payment of—Sum paid — Balance by instalments — Liability of guarantee—Sale.

Plaintiffs as "owners" of omnibuses and horses agreed to let them to G., the "hirer," who paid a large sum of money in advance, the balance to be paid by monthly instalments. The agreement was, that in case of breach or default, the owners might seize the chattels, and in that event all money already paid under the agreement was to belong to them.

Default was made in payment of an instalment and the owners seized the chattels. In consideration of the chattels being returned to the hirer, the defendant paid the amount due, and became guarantor of the remaining instalments due. Upon two more instalments becoming in arrear, the plaintiff again seized and resumed the possession of the chattels. The owners then sued the defendant (the guarantor) for the amount of the two unpaid instalments and recovered judgment. On appeal by the defendant (the guarantor) from a judgment recovered against him in the County Court:

Held, that the hire-and-purchase agreement was primarily a sale-and-purchase agreement, and was determined by the plaintiffs (the owners)

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law

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resuming possession of the chattels. By so doing they lost their right to sue G. (the hirer), and therefore could not recover the unpaid instalments from the defendant (the guarantor). They could not resume possession and still recover unpaid instalments from the surety.

THIS was an appeal from the County Court.

The plaintiffs were owners of certain omnibuses and horses which were admitted to be of the value of 368*l.*, and the owners of these chattels let the same to a person who hired the same. The hirer paid 125*l.* in advance, and the remainder was to be paid by monthly instalments. Default was made in payment of one of the instalments, and in accordance with the terms of the agreement the plaintiffs as owners seized the omnibuses and horses. In consideration, however, of the omnibuses and horses being returned to the hirer, the defendant came forward, paid the amount due and became guarantor of the remaining instalments.

Two more instalments becoming in arrear the plaintiffs again seized and recovered possession of the chattels in question. Having done this they then sued the defendant upon his guarantee for the amount of the two remaining instalments. The plaintiffs recovered judgment in the County Court for 24*l.*, the amount of the two remaining instalments and costs, and the learned judge gave judgment for the plaintiffs accordingly. The following is a copy of the agreement in question:

Memorandum of agreement made and entered into the 3rd day of December 1892, between Peter Frank Hewison and George Etherington Peacock, of, &c., omnibus proprietors, hereinafter called "the owners," of the one part, and George Guerin, of, &c., hereinafter called "the hirer," of the other part, whereby it was agreed between the parties hereto as follows:

The owners will let and the hirer will hire two omnibuses, seventeen horses, four pairs of harness, seventeen collars, and seventeen bridles, hereinafter called the said chattels, particularly set forth and described in the schedule hereto. The said goods and chattels are admitted by the hirer to be of the value of 368*l.*, and the same are to be let and hired at a monthly hiring upon the terms and conditions hereinafter mentioned; the hire is a payment of 125*l.* in advance on or before the signing of this agreement, and the sum of 243*l.* by twenty monthly payments of 12*l.* each and one monthly payment of 3*l.* The first and all future payments are to be made by the hirer at the office of the owners on the first day of every month, or within twenty-one days thereafter, commencing with the 1st day of January 1893. The hirer shall keep the rent and taxes to accrue due in respect of the premises in or upon which the said chattels for the time being are placed regularly and punctually paid, and shall upon the request of the owners produce to them or their representatives the receipt for such rent, rates, and taxes, and shall not assign or in any way part with the possession of the said chattels. The hirer shall not during the continuance of this agreement and without the consent in writing of the owners remove the said chattels or any part thereof, or permit the same to be removed from or off the premises at which the same shall have been delivered except in the usual course of business. The owner and every person appointed by him shall and may at any convenient time enter into or upon any premises in or upon which the said chattels may or be supposed to be for the purpose of viewing the state or condition thereof. As to the said chattels, the hirer shall not injure the same or permit the same to be injured, and will keep the same unhurt but in the same state as they now are (reasonable wear and tear excepted), and will to the satisfaction of the owners replace any of the chattels other than the said horses which may have to be destroyed by disease, and as to the said horses the hirer shall keep well fed and bestow all due and reasonable proper care and attention upon them.

In case of any breach of this agreement or any of the conditions thereof on the part of the said hirer, or in case the rent or any instalment thereof shall not be paid on the days hereinbefore appointed for payment thereof, or within twenty-one days thereafter, or in case the said hirer shall become bankrupt or make any arrangement with his creditors, or allow any judgment to remain unsatisfied against him, it shall be lawful for the owners to seize the said chattels at any time or in any place, and to enter the said premises for the purpose of such seizure and remove the said chattels. And this agreement may be pleaded as conclusive evidence of the leave and licence of the said hirer to the said owners and all persons acting therein by that order for the entry or trespass, and in case of damage, loss, or injury being done or caused to the said chattels, the said hirer shall make same good. In case of determination and in all other cases any money paid under this agreement shall belong absolutely to the owners. If this agreement shall not be determined before the expiration of the period of hiring, then upon the expiration thereof, and upon full payment of all moneys due for hire, and not before or otherwise, the things hired shall become the absolute property of the hirer.

Guerin (the hirer) made default in payment of the instalment due 1st Aug. 1893; and the plaintiffs seized two omnibuses and refused to part with them unless the remainder of the instalments were guaranteed. The defendant consented to guarantee them, and on the 5th Aug. signed an undertaking which, after reciting the agreement of 3rd Dec. 1892, the default, and seizure, and reciting that the defendant had requested the owners to return the omnibuses to the hirer, and in consideration thereof had agreed to pay to them the sum of 12*l.*, being the amount of the instalment then in arrear, and to guarantee the punctual payment of the instalments thereafter to accrue due, was as follows:

Now I, the said Edward Ricketts, in consideration of the said Peter Frank Hewison and George Etherington Peacock at my request returning to the said George Guerin the two omnibuses so seized and taken possession of as aforesaid, do hereby agree and undertake to pay to them, the said Peter Frank Hewison and George Etherington Peacock, the sum of 12*l.*, being the sum in arrear as aforesaid, and for the consideration aforesaid I do further guarantee to the said Peter Frank Hewison and George Etherington Peacock the punctual payment of the instalments hereafter to accrue due under the hereinbefore recited agreement until the full amount thereby agreed to be paid shall be paid as therein mentioned. And I further undertake to pay to the said Peter Frank Hewison and George Etherington Peacock each and every of such instalments as they become due in case default shall hereafter be made in the payment of such instalments by the said George Guerin in the manner and at the times and place as in the said agreement mentioned.

Cababé on behalf of the defendant, who appealed.—This agreement is a sale-and-purchase agreement. By the last clause of the agreement, the plaintiffs can seize the chattels in default of payment of any of the instalments; default was made, and the plaintiffs, after seizing and resuming possession of these goods, sued the defendant upon his guarantee for the last two instalments. The seizure of the chattels by the plaintiffs has wiped out the debt due from the defendant under his guarantee. The exercise of one right has

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done away with the exercise of the other right. [Collins, J.—The short point is, that the vendors having waived their right against the principal debtor by resuming possession of the goods, have by that act released the surety.] Yes, but there is also the point whether the right to seize and the right to sue can co-exist. I submit that they cannot under an agreement of this kind. He cited the case of

Lee v. *Butler*, 69 L. T. Rep. 370; 62 L. J. 591, Q. B.; (1893) 2 Q. B. 318.

Taylor on behalf of the plaintiffs.—Upon the clear wording of the guarantee, the defendant is liable. The plaintiffs can seize under the agreement, and can sue the defendant under the guarantee. This is a hiring agreement and not a sale-and-purchase agreement; the last clause of the agreement clearly shows this. These two agreements co-exist, and the cancelling of one does not cancel the other.

Cababé in reply.—This is an executory contract for sale with prepayment, and a handing over of the goods.

Charles, J.—In this case the defendant is sued upon a guarantee which he signed upon the 5th Aug. 1893. At that date it was understood by the parties that an instalment was due to the plaintiffs (the owners) from Guerin (the principal debtor) under an agreement dated the 3rd Dec. 1892. The guarantee recites that agreement and states that the defendant (the guarantor), in consideration of the plaintiffs returning to Guerin (the hirer) the omnibuses and horses which the plaintiffs had seized, agrees to pay the 12*l.* then due, and to pay the future instalments of 12*l* when due and in arrear. In order to find out what in reality the defendant did guarantee, it is necessary to turn to the agreement between Guerin (the principal debtor) and the plaintiffs. The words of the agreement point to it being a hiring agreement, but a hiring agreement not quite in the usual form. In effect it constitutes an agreement between a vendor and a purchaser, although the payment is described as hire. 125*l.* was to be, and was, paid down in advance, and the sum was to belong absolutely to the owners in case of the determination of the agreement, from any cause whatever. The payment of the residue was to be extended over a certain period. There was default made in the payment of a 12*l.* instalment of the residue on the 1st Aug. 1893, and the owners seized the omnibuses and horses. They however returned them, upon the defendant paying that instalment and guaranteeing the payment of the future instalments. Default was again made in payment of instalments due on Sept. 1 and Oct. 1, and the owners again seized the goods in respect of these two instalments, and subsequently the owners sued the defendant for 24*l.* (the amount of the two instalments due) on his guarantee. Now, in the first place, we must consider whether having seized the goods they could have sued Guerin for these two instalments in arrear. Clearly they could not, having seized as they did. As it is, Guerin cannot get the 125*l.* back, because of the express provision in the agreement. Can it be said that under the terms of the guarantee the defendant is liable? I do not think it can. I cannot adopt Mr. Taylor's view of the contract. I am of opinion that the plaintiffs, by seizing the chattels, extinguished the liability of Guerin with regard to the instalments due, and therefore thus relieved the surety. The practical result of holding otherwise would be that the vendors (or, as they term themselves, owners) in cases of this kind, on default being made, might seize the property and keep at the same time the 125*l.* or other large sums paid down in advance, and thus get twice paid. Upon the true construction of the agreement the general right to sue Guerin having been put an end to by the seizure, the right to sue the defendant is sure to fall to the ground.

Collins, J.—I am of the same opinion. The agreement in this case is called a hire-and-purchase agreement, the property in the goods meanwhile remaining in the vendors. We must construe the whole of the agreement in order to see whether these two things, hire and purchase, co-exist, that is to say, whether being an agreement for purchase, it is at the same time an agreement for hire. In the first place, it is seen that a sum of money has to be paid down in advance, and there is a provision that this sum together with all money paid under the agreement shall belong to the vendors absolutely; were this otherwise the vendors would have to refund. This agreement, upon its true construction, provides for the payment of the residue of the purchase money by instalments. After the guarantee had had been given by the defendant, the plaintiffs had two rights: they could under the original agreement resume possession; or they could sue the surety, the present defendant, on his guarantee. By resuming possession the plaintiffs would determine the agreement. This is what they did do, and by so doing they lost the right they had to sue Guerin. Consequently any proceeding taken by the plaintiffs against the defendant to enforce the guarantee against him as surety must fail. The agreement does not give the plaintiffs, who are the vendors, the right to resume possession of the goods and at the same time recover unpaid instalments from the surety (the defendant) upon his guarantee.

Appeal allowed.

Solicitors for the plaintiffs, *Bono* and *Simonds*.
Solicitors for the defendant, *Norris* and *Son*.

June 6 and 23.

(Before Wills, J.)

The Hydarnes Steamship Company Limited v. The Indemnity Mutual Marine Assurance Company Limited. (a)

Insurance—Marine—Policy on freight—Construction of policy—Commencement of risk.

By the terms of a policy of marine insurance the defendants agreed to make good to the plaintiffs all such losses thereinafter expressed as might happen to be the subject-matter of the policy and might attach to the policy in respect of the sum of 2000l. thereby assured, which assurance was thereby declared to be upon freight of meat valued at 3000l., warranted free from all claims, unless caused by stranding, sinking, burning, or collision, but to be liable for any loss occasioned by breaking down of machinery until the final sailing of the vessel, &c. The assurance

(a) Reported by W. H. Horsfall, Esq., Barrister-at-Law.

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to commence upon the freight from the loading of the said goods or merchandise on board the said vessel at Monte Video, and to continue until the said goods or merchandise were discharged and safely landed at as aforesaid.

The freight insured arose under a contract between the plaintiffs and a firm of merchants who imported meat from South America to Europe, and it was thereby agreed that after the arrival of the vessel at the port of loading the refrigerating engine should be worked until the temperature in the chamber in which the meat was to be loaded was reduced to a specified temperature, and then, and not until then, the steamer's agents were to give notice that the steamer was ready to receive the meat. The merchants agreed to pay freight on the arrival of the vessel at the port of discharge.

After the arrival of the vessel at the port of loading, the refrigerating engine broke down and the cargo of meat was not taken on board the vessel, which was subsequently loaded with other goods.

Held, that the plaintiffs were not entitled to recover the amount covered by the policy, as the risk had never attached.

The plaintiffs in this case sought to recover the amount alleged to be due upon a policy of marine insurance on freight of meat.

The defendants denied that the risk insured against ever attached according to the terms of the policy, or that there was any loss either actual or constructive.

Sir *R. Webster*, Q.C., *Bigham*, Q.C., and *Horridge* appeared for the plaintiffs.

Joseph Walton, Q.C. and *J. A. Hamilton* for the defendants.

The terms of the policy, the facts of the case, and arguments appear fully from the judgment of the court.

June 23.—Wills, J.—This is an action to recover 2000*l.* under a valued policy on freight. The policy, so far as is material, is in the following words: "This policy witnesseth that in consideration of the sum of 17*l.* 10*s.*, the Indemnity Mutual Assurance Company Limited doth agree that the said company will make good all such losses hereinafter expressed as may happen to be the subject-matter of this policy, and may attach to this policy in respect of the sum of 2000*l.* hereby assured, which assurance is hereby declared to be upon freight of meat valued at 3000*l.* warranted free from all claims (except general average and salvage charges) unless caused by stranding, sinking, burning, or collision, but to be liable for any loss occasioned by breaking down of machinery until final sailing of vessel, the ship or vessel called the *Hydarnes* (s.), lost or not lost, at and from Monte Video to any ports or places in any order, backwards and forwards in the river Plate (including the Boca), and (or) the rivers Parana and (or) Uruguay, or thence to any port or ports in the United Kingdom, and (or) continent of Europe not north of Hamburg, that port included in any order, and thence to any port or ports in the United Kingdom in any order with leave to call and wait at any ports, parts, and places for all purposes (especially in any order in the Brazils, either to discharge or take in cargo, or for any other purposes) with leave to tow and be towed and assist vessels in all situations. To return 2*s.* 4*d.* per cent. for no river Parana or Uruguay risk. . . . The assurance aforesaid shall commence upon the freight and goods or merchandise on board thereof from the loading of the said goods or merchandise on board the said ship or vessel at Monte Video, and shall continue until the said goods or merchandise be discharged and safely landed at as aforesaid. . . . Dated the 23rd Jan. 1890." The freight insured arose under a contract of the 9th May 1889 between the plaintiffs' brokers of the one part and Sansinena and Co., merchants, of the other part. By clause 8 of that contract it was provided that, "as soon as possible after the arrival of a steamer at Boca, Buenos Ayres, and after the discharge of cargo, if any, stowed in the chambers, the refrigerating engine shall be worked until the temperature in the said chamber shall be reduced below 28 degrees Fahr., and then, and not till then, the steamer's agents shall give written notice that the steamer is lying ready to receive the meat." The lay days were, subject to certain exceptions, to commence twenty-four hours after the receipt of the notice by the agents of Sansinena and Co. By clause 13 "the charterers shall pay freight on the arrival of the steamer at the port of discharge of the meat intended for such port and such freight shall be payable on all carcases which may be shipped at the Boca, Buenos Ayres, for such port," at certain specified rates. The vessel arrived at Monte Video on the outward voyage and there discharged outward cargo. She then proceeded to the Boca, where she arrived on the 25th Jan. 1890. The refrigerating engine was started on the 27th Jan. to cool down the brine which circulates in pipes through the chamber, and thus reduces it to the required temperature. On the 8th Feb. the brine was once reduced as low as 27½ degrees F., and on the 11th Feb. to 27 degrees, but this temperature was not maintained, and the temperature of the brine was generally above 28 degrees, and none of the meat chambers had got below 33 degrees, as appears from the engineer's log. The stipulated degree of cold in the chambers, therefore had not been reached. No notice, of course, had been given to the charterer's agents under clause 8 of the charter-party, and the vessel was not, in fact, ready to receive the meat. On the 11th Feb. the refrigerating engine broke down in a way and under circumstances which rendered repair in South America impossible, and the adventure so far as the carriage of meat was concerned was properly abandoned, and notice of abandonment, was duly given to the defendants. At the time this policy was entered into no meat ever was or could be loaded at Monte Video. There were no appliances for freezing meat at Monte Video. The Boca is a part of the port of Buenos Ayres, and the Parana is the main affluent of the river Plate. The Uruguay falls into the waters of the Parana some thirty or forty miles above Buenos Ayres. There were appliances for freezing meat at the Boca, and at places higher up, both on the Parana and the Uruguay, notably at San Nicolas on the Parana, and at Frey Bentos on the Uruguay. These facts were well known to shippers, shipowners, and underwriters, and I find that they were known to both plaintiffs and defendants when the policy was entered into. There is no doubt that the machinery spoken of in the policy

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is, or includes, the refrigerating machinery in question. There is no doubt that it broke down before the final sailing of the vessel, and, without going into details, there is no doubt that, if the risk ever attached, the money assured by the policy is due. The real, and indeed only question is, whether the assurance had commenced, a question which must be answered by a study of the policy itself. The words in the policy "the assurance shall commence upon the freight and goods or merchandise on board thereof (*i.e.*, of the vessel) "from the loading of the said goods or merchandise at" are in print; The single word "Monte Video," completing the sentence is in writing. Two things therefore appear to be pretty plain; first, an assurance upon freight and an assurance upon goods (if effectual) were intended to commence simultaneously, and the event upon which either attached was the loading of goods, that is to say, an assurance upon goods would commence with the loading of the goods insured, an assurance upon freight with the loading of the goods in respect of which the freight would accrue; secondly, "Monte Video" was advisedly inserted. And yet a literal reading would reduce the clause to nonsense. Both parties knew that the freight insured could not accrue in respect of any goods that could be put on board at Monte Video; and if so, and if no other interpretation is possible, either the whole assurance must go as an absurd and impossible contract, or this clause must be rejected as nonsense. The latter view is that contended for by Sir R. Webster. The defendants say on the other hand that the words "at Monte Video" were intended to cover both Monte Video and any other loading port permitted by the policy, and that as no meat had been loaded at the Boca when the accident occurred the policy had never attached. It would certainly appear from the cases as to insurance upon goods that, with a policy so expressed, the phrase "at place A.," A being the first place mentioned in the description of the voyage contained in the policy, is sufficient to cover the other unnamed loading ports, and as in this policy freight is clearly intended to stand upon the same footing as goods in respect to this clause, my opinion is that the policy should be so read, and I see no reason for not giving this construction, because the first place named in the description of the voyage is one at which the particular class of goods in question could not be loaded. "Monte Video" stands in such a collocation simply to indicate that from one end of the series of lawful loading places to the other the policy should attach from the loading of the goods. I do not lose sight of the fact that, as a general rule, the principles which regulate the commencement of risk as regards goods and freight are far from identical. But how can such general principles apply when the clause, and the only clause which is intended to deal with and define the commencement of risk deals with freight in exactly the same words as apply to goods? The method of interpretation I have referred to, by which the mention of the first of the lawful loading ports in the clause defining the commencement of risk has been held to cover the whole series, though not named, and to make the risk attach at each of the lawful ports named in the description of the voyage, though not mentioned in the risk clause, is well established, and I can see no reason why when the same words are made to deal simultaneously with freight as well as goods the same principle of interpretation should not be adopted. This view is strengthened by the clause in the policy by which 2*s.* 4*d.* per cent. is to be returned if no river Parana or Uruguay risk be in fact incurred. The clause defining the commencement of risk appears to me therefore to make the policy attach to freight at each loading port as soon as the goods in respect of which the assured freight will accrue are put on board, and not before; and the clause is intelligible enough. It remains to be seen whether such an interpretation is contradicted by any other part of the policy, or leads to results absurd in themselves, or so unreasonable that it is impossible to suppose that the parties could have so intended. The freight in the present case was payable provided the vessel arrived at the port where the meat was to be discharged. The policy therefore, from any point of view, covered the loss of freight which would ensue if the vessel were lost by stranding, burning, collision, &c., after the meat was on board. But freight might be lost in another way. By the agreement between Sansinena and Co. and the plaintiffs the freight was payable on each carcase separately, and until the whole of the intended shipment was on board only so much freight would be in course of being earned as was applicable to the quantity actually shipped. If the machinery broke down during the loading of the meat, the freight would be only partially earned, though the ship came safely home. It would be practically earned, because so far as freight was concerned it would not matter whether the meat were spoiled or not, if the ship arrived, and the breaking down of the machinery, even though it involved the destruction of the meat, would cause no loss of freight on the carcases already shipped. On those remaining to be shipped, if it prevented their being shipped, there would be a loss of freight. That the freight was not dependent upon the efficiency of the machinery after the homeward voyage began is obvious from the terms of the policy, and must have been known to the defendants when the insurance was effected. It was equally obvious that the plaintiffs sought to insure against the breaking down of machinery after the loading began. There is, therefore, construing the policy as I have done, a risk to be insured against, and as twelve days are allowed for loading and unloading, at least half that time might very well be occupied in loading, so that there is a substantial risk in respect of breakdown of machinery undertaken by the underwriters. It is argued for the plaintiffs that it is so small a matter that the parties must have contemplated something beyond it, viz., the damage of loss of freight by reason of a breakdown before the ship was ready to receive the meat, or before the loading began. I do not see that I have any materials for measuring the value of the risk, nor do I think it would be consistent with sound principles of interpretation to enter upon so vague an inquiry. A policy of insurance can hardly receive one construction if the premium be 10*s.* per cent., and another if it be 15*s.* per cent. It is enough, as it seems to me, if there is, according to the construction adopted, a substantial risk of loss of freight by reason of breakdown in machinery after the loading has begun and the assurance has there-

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fore attached. The difficulty—I should rather say the impossibility—of adopting the view presented on behalf of the plaintiff seems to me to lie in the fact that it requires that the clause defining the commencement of the risk should be altogether rejected. So strong an expedient should not, as it seems to me, be resorted to unless it is reasonably possible to adopt a construction by which every part of the contract shall have its meaning. Perhaps no clause can be more important than that which defines the commencement of the risk. That it was intended to be more than formal, and to have a real application, is apparent from its being completed in writing. Other blanks in places not applicable to the insurance of freight are left unfilled. It points most clearly to loading of some sort, as preliminary to the attachment of risk. The contention of the plaintiffs would expunge it altogether. I cannot think this can be right. The risk of breakdown insured against continues until final sailing of vessel. This provision, however, does not seem to me to affect the present question. A breakdown, however disastrous to the meat between the completed loading and the final sailing would not affect the right to freight. And I think the expression merely meant that, so long as there was a port to be called at where freight on meat could be earned, the insurance against loss of freight by breakdown of machinery should be in force. In fact, it amounts to only an additional illustration of the necessity of reading "at Monte Video" in the clause defining the commencement of risk as equivalent to "at and from Monte Video." Sir R. Webster argued that it was abundantly evident that the underwriters meant to take the risk of what I may call preliminary breakdown. If I were at liberty to interpret the contract by the correspondence which took place when the breakdown was announced I should be of the same opinion. It is clear that the real objection then entertained by the defendants was that they thought the adventure had not been properly abandoned. But it does not need authority, though there is abundance of it, to show that a contract must be construed by its own language, and not by any views taken of the meaning of that language by the parties. I have not forgotten that there is strong authority for the general proposition that insurance on freight attaches when the ship is at her port of loading with cargo ready for her or contracted for, and herself ready to receive the cargo, and in many instances still earlier. But, as I have already pointed out, these general principles seem to me inapplicable in face of a specific and inconsistent provision as to the time when risk shall attach, and I have further shown that the ship was not, in fact, ready to receive the meat. The real question appears to me to be whether the clause as to the commencement of the risk is to be expunged as insensible or unintelligible, or whether it is possible to give to it a meaning that is not contradicted by any other part of the policy. For the reasons I have given I am of opinion that my judgment must be for the defendants.

Judgment for the defendants.

Solicitors: for the plaintiffs, *Pritchard* and *Englefield*, for *Simpson, North, Harley*, and *Birkett*, Liverpool; for the defendants, *Waltons, Johnson, Bubb*, and *Whatton*.

June 23 and 25.

(Before Cave and Collins, JJ.)

Gordon and others v. Vestry of St. Mary Abbotts, Kensington. (a)

Metropolis — Street improvement — Compulsory purchase—Power to take part of building—Interim injunction—57 Geo 3, c. xxix., ss. 80, 82.

The plaintiffs, who were the owners of a public-house in the defendants' parish, were served with a notice by the defendants under the provisions of 57 Geo. 3, c. xxix., that they required to purchase from them the projecting stone porch, step and cellar-flap which formed part of such house and projected into and prevented them from widening the street in which the public-house was situated.

The plaintiffs brought an action for an injunction to restrain the defendants from proceeding to take the parts of the premises specified, and contended that the defendants were bound to take the whole of the premises, and could not take a part only.

The plaintiffs applied for an interim injunction to restrain the defendants from proceeding to have the value of the specified parts of the house assessed by a jury.

Held, that the court would not grant an injunction, as there was the question of fact to be decided upon the trial of the action as to whether the taking away of the parts required by the defendants would make such an alteration in the house that the defendants ought to be required to take the whole of the house.

This was an application on behalf of the plaintiffs for an interim injunction to restrain the defendants from proceeding under their two several notices, dated respectively the 24th Nov. 1891 and the 24th July 1893, to take the premises therein mentioned, and from issuing their warrant to the sheriff of the county of London to summon a jury to assess the value of part only of the said premises.

The plaintiffs were the owners of the premises known as the Town Hall Tavern, situate in High-street, Kensington.

In 1869 certain alterations were made in the premises whereby the north front on the ground floor came up to the footway of the street, and was in the same line of frontage as the north front of the building on the east side of the premises. A doorway on the west side of the premises on the ground floor gave access thereto across a private plot of land which adjoined the street. The north frontage from the first floor and upwards was set back about five feet six inches from the street.

In 1887 the frontage of the premises facing the street was altered by removing the ground floor windows facing the street as far back as the upper north front wall of the premises, making an entrance doorway on the north side of the premises, at the side of a window facing the street, instead of the former doorway. This alteration gave the premises somewhat the appearance of having a portico closed in by a wall on its east side, and having its pavement raised a step above the footway of the adjoining street. The cellarage was approached from the street by

(a) Reported by W. H. Horsfall, Esq., Barrister-at-Law.

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flaps on the pavement of this *quasi*-portico, and the ground floor arrangement of the premises was remodelled.

In 1891 the house on the east side of the premises was pulled down, and the new building line was thrown back five or six feet, thus giving the plaintiff's premises the appearance of having a projecting portico. This *quasi*-portico was permanently closed in by the wall on the east side, and was closed in on the north and west sides whenever the public-house was not open, by movable iron railings, six or seven feet high. There were underneath it a rolling way to the cellars of the public-house, and also other cellars.

Upon the 28th Oct. 1891 the defendants passed a resolution to the effect that it was desirable for the improvement of the street known as Kensington High-street that the footway of the thoroughfare fronting the premises, known as the Town Hall Tavern, should be widened, and they adjudged that the projecting stone porch, step, and cellar flap forming part of the said building obstructed and prevented them from so widening the said street, and that the possession, occupation, and purchase of the said projecting portion or portions of the building in question, and the land it stood upon, was necessary for the carrying out of the said improvement; and they directed that the necessary notices to treat, contract, and agree with the owners and occupiers of the house, building, and land in question should be served upon the respective parties, and all other steps should be taken as provided by 57 Geo. 3, c. xxix. to allow of effect being given to the improvement.

Upon the 24th Nov. 1891 a notice was served upon the plaintiffs by the defendants, in which it was stated that the defendants required to purchase the stone porch, step, and cellar flap referred to above.

Upon the 14th Dec. 1891 the plaintiffs, under protest, sent in their claim in respect of the portions of the premises required by the defendants, and objected that the statute did not enable the defendants to take part only of the premises.

Upon the 24th July 1893 the defendants served notice upon the plaintiffs of their intention to cause a jury to be summoned to assess the amount to be paid to the plaintiffs in respect of the portions of the premises required by the defendants.

Upon the 22nd Dec. 1893 the plaintiffs commenced the present action in which they claimed an injunction to restrain the defendants from proceeding under the above-mentioned notices to take the premises therein mentioned, and from issuing their warrant to the sheriff of the county of London to summon a jury for the purpose expressed in the notice of the 24th July 1893.

57 Geo. 3, c. xxix., enacts:

Sect. 80. That for the improvement of the streets and public places in the parochial and other districts within the jurisdiction of this Act and for the public advantage, it shall and may be lawful to and for the commissioners or trustees, or other persons having the control of the pavement of any parochial or other district from time to time and at all times hereafter, to alter, widen, turn, or extend any of the streets or other public places within any such parochial or other district (except turnpike roads), and to lengthen and continue or open the same from the sides or ends of any streets or public place within any parochial or other district into any other street or public place within such or any other parochial or other district, and to raise, level, lower, drain, ballast, gravel, or pave such new part or parts of any such streets or public places so altered, widened, extended, opened, or lengthened as aforesaid; and that if any houses, walls, buildings, lands, tenements, or hereditaments, or any part thereof, shall be adjudged by the said commissioners or trustees or other persons as aforesaid to project into, obstruct, or prevent them from so altering, turning, widening, extending, lengthening, continuing, or opening the said streets or public places within the said parochial or other district, and that the possession, occupation, and purchase of such houses, walls, buildings, lands, tenements, or hereditaments will be necessary for that purpose, it shall and may be lawful to and for the said commissioners or trustees or other persons as aforesaid, and they shall have full power and authority to treat, contract, and agree, or to employ any person or persons to treat, contract, and agree with the several owner or owners, occupier or occupiers, of all such houses, walls, buildings, lands, tenements, and hereditaments of whatsoever nature, tenure, kind, or quality for the purposes aforesaid, and to pay for the same such sum and sums of money as shall be agreed upon, &c., . . . and to pull down, use, sell, or dispose of such houses, walls, and buildings and the materials thereof, and lay the sites thereof, and also such other lands, tenements, or hereditaments or so much thereof as they the said commissioners or trustees or other persons as aforesaid shall think proper into the said streets or other public places, and all such new parts of such streets or public places. . . .

Sect. 81 enables corporate or collegiate bodies and incapacitated persons to sell for the purpose aforesaid.

Sect. 82 provides that if any body or bodies politic, corporate, or collegiate, or any other person or persons seized or possessed of or interested in any such houses, buildings, lands, tenements, or hereditaments, as aforesaid shall refuse to treat or agree or shall not agree with the said commissioners, &c., for the sale and conveyance of their respective estates and interests therein, &c., a jury shall be summoned and shall inquire of the value of such houses, buildings, lands, tenements, or hereditaments, and of the proportionable value of the respective estates and interests of all and every person and persons seized or possessed thereof or interested therein, or of or in any part or parts thereof, and shall assess and award the sum or sums of money to be paid to such person or persons, party or parties respectively for the purchase of such houses, buildings, lands, tenements, or hereditaments, &c.

It was agreed between the parties that the hearing of this motion should be treated as the trial of the action, but the Court, after hearing the arguments, decided, as appears from the judgments, that it could not be so treated.

Willis, Q.C. and *Maurice Powell* for the plaintiffs.—There is no power conferred by 57 Geo. 3, c. xxix. upon the defendants for the compulsory taking of part only of a house, and there is no power for a jury to assess the damage caused by severance. If the land is not built upon a part can be taken, but the case is different where there is already a building upon the land required:

Gard v. *Commissioners of Sewers of the City of London*, 49 L. T. Rep. 325; 28 Ch. Div. 486.

If the plaintiffs desired that only a part of their building should be taken, the vestry could not take the whole:

Teuliere v. *Vestry of St. Mary Abbotts, Kensington*, 53 L. T. Rep. 422; 30 Ch. Div. 642.

In the present case the plaintiffs say that the premises will not be suitable for carrying on the business of a public-house if the part required by

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the vestry is taken away, and therefore it is submitted that they are entitled to an injunction.

Channell, Q.C. and *G. M. Freeman* for the defendants.—The defendants have *bonâ fide* decided that all that is required for widening the street is the very small portion of the building that they have specified in their notice to the plaintiffs. They can only take what is necessary for the improvement. If to carry out the improvement it was necessary to pull down the greater part of the house, the defendants would have to take the whole. They are required to adjudicate what portion obstructed, and they cannot on such adjudication take the whole building unless required by the owner to do so:

Gard v. *Commissioners of Sewers of the City of London*, 49 L. T. Rep. 325; 28 Ch. Div. 486;
Thomas v. *Daw*, 15 L. T. Rep. 200; L. Rep. 2 Ch. 1.

The defendants have not exceeded their powers in this case, and the injunction should therefore be refused.

Willis, Q.C. in reply.

Cave, J.—In this case the plaintiffs in the action move for an injunction to restrain the defendants from continuing the proceedings they have taken to assess the compensation to be awarded to the plaintiffs in respect of a portion of a house called the Town Hall Tavern. The first ground relied upon by the plaintiffs is that, inasmuch as, admittedly, the portion sought to be taken would involve the removal of a portion of the house, and as that would involve the alteration of the premises and diminish the value of the tavern there is no power to take the portion which the defendants propose to take, and that, therefore, this injunction ought to go. In my judgment those facts are not sufficient to warrant us in issuing this injunction. The question whether under this statute a portion of a house can be taken has never been authoritatively settled, but there have been divers decisions with reference to taking a portion of land upon which questions have arisen touching the extent of the compulsory powers given by the Act, and there have been opinions expressed which, even supposing they are to be treated as dicta, and as not binding upon us, are nevertheless entitled to most respectful consideration at our hands. It has been settled that a portion of an estate may be taken. That, however, does not decide the question which we are dealing with here, because the words used in the section are "houses, walls, buildings, lands, tenements, and hereditaments." If a portion of an estate is taken, land is taken. Land is itself a thing which in point of fact admits of division, and when so much of the land is taken as really is necessary for the purpose of the improvement it seems to me that land is taken within the meaning of the statute, and, according to the express decision of the Court of Appeal, a portion of a piece of land may be taken. But when we come to deal with a house somewhat different considerations arise. A house is not a thing which can be divided in the way that a piece of land can be. If you take, for instance, a building which is occupied as a tavern, and you take exactly one-half of it as nearly as you can divide the areas, you do not take a tavern and leave a tavern, but you take part of a whole thing, and you leave the other part of that whole thing for the previous owner. So far as I can see the Act does not contemplate that that shall be done; it does not contemplate that part of a house shall be taken, leaving to the owner something which is not a house, which cannot be used for the purpose for which the house was used before, and which involves an alteration which will leave something essentially different in its character and condition to the house in its original state. If that were the case which was made out here I should be clearly of opinion that the Act does not enable a portion of the house in that sense to be taken, and that the vestry must consequently take the whole of the house. But suppose a house had a garden of thirty or forty feet in front of it, I should say that the vestry could take a few feet of the garden for the purpose of widening the footway without taking the remainder. That would be within their powers under the statute. To approach somewhat nearer the present case, supposing there was in front of the house a projecting erection used solely for the purposes of ornament, the taking away of which would involve an alteration in the appearance of the building and diminish the value of the house, if the effect of removing such erection would be to leave the house substantially as it was before, so that for all purposes of convenient occupation it would be precisely the same house, I should be of opinion that that would be a thing which could be done under the powers conferred by the Act. The present case is one which seems to fall between the cases I have up to the present time dealt with. Some alteration, not merely external but internal, will be required; a new approach to the cellar will have to be made, and the size of the cellar will be somewhat reduced. Is that a taking away of a part of a house? In one sense no doubt it is, because some portion of the external front of the house and some portion of the cellar is to be taken away. But is that a taking of a portion of the house which would be warranted by the terms of the Act? I am unable to decide that question at present. It seems that it is not enough to say that any interference with a house which will have the effect of requiring alterations to be made, and will in fact diminish its value to some, however small, an extent, is sufficient to make it necessary that the vestry should take the whole house or forego the proposed improvement. If the effect of what the vestry propose to do will be to alter the character and condition of the house so that it can no longer be occupied as the kind of structure it was before, then, it seems to me, that involves something which the law does not enable them to compel the owner of the house to accede to. If, for instance, the tenancy of the house could not be carried on as it was before, or if so much will be taken as to make it necessary to make alterations in the structural condition of the rest of the house so as to adapt it to a new purpose and to a different kind of business, or a business of a much more limited nature than that which is at present carried on there, so that it would be difficult to assess the effect of what was done by any compensation to be awarded, then I should say that that would not be within the powers of the vestry to force upon the owner. But if the effect of the alteration to be made will be that the business can be carried on as before, and the diminution of the size of the cellar will not be such as to interfere substantially and sensibly with the convenience of the occupiers,

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and with its use as it is used at present, then I should say that that is a case in which the vestry would have power to take the portion of the house which they are seeking to take. That, however, is a question of fact upon which both parties have a right to be heard at the trial of the action, and we cannot decide it here. It is impossible therefore for us to grant an injunction here as disposing of the action, which is what the parties came before us in the hope that we might be enabled to do. I think also that there are no grounds laid before us for granting an interim injunction. The vestry will proceed of course at their peril. If it turns out that they are taking a substantial portion of this house, which will alter its character and condition so that the use to which it has been put hitherto can no longer be continued, then, if we are right in our law, the proceedings of the vestry in summoning a jury and assessing compensation will go for nothing. If, on the other hand, what the vestry contend for is established, that these alterations are of a comparatively trivial nature and the business can still be carried on in the same building with substantially the same result and the same convenience as before then they will be right, and the proceedings to have the compensation assessed will have been properly taken. It seems to me, therefore, that we ought not to grant this injunction, and consequently that the motion should be dismissed.

Collins, J.—I am of the same opinion. I think that considering the words of sect. 80 of the Act and the decisions thereon, it is too late to argue now that the powers of the public authority are limited to taking the whole of either land or houses where such authority has come to the conclusion that something less than the whole obstructs the improvement. Some argument has been addressed to us based upon the fact that sect. 82 deals with compulsory purchase, and that in that section there are no words pointing to the dealing with anything less than the whole of the subject-matter whether it be land or houses which are required for the purposes of the improvement. But I think that sect. 80 really lies at the root of the whole question. The courts have decided that the first part of that section, in which the words are "any houses, walls, buildings, lands, tenements, and hereditaments, or any part thereof," contemplates that the adjudication to be made by the commissioners both as to the fact of obstruction and as to the necessity of purchase shall be limited to a part, and they arrive at that by saying that the subsequent part of the section deals with such houses, walls, buildings, lands, tenements, or hereditaments, which therefore they construe as embracing not only the whole but part of the house or land which has been dealt with in the earlier part. Rightly or wrongly, that is the construction which has been put upon sect. 80 in several decisions. Then sect. 81 deals with persons incapacitated to treat, but still with the same subject-matter. Then sect. 82, which is the compulsory section, deals with persons unable or unwilling to treat, and refers simply to such houses, buildings, lands, tenements, or hereditaments; thus carrying on the initial definition through the three sections. The 80th section is the foundation of the whole code, and the courts have come to the conclusion that the words "any part thereof" in the beginning of the section are by implication carried on into the words "such houses, lands, &c., in the other parts of the sections. It seems to me to follow that there is power for the vestry to confirm a resolution, if they do it *bonâ fide*, not only that a part of land but that a part of a house obstructs and will be necessary for the purpose of the improvement. I think that that was not only a dictum, but that the court arrived at that decision in *Thomas* v. *Daw* (15 L. T. Rep. 200; L. Rep. 2 Ch. 1), which was a decision of Lord Chelmsford confirming Kindersley, V.C. (14 L. T. Rep. 123), and in *Gard* v. *Commissioners of Sewers of the City of London* (49 L. T. Rep. 325; 28 Ch. Div. 486), which was a decision of the Court of Appeal. I think that the courts arrived at their decisions in those cases by saying that where the authority had *bonâ fide* adjudicated that something else than the whole obstructed then they were in a position to put their compulsory powers into operation. I think that proposition is one of the essential steps which was arrived at in those cases, and therefore I regard that view not merely as a dictum but as the actual decision. I think, as has been pointed out, that there must be a distinction in point of fact between land and houses. Land is in its nature capable of being divided; a house is *primâ facie* a unit, incapable of being divided. But there are cases in respect of houses where it would be impossible to say that a certain portion of a house might not be cut off without destroying the identity of the house itself, and if any particular part of a house can be pointed out, and which the authority *bonâ fide* find is the only part that obstructs, and that part is separable from the house, so that it can be removed without destroying the house as a house I should say then there is nothing to prevent the company compulsorily acquiring that part only. If, on the other hand, the thing, as to which they form their judgment that it obstructs, and that it is necessary to remove it, is so indissolubly linked with the whole that it cannot be removed without, in the opinion of a jury, practically destroying the identity of the house as a house, then it would seem to me that they really cannot say that part thereof only obstructs, or that part thereof only is necessary for the purpose of the improvement, and that under those circumstances they could not stop short of taking anything less than the whole. That leaves the question of fact ultimately to be decided, but for the purpose of our decision to-day it is enough to defeat the plaintiff's right to the injunction that he has failed on the only point on which he asked for it in the first instance, and as to the question of fact no evidence of fact has been given showing that the balance of convenience is in favour of holding the hands of the parties until that question of fact is decided.

Motion dismissed.

Solicitors for the plaintiffs, *Peacock* and *Goddard*.

Solicitors for the defendants, *Pontifex, Hewitt,* and *Pitt*.

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Monday, July 16.

(Before Wills and Kennedy, JJ.)

East London Waterworks Company (apps.) v. Charles (resp.). (a)

Water-rate — Nonpayment — Summons — Limitation of time—Jervis' Act (11 & 12 *Vict. c.* 43), *ss.* 1, 11—*Waterworks Clauses Act* 1847 (10 *Vict. c.* 17), *ss.* 74, 85—*Railways Clauses Consolidation Act* 1845 (8 *Vict. c.* 20), *s.* 140.

It is provided by Jervis' Act (11 & 12 *Vict. c.* 43) *that in all cases where no time is already or shall hereafter be specially limited for making a complaint, upon which justices have authority to make an order for the payment of money such complaint shall be made within six calendar months from the time when the matter of such complaint arose.*

Held, that the above provision applied to a complaint made against the respondent for the nonpayment of water rates more than six months after the same had been due and demanded.

This was a case stated by one of the metropolitan police magistrates for the purpose of obtaining the opinion of the court on questions of law which arose before him as hereinafter stated.

On the hearing of a certain summons wherein the appellants claimed from the respondent the sum of 6*l.* 12*s.* for water rates chargeable in respect of certain houses situate at Cubitt Town, in the parish of All Saints, Poplar, within the metropolitan police district, the magistrate decided that, as the sum so claimed for the water rates had accrued due more than six months before the date of the summons, his jurisdiction was therefore ousted by sect. 11 of Jervis' Act. On the application of the appellants the magistrate stated and signed the following case.

1. The respondent was summoned to answer the appellants' claim for the sum of 6*l.* 12*s.* alleged to be due for water rates chargeable in respect of certain houses known as Nos. 1 to 8 (inclusive), Totness-terrace and Nos. 1 to 4, Totness-cottages, all situate at Cubitt Town, in the parish of All Saints, Poplar, within the metropolitan police district aforesaid.

2. The annual value of each of the said houses did not exceed 20*l.*, and during the time, in respect of which the appellants made the said claim, the said houses were supplied with water by the appellant company.

3. The respondent, during the period in respect of which the appellants' claim was made, received the rents of the said houses, either on his own account or as agent or receiver for some person interested therein, and was liable to the payment of any water rates that might be chargeable in respect of the said houses.

It was admitted that the 6*l.* 12*s.* so claimed by the appellants had become due, and had been demanded more than six months before the 18th Jan. 1894, when the summons was issued and objection was thereupon made by the respondent (with other objections) that the jurisdiction of the magistrate was ousted by sect. 11 of Jervis' Act. It was contended by the appellants that that section did not apply to proceedings in respect of water rates.

4. The magistrate was of opinion that the respondent's contention was right, and he therefore made an order dismissing the appellants' claim, as being for water rates due and demanded more than six months before the complaint was made.

The question for the opinion of the court was, whether this decision was correct in law.

Jervis' Act (11 & 12 Vict. c. 43) enacts:

Sect. 1. In all cases where a complaint shall be made to any such justice or justices upon which he or they have or shall have authority by law to make any order for the payment of money or otherwise, then and in every such case it shall be lawful for such justice or justices of the peace to issue his or their summons. . . .

Sect. 11. In all cases where no time is already or shall hereafter be specially limited for making any such complaint, or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made, and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose.

The Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49) provides by sect. 6 that a sum of money recoverable on complaint to a court of summary jurisdiction shall be deemed to be a civil debt and shall be recoverable as such.

The East London Waterworks Act 1853 (16 & 17 Vict. c. 166) incorporates therewith the Lands Clauses Consolidation Act 1845 and the Waterworks Clauses Act 1847, and provides by sect. 81 that the person receiving the rents of any houses not exceeding the annual value of 20*l.* shall be deemed to be the owner thereof, and as such liable for the payment of the water rates.

The Waterworks Clauses Act 1847 (10 Vict. c. 17) enacts by sect. 74 that the undertakers may recover the amount due in respect of water rates if less than 20*l.* in the same manner as any damages for the recovery of which no special provision is made by this or the special Act; and by sect. 85 "the clauses of the Railways Clauses Consolidation Act 1845 with respect to the recovery of damages not specially provided for, and of penalties, and to the determination of any other matter referred to justices shall be incorporated with this and the special Act."

The Railway Clauses Consolidation Act 1845 (8 Vict. c. 20) enacts

Sect. 140. And with regard to the recovery of damages not specially provided for and of penalties and to the determination of any other matter referred to justices, be it enacted as follows:

In all cases where any damages, costs, or expenses are by this or the special act or any Act incorporated therewith directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for such amount in case of dispute shall be ascertained and determined by two justices, and if the amount so ascertained be not paid by the company or other party liable to pay the same within seven days after the demand, the amount may be recovered by distress of the goods of the company or other party liable as aforesaid, and the justices by whom the same shall have been ordered to be paid or either of them or any other justice on application shall issue their or his warrant accordingly.

Bray for the appellants.—The question raised by this case is, whether proceedings can be taken before a court of summary jurisdiction to recover water rates after six months have expired since the rates became due. The magistrates

(a) Reported by W. H. Horsfall, Esq., Barrister-at-Law.

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held that such proceedings could not be taken, and it is submitted that his decision was wrong. The appellants could recover the amount in the County Court, but the expenses would be far greater. The magistrate could not make an order for the immediate payment of the amount claimed and therefore the proceedings do not fall within the provisions of Jervis' Act. That provision does not apply to offences of continuance:

Mayer v. *Harding*, 17 L. T. Rep. 140.

Travers Humphreys (*Bodkin* with him) for the respondent.—The rates are recoverable summarily, on complaint before justices who make an order what sum is to be paid, and no further application is necessary. If the magistrate had only jurisdiction to assess the amount to be paid, the provision in Jervis' Act would not apply:

Reg. v. *Edwards*, 51 L. T. Rep. 586; 13 Q. B. Div. 586.

[Wills, J.—There is no difficulty about this being a complaint, but you have to satisfy us that the order of the magistrate is an order for the payment of money.] The order of the magistrate states the amount to be paid, which is equivalent to ordering it to be paid, because, without any further order the appellants could levy a distress for the amount.

Bray in reply.—The provisions contained in sect. 140 of the Railways Clauses Consolidation Act 1845, are very similar to those in sect. 24 of the Lands Clauses Act 1845, and it has been held that Jervis' Act does not apply to an order made under the latter Act:

Reg. v. *Edwards* (*ubi sup.*).

Wills, J.—This is a case of some difficulty, and the difficulty arises from the manner in which these various sections have been drafted. I have very little doubt, however, that Jervis' Act does apply, and that the contention put forward on behalf of the respondent is right. The first provision that we have to deal with is contained in sect. 74 of the Waterworks Clauses Act 1847 (10 Vict. c. 17), which enacts that if any person who is liable to do so neglects to pay the water rate, the undertakers may cut off the supply of water from his premises, and may recover the rate due from such person if less than 20*l.* in the same manner as any damages for the recovery of which no special provision is made by this or the special Act. And sect. 85 of the same Act provides that the clauses of the Railways Clauses Consolidation Act 1845 with respect to the recovery of damages not specially provided for and of penalties, and to the determination of any other matter referred to justices, shall be incorporated with this and the special Act. It seems to me, therefore, that sect. 140 of the Railways Clauses Consolidation Act 1845 (8 Vict. c. 20) must apply, unless there is some overwhelming reason to the contrary, as was the case in *Reg.* v. *Edwards* (51 L. T. Rep. 586; 13 Q. B. Div. 586). Now, that section provides that where damages, costs, or expenses are directed to be paid, and the method of ascertaining the amount or enforcing the payment thereof is not provided for, such amount in case of dispute shall be ascertained and determined by two justices, and if the amount so ascertained be not paid within seven days the amount may be recovered by distress, and the justices shall issue their warrant accordingly. It seems to me that that section does apply in terms, and it becomes necessary to consider what is meant by it. The first part of the section does not say that the decision of the justices assessing the sum to be paid is an order for the payment of money, but the latter part of the section could not be satisfied unless the decision of the justices amounted in effect to such an order. And I think that it meant that the determination of the justices is to amount to an order to pay. Two questions then arise: first, is this a complaint? and, secondly, is it a complaint followed by an order for the payment of money? If it is not, then the provision in Jervis' Act is not satisfied, and does not apply. Now, sect. 6 of the Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49) provides that where a sum of money claimed to be due is recoverable on complaint to a court of summary jurisdiction such sum shall be deemed to be a civil debt, and sect. 35 of the same Act provides that the order shall not be enforced in default of distress by imprisonment. That Act therefore removed the difficulty which might be felt of the possibility of inflicting imprisonment for default, and there is no practical inconvenience in holding that this was an order for the payment of money, and so falls within Jervis' Act. If the amount of the water rates is small the appellants can go before the justices and apply for an order, which is a very cheap form of proceeding; on the other hand, if the amount is large they have their remedy in the County Court. It appears to me that the decision of the magistrate was right, and this appeal must therefore be dismissed.

Kennedy, J.—I agree, and have nothing to add.

Appeal dismissed.

Solicitors for the appellants, *George Kebbell* and *Miller*.

Solicitors for the respondents, *Saw* and *Son*.

Monday, July 16.

(Before Wills and Kennedy, JJ.)

London County Council (apps.) v. Humphreys Limited. (a)

Metropolis—Metropolis Management and Building Acts (Amendment) Act 1882 (45 *Vict. c.* 14), *s.* 13—"*Wooden structure of a movable or temporary character*"—*Bungalow—Erected for exhibition.*

The respondents erected a bungalow upon a piece of ground adjoining their factory. The bungalow, which was made partly of wood and partly of corrugated iron, was erected as an advertisement and specimen building to be seen by intending purchasers, and not for use upon the spot where it was then set up.

Held, that the bungalow was not a wooden structure of a movable or temporary character within the meaning of 45 *Vict. c.* 14, *s.* 13, *so as to require a licence from the county council.*

This was a case stated by one of the magistrates of the police-courts of the metropolis for the purpose of obtaining the opinion of this court upon a question of law which arose before him.

On the 22nd Feb. 1894 complaint was made before the said magistrate by Thomas Chilvers on behalf of the appellants, for that the respon-

(a) Reported by W. H. Horsfall, Esq., Barrister-at-Law.

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dents, on the 17th Oct. 1893 and on the days between the said 17th Oct. 1893 and the 22nd Feb. 1894, at the west side of Hill-street, Knightsbridge (adjoining Humphreys' factory), in the parish of St. Margaret's, Westminster, in the county of London, and within the metropolitan police district, did unlawfully continue erected and set up a wooden structure of a movable and temporary character (called a bungalow) without a licence in writing first had and obtained from the London County Council as successors in law to the Metropolitan Board of Works, contrary to sect. 13 of 45 Vict. c. 14 and 51 & 52 Vict. c. 41.

At the hearing of the said complaint on the 8th March 1894 the following facts were proved:

The respondents are manufacturers of and dealers in buildings constructed of wood and corrugated iron, and carry on their business at premises situate in Hill-street, Knightsbridge. The said premises include a piece of land about eighty feet long and forty feet wide, situate at the corner of Hill-street and Knightsbridge, from where, for two years last past, numerous cottages, bungalows, stables, &c., constructed as stated, have been shown and sold to customers.

In or about the month of Oct. 1893 the respondents erected or set up on part of the said piece of land the bungalow hereinafter described. The said bungalow continued so erected or set up until the 22nd Feb. 1894, when it was sold to a purchaser, and was taken away for the purpose of being re-erected in Hertfordshire.

The said bungalow was 31 feet long and from 22 to 28 feet wide, the height to the eaves being 9 feet, and to the ridge of the roof 17 feet. The floor of the bungalow was of wood, the sides and ends consisted of wooden uprights and cross pieces, lined on the inside with match boarding, and covered on the outside partly with corrugated iron and partly with wood. The roof was formed of wooden rafters and principals covered externally with corrugated iron. The interior was divided into four rooms by means of wooden partitions. The said bungalow merely rested on the ground, and had no foundation, and it had no chimney or flue.

The bungalow was so erected and set up by the respondents for sale and to attract purchasers, and as an advertisement, but more particularly as a specimen building to be seen by intending customers. From the time of its erection it had upon it a board notifying that it was for sale, and it was in fact intended for sale.

The respondents did not at any time apply to the appellants for a licence for the erection or setting up of the said bungalow, and had at no time any such licence.

The appellants contended that the said bungalow being in fact a wooden structure or erection of a movable or temporary character, came within the section, and that being such as it was, the purpose for which it was erected was wholly immaterial.

The respondents contended that they had merely exhibited on their own premises an article which they had for sale just as a coachbuilder exhibits the vehicles which he makes and sells, and that the section did not apply to such a case.

The magistrate found that the said bungalow was a wooden structure or erection partly covered with corrugated iron, but it was a structure or erection of a movable or temporary character placed there merely for the purpose of sale, and as a specimen of the wares sold by the respondents, and that the respondents had erected and set it up as hereinbefore stated; but he was of opinion, as a matter of law, that, inasmuch as it was merely exhibited by the respondents as wares which they had for sale, upon the true construction of sect. 13 of 45 Vict. c. 14 the respondents had committed no offence against the section, and he decided to dismiss the complaint subject to this case.

The question of law for the opinion of the court was, whether upon the facts as above stated the decision of the magistrate was right.

The Metropolis Management and Building Acts (Amendment) Act 1882 (45 Vict. c. 14) enacts:

Sect. 13. It shall not be lawful for any person to erect or to set up in any place any wooden structure or erection of a movable or temporary character (unless the same be exempt from the operation of the first part of the Metropolitan Building Act 1855) without a licence in writing first had and obtained from the board for the erection or setting up of such structure or erection in such place, and every such licence may contain such conditions with respect to such structure or erection, and the time for which it is to be permitted to continue in such place, as the board may think expedient, and if any person erects or sets up any such structure or erection in any place without having had and obtained such licence to erect or set up the same in such place, or makes default in observing any of the conditions contained in such licence, or is guilty of any breach of such conditions, he shall be liable to a penalty not exceeding five pounds, and to a further penalty not exceeding forty shillings for every day on which any such structure or erection continues erected or set up without such licence being had and obtained, or upon which such default or breach continues after the day on which the first penalty is incurred.

Provided always, that a licence shall not be required in the case of any wooden structure or erection of a movable or temporary character, erected by a builder for use during the construction, alteration, or repair of any building, unless the same is not taken down or removed immediately after such construction, alteration, or repair.

Daldy for the appellants.—It is submitted that the decision of the magistrate was wrong. It is clear that this structure comes within the exact words of the section. If it was such a thing as a dog-kennel, although that would come within the words, it would not be within the meaning of the section; but if it is a house such as this structure which can be moved elsewhere and there used, it is within the meaning of the section:

Stevens v. *Gourley*, 1 L. T. Rep. 33; 7 C. B. N. S. 99.

It is a very different structure to a builder's pay-office on wheels, which has been held not to be within the meaning of this section:

London County Council v. *Pearce*, 66 L. T. Rep. 685; (1892) 2 Q. B. 109.

And different to a builder's temporary wooden structure erected during the alteration of premises:

London County Council v. *Candler*, 60 L. J. 114, M. C.

The respondents might erect a whole street of these buildings; the only limit to them is the size of the ground at the disposal of the respondents.

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Poland, Q.C. and *Travers Humphreys* for the respondents.—This structure is not within the meaning of the section. It is merely erected as an advertisement or specimen building, and is part of the wares and stock-in-trade of the respondents. If it were put up for the purpose of being used it would be within the meaning of the section. [Kennedy, J.—There is nothing in the section about the building being used.] The structure could not be used as a house, there being no chimney or flue to it. It is in reality only a mere chattel.

Daldy in reply.

Wills, J.—This is a case of some difficulty, for the structure comes within the very words of the Act, but the decisions to which we have been referred show that that in itself is not sufficient to make the respondent liable. We have the authority of two courts, one consisting of Lord Coleridge, C.J. and Mathew, J., and the other of Pollock, B. and Williams, J., who have said that, although a structure, as in this case, may be within the actual words of the statute, that is not conclusive. The question to be decided is, whether the Act was intended to apply to a structure of this description which was not intended for occupation where it then stood, and was only a part of the stock-in-trade of the respondents. I agree with what was said by Mathew, J. in *Hall* v. *Smallpiece* (59 L. J. 97, M. C.) that "the things in question in this case are, in common with the things mentioned in the course of the argument, in a sense, structures; but they are clearly not things with which the Act was intended to deal." The magistrate has found in the present case, as in the other cases, that the structure was a wooden structure of a movable or temporary character, but he goes on to say that it was placed there merely for the purpose of sale and as a specimen of the wares sold by the respondents. He dismissed the complaint against the respondents, and I think he was right in doing so. If we held otherwise, every wooden summer-house exposed for sale would fall within the terms of the Act. It seems to me that the object of the Act was not to deal with the structures used in this manner, and that the test applied in *Hall* v. *Smallpiece* (*ubi sup.*) and *London County Council* v. *Pearce* (66 L. T. Rep. 685; (1892) 2 Q. B. 109) must be applied in the present case. What was the object with which the structure was placed there? Was it to be used there or elsewhere? We are bound to follow those decisions, and, as this structure was only exposed for sale and not for use in the place where it was erected, I think the decision of the magistrate was right, and this appeal must be dismissed.

Kennedy, J.—I am of the same opinion. The difficulty in this instance arises from the fact that the words of the statute might cover this case, and yet it clearly appears that it was not the intention that they should do so. For, as Pollock, B. said in *London County Council* v. *Pearce* (66 L. T. Rep. 685; (1892) 2 Q. B. 109): "It cannot be supposed that the Legislature intended that everything that could in any sense be called a wooden building of a temporary character should be within the section." And we find in that as well as in other cases the courts have given a limited meaning to these words, although a much wider construction might have been placed upon them. The question is whether this particular structure comes within the meaning of this section. I think that it does not. The one salient point is that, although it was, as the magistrate found, a wooden structure of a movable or temporary character, it was not intended to be used on the spot where it was erected. It was on the premises of the manufacturer for the purpose of sale, and I shrink from holding that as such it comes within the terms of the section. I think, therefore, that the decision of the magistrate was right, and that this appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellant, *Blaxland*.

Solicitor for the respondent, *T. Duerdin Dutton*.

Friday, July 20.

(Before Mathew and Day, JJ.)

Ind, Coope, and Co. Limited v. Kidd.

Aitcheson and Co. v. Same. (a)

Receiver—Order to pay to creditors—Payment to solicitor of creditors—Defalcation by solicitor—Liability of receiver.

A judgment having been obtained against the defendant, and other actions having been commenced against her, a receiver of her property was appointed. The order appointing the receiver directed him to receive an annuity to which the defendant was entitled, and in the first place to pay the sum of 1l. per week to the defendant, and then to pay to the plaintiffs the amount of their judgment debt, and after satisfaction of such judgment debt to pay pari passu *any debts owing by the defendant to other creditors.*

The receiver paid the weekly sum to the defendant, but handed over the balance of the amount received by him to the solicitor who had acted for the plaintiffs in the actions against the defendant, and who also acted as private solicitor to the receiver himself. The solicitor appropriated the money so paid to his own use.

Held, that the receiver must refund the money paid to the solicitor, as he had not complied with the order directing him to pay the amounts received by him to the plaintiffs.

This was an appeal from an order of Bruce, J. at chambers.

On the 27th Oct. 1890 the plaintiffs Ind, Coope, and Co. Limited obtained judgment against the defendant Margaret Ann Kidd for 269*l.* 1*s.* 2*d.* for goods sold and delivered by them to her.

Other actions were commenced against the defendant, but before judgment was obtained in them an order was made on the 19th Nov. 1890 by Pollock, B., by consent, appointing Benjamin Smyrke as receiver to receive an annuity of 200*l.*, to which the defendant was entitled, and such portion of the estate of her deceased husband as she might be entitled to on behalf of the plaintiffs Ind, Coope, and Co. Limited., and of the plaintiffs Aitcheson and Co., and of certain other creditors of the defendant, and in the first place to pay or allow thereout the sum of 1*l.* per week to the defendant, and next to pay the costs, &c., and then to pay the amount of the judgment

(a) Reported by W. H. Horsfall, Esq., Barrister-at-Law.

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debt 269*l.* 1*s.* 2*d.* and costs due to the plaintiffs, Ind, Coope, and Co. Limited, and after satisfaction of such judgment debt and costs to pay *pari passu* any debts owing by the defendant to the plaintiffs Aitcheson and Co. and any debt owing by the defendant to certain other creditors.

The receiver, in pursuance of the above order, entered upon his duties and received from the date of the order down to the 9th Aug. 1893 the sum of 590*l.*, out of which he had paid to the defendant the sum of 100*l.* He paid the further sum of 520*l.* to the solicitor who had acted for the plaintiffs in the proceedings, and who also acted as private solicitor to the receiver himself. There was at the date mentioned a balance due to the receiver.

It appeared that the solicitor appropriated the money so paid to his own use, and did not pay the same over to the plaintiffs or the other creditors.

On the 28th May 1894 an order was made directing the receiver to pay into court the sum of 449*l.* 3*s.*, the balance certified to be due from him under the above-named order of Pollock, B.

The receiver appealed to Bruce, J. to vary the last-mentioned order by finding that the sum named therein had been properly paid by him to the plaintiffs' solicitor in entire satisfaction of the claim of the plaintiffs Ind, Coope, and Co. Limited, and in reduction of the claims of the other creditors.

Bruce, J. declined to make the order asked for, and the present appeal was brought from his decision.

Lawson Walton, Q.C. and *Lacy Smith* for the receiver.—The receiver was justified in paying the money received by him to the solicitor who was acting for the plaintiffs, and he ought not to be required to pay the same over again. The plaintiffs held the solicitor out as their agent to receive the money. It has been held that the payment of a sum to the plaintiff's late attorney, who was changed without leave of the court, was a good payment:

Powell v. *Little*, 1 Wm. Bl. 8.

The attorney upon the record is the person to whom a payment ought to be made:

Crozer v. *Pilling*, 4 B. & C. 26.

Even where the payment was made by a sheriff to the clerk of the plaintiff's attorney, and the clerk absconded with the money, it was held that the plaintiff could not recover the amount again from the sheriff:

Hemming v. *Hale*, 29 L. J. 137, C. P.

It appears from the correspondence that the plaintiffs Ind, Coope, and Co. Limited authorised the payment to the solicitor. A receiver is in the same position as a sheriff who can make payments to the solicitor from whom he receives his instructions.

Carson, Q.C. and *Montague Lush* for the plaintiffs Ind, Coope, and Co. Limited.—The receiver was directed by the order to pay certain sums to the plaintiffs, and he has not done so, therefore he is liable. He has not carried out the order of the court. The solicitor in question was the agent of the receiver, and not of the plaintiffs. The correspondence does not show that the plaintiffs consented to the payment to the solicitor.

Chester (with him *Robson*, Q.C.) for the plaintiffs Aitcheson and Co.—The receiver must pay to the person mentioned in the order, or, if no person is mentioned, into court; he must take proper receipts from the persons to whom he makes payments. The duties and liabilities of a receiver are fully set out in Daniell's Chancery Practice, 6th edit., pp. 1701, 1702.

Ashton Cross appeared for the defendant.

Lawson Walton replied.

Mathew, J.—I think that this appeal must be dismissed. The question which is raised by it is one of very general importance, and the facts are shortly as follows: Smyrke was appointed the receiver of an annuity which was payable to the defendant, and the order appointing him directed him to apply the sums received by him first in paying to the defendant the sum of 1*l.* per week, then in paying the judgment debt of the plaintiffs Ind Coope, and Co., then in paying the amount due to the plaintiffs Aitcheson and Co., and after that the amounts due to other creditors. It is clear that the receiver was to pay the persons mentioned in the order. No doubt he had no intention of acting irregularly, but I think that he so acted in this case. The solicitor to whom he made the payments appears to have been acting for him as well as for the creditors. When the receiver obtained the money it is clear that he should have paid the weekly sum named in the order to the defendant, and then paid to the plaintiffs Ind, Coope, and Co. the amount of their debt. Instead of pursuing that course he paid the amounts received from time to time to the solicitor on account of the creditors. The question then arises, whether the solicitor is to be treated as the agent of the receiver or of the creditors. I am clearly of opinion that he was the agent of the receiver. Mr. Walton has asked us to draw some analogy from the cases of payments in actions to the solicitors whose names appear on the record, and asks us to extend that principle to receivers, but I do not agree with his contention. The appointment of a receiver takes the place of the former procedure of a bill in Chancery, and the practice is properly described in Daniell's Chancery Practice, where it says that a receiver must take proper receipts from the persons to whom he makes payments and produce such receipts when he comes to pass his accounts. It has been said that the circumstances in this case are peculiar with reference to one of the plaintiffs, and that it appears from the correspondence that they held out the solicitor as their agent to receive the sums due to them, but I do not take that view of the letters. The defendant is entitled to have the arrears of the weekly sum which should have been paid to her handed over to her out of the money which it is our duty to direct the receiver to pay over again.

Day, J. concurred.

Appeal dismissed.

Solicitors for the receiver, *J. E.* and *H. Scott.*

Solicitors for the plaintiffs Ind, Coope, and Co., *Johnson, Wetherall,* and *Sturt.*

Solicitor for the plaintiffs Aitcheson and Co., *Chas. Rogers.*

Solicitor for the defendant, *Arthur Vernon.*

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House of Lords.

Monday, June 11.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, MORRIS, and RUSSELL.)

CHARTERED INSTITUTE OF PATENT AGENTS *v.* LOCKWOOD. (*a*)

ON APPEAL FROM THE SECOND DIVISION OF THE COURT OF SESSION IN SCOTLAND.

Patent agent—Registration—Board of Trade Rules—Validity—Action for interdict—Penalty—Patents, Designs, and Trade Marks Act 1888 (51 & 52 *Vict. c.* 50), *s.* 1.

The Patents, Designs, and Trade Marks Act 1888, *sect.* 1, *provides,* (1) *That no person shall describe himself as a patent agent unless he is registered under the Act;* (2) *That the Board of Trade shall make rules for giving effect to the section;* (3) *That a person* bonâ fide *practising as a patent agent before the passing of the Act shall be entitled to be registered;* (4) *That an unregistered person describing himself as a patent agent, shall be liable to a penalty on summary conviction: The section further provided that the provisions of sect.* 101 *of the Act of* 1883 *should apply to the rules so made, which makes them of the same effect as if they were contained in the Act; and provides that they should be laid on the table of both Houses of Parliament.*

The Board of Trade made rules imposing a registration fee, and an annual fee on all registered patent agents. The name of the respondent, who had bonâ fide *practised as a patent agent before the passing of the Act, was placed upon the register, but he refused to pay the fees, and his name was removed in accordance with the rules. He still continued to describe himself as a patent agent. and this action was brought to restrain him from so doing, and for an interdict.*

Held (reversing the judgment of the court below), that the rules were not ultra vires *the Board of Trade, but in any case (Lord Morris dissenting on this point) their validity could not be questioned in a court of law; but held further, that the right remedy against the respondent was not by proceedings in the Court of Session for interdict, but by summary proceedings for the penalty under the Act.*

THIS was an appeal from a judgment of the Second Division of the Court of Session in Scotland (the Lord Justice Clerk Macdonald, Lords Young, Rutherfurd-Clark, and Trayner), reported in 20 Court Sess. Cas. 4th series, 315, who had reversed a judgment of the Lord Ordinary (Low) in an action brought by the appellants against the respondent.

The question involved in the case was as to the right of the respondent to describe himself as a patent agent. By sect. 1, sub-sect. 3, of the Patents, Designs, and Trade Marks Act 1888 (51 & 52 Vict. c. 50), it was provided that every person who proved to the satisfaction of the Board of Trade that prior to the passing of the Act he had been *bonâ fide* practising as a patent agent should be entitled to be registered as a patent agent. The respondent, who was a wood engraver and artist, carrying on business in Argyle-street, Glasgow, having given the necessary proof, was duly placed upon the Register of Patent Agents in Oct. 1890. The statute empowered the Board of Trade to frame rules for giving effect to the 1st section of the Act. and the rules so framed were known as "the Register of Patent Agents' Rules 1889." One of those rules prescribed that every registered patent agent should pay an annual fee of 3*l.* 3*s.*, and that if the annual fee were not paid within a definite time the registrar might erase the name of the patent agent whose fee was unpaid from the Register of Patent Agents, and the statute provided that any person practising as a patent agent whose name was not upon the register should be liable to a penalty of 20*l.* The respondent refused to pay the prescribed annual fee for the year commencing the 1st Jan. 1891, and on the 23rd Feb. 1891 the registrar erased his name from the Register of Patent Agents. The appellants, the Chartered Institute of Patent Agents, were constituted and incorporated by Royal Charter, dated the 11th Aug. 1891, for the purposes of promoting the education, status, and training of patent agents, and of maintaining a high standard of rectitude and professional conduct, with power to sue for penalties.

By the 23rd ordinance of the Royal Charter it was provided that the council of the institute should have power to apply the funds arising from the fees which might be received by them

> In carrying out the duties which might for the time being be intrusted to them under any rules made by the Board of Trade or any other competent authority by virtue of the Patents, Designs, and Trade Marks Act 1888, or any amendment thereof or otherwise, and in the conduct of any proceedings which in the opinion of the council might become necessary or desirable for enforcing compliance with the provisions of the Patents, Designs, and Trade Marks Act 1888, or any amending or subsequent Act or Acts which might hereafter be passed in relation thereto and for other purposes connected therewith, and also in acquiring, extending, and improving the library of the institute, and in the acquisition, renting, or erection and fitting up of a hall and other suitable buildings for the use of the members of the institute, and for other purposes connected with the profession of patent agents, and in the purchase or renting of a site or sites for a library, hall, and other suitable buildings as aforesaid, and in paying the salaries or remuneration of the registrar, secretary, and officers and servants of the institute, and in otherwise promoting the objects of the institute.

Notwithstanding the erasure of the respondent's name from the register under the circumstances stated, the respondent continued to practise and to describe himself as a patent agent, and accordingly the present proceedings were instituted against him by the appellants to interdict him from practising as a patent agent. The respondent maintained that the Board of Trade rules were *ultra vires*, inasmuch as the Patents, Designs, and Trade Marks Act 1888 did not authorise the board to require the payment of the annual fee from persons whose names were upon the Patent Agents' Register. The Lord Ordinary held that the appellants could enforce the rules of the Board of Trade, but the Second Division of the Court of Session held that the rules were *ultra vires* and therefore invalid, and decided in favour of the respondent.

Byrne, Q.C. and *Graham Murray*, Q.C. (of the Scotch Bar) appeared for the appellants.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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McCall, Q.C., *Linwood*, and *Crossfield* for the respondent.

At the conclusion of the arguments their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell).—My Lords: In this case the summons of the present appellants claims a declaration that the defender was not registered as a patent agent in pursuance of the Patents, Designs, and Trade Marks Act 1888, and was not entitled to describe himself as a patent agent; and in the second place, that the defender should and ought to be interdicted, prohibited, and discharged from describing himself as a patent agent. The pursuers in the action were the Institute of Patent Agents, and three registered patent agents practising in Glasgow. An interdict in the terms prayed for by the summons was granted by Lord Low, the Lord Ordinary, who came to the conclusion that the defender had held himself out as a patent agent when not registered, and that he was therefore liable to be interdicted in the manner prayed. When the case came before the Second Division of the Inner House they recalled the interdict. They came to the conclusion that, although the defender was not registered as a patent agent, and had been holding himself out as such without being registered, his name had been improperly removed from the register by the Institute of Patent Agents or the registrar appointed; and, secondly, that although not registered he could not be treated as having committed an offence by so holding himself out. The majority of the learned judges came to the conclusion that the rule under which the registrar had purported to erase his name was invalid, being *ultra vires*, although duly made by the Board of Trade with the formalities and in the way prescribed by the Act. They came to this conclusion on somewhat different grounds, to which I shall have to call attention in a moment. I will first state to your Lordships what are the statutory provisions and what are the rules made under them. Provisions relating to the registration of patent agents were first made in the year 1888 by the 1st section of the Patents, Designs, and Trade Marks Act of that year, which provided that after the 1st July 1889 a person should not be entitled to describe himself as a patent agent unless registered as such in pursuance of the Act; and, next, that the Board of Trade should, as soon as might be after the passing of the Act, and might from time to time, make such rules as were in the opinion of the Board of Trade required for giving effect to the section. It contains a further provision to which I shall have occasion to call attention. It further provides that "If any person knowingly describes himself as a patent agent, in contravention of this section, he shall be liable on summary conviction to a fine not exceeding twenty pounds." It will be observed that the enactment does not provide for the manner in which the register is to be formed, who is to be the registrar, the formalities requisite for registration, or any particulars in relation to it, but it leaves it to the Board of Trade to make such general rules as in their opinion are required for giving effect to the section, the effect, of course, intended by the Legislature being the establishing of a complete system of registration for patent agents. The Board of Trade accordingly made a number of rules, and amongst them a rule requiring a certain fee to be paid on first registration and an annual fee of three guineas so long as the person continued on the register, and provided further that nonpayment of the required fees should be a ground for erasing the name from the register. The Lord Ordinary considered that those rules were *intra vires*. The majority of the Inner House appear to have thought that no rules with reference to fees could be *intra vires*, inasmuch as power to impose fees was not expressly conferred. Lord Rutherfurd Clark, I gather, dissented from that view, and concurred with the Lord Ordinary in thinking that some fees might be properly imposed by rules, but he said: "It is quite possible that fees may be exacted for the maintenance of the register, but the fees which are fixed by the rules are plainly in excess of what is required for that purpose, and it is equally plain that they were not imposed in order to carry that purpose into effect." I am unable to see upon the record any foundation for that conclusion. It seems to be suggested that there was an admission that they were larger than would be required for such a purpose, but no such admission has been made at the bar, nor does it appear on the record, and I cannot but think that there was some misapprehension as to there being any admission going to that extent. I confess that it seems to me, if there were any power to impose fees at all, very difficult indeed to arrive at the conclusion, when the Board of Trade have sanctioned a particular fee, that it is within the province of a court of law to canvass their conclusion, and to determine what is a legitimate amount at which the fee may be fixed. A body such as the Board of Trade is very much more competent to determine a question of that description than judges can possibly be, and it would be, I think, not an improvement upon any scheme of legislation which gave power to fix fees at all if those fees were made subject to the control of the judges according to their views of what fees were reasonable or unreasonable. The question whether there is any power to impose a fee at all is no doubt a much more serious question. The contention on the part of the respondent is that, there being no express power given to impose fees, this is the imposition of taxation which it can never be supposed that it was intended to commit to a public body without express sanction and authority. I cannot myself regard this as properly called taxation. The statute of 1883, of which this Act in many particulars is an amendment, creates a register, or, at all events, continues that register, and it provides that the Board of Trade, with the sanction of the Treasury, may regulate the fees to be required for registering and doing other acts in connection therewith; and, of course, the fixing of fees for a vast variety of matters being left to a rule-making body is a description of legislation thoroughly well understood. It is every-day practice for those to whom rule-making is committed to have committed to them also the fixing of the fees which are to be paid in relation to the matters done under the rules. There is, therefore, nothing novel in legislation of this description. But it is said that no such right is expressly conferred. It is impossible to my mind to conceive wider language than that which is used in the 2nd sub-section of the 1st section of the Act of 1888. The truth is the legislation is a skeleton

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piece of legislation left to be filled up in all its substantial and material particulars by the action of rules made by the Board of Trade. The section itself contains no provision with reference to the register or the registrar, or proceedings on registration, or any of those matters, but it gives very wide power to the Board of Trade to make such rules as are in their opinion required for giving effect to the section. It seems to me that upon that it was their duty to make all the rules necessary for making the legislation contemplated by the section effectual. The Legislature must be taken to have contemplated that a register could not be made without someone filling the office of registrar, or some corresponding office: that any person performing those duties would require a payment for performing them; that the funds not having been expressly found by Parliament must be somehow or other provided; and seeing that the system and scheme of the legislation under the previous Act had been that fees for registration should, at all events, go towards the expenses of paying for registration, I cannot but think that it was well within the scope of this enactment that the Legislature should intrust the Board of Trade, who were to make these rules, with the power of fixing such fees as they thought reasonable and necessary for carrying into effect the purposes of the section. Unless they had done so it seems to me very difficult to say that it would have been possible to carry them into effect at all. With all deference to the learned judges who have taken a different view, it seems to me that the conclusion at which they have arrived has been induced by not sufficiently regarding the method of legislation which has been followed in this section now under consideration, and not observing that it was the intention of the Legislature really, having expressed the general object, and having provided the necessary penalty, to leave the subordinate legislation, so to speak, to be carried out by the Board of Trade. What I am about to say bears also upon the further question that has been argued. It is said that this would be a very large power for the Legislature to commit to any other body; but it must be remembered that it is committed to a public department, and a public department largely under the control of Parliament itself; and not only so, but inasmuch as the section provided that these rules are to be dealt with in the same way and subject to the provisions contained in the 101st section of the previous Act, the result is to leave the matter completely in the control of Parliament, because any of the rules made by the Board of Trade may be annulled by either House of Parliament within forty days after they are laid on the table, and the laying of them on the table is made compulsory. Therefore I can see nothing extraordinary in leaving to such a body as the Board of Trade the powers which are in question in this case; at all events when the exercise of their functions by a great public department of State, itself under the control of Parliament, is placed directly under the control of Parliament also, and made subject to its direct action. That really would be sufficient to determine that these rules were such as the Board of Trade were entitled to make. I will say one word further before leaving this part of the subject upon the point suggested that they involve something harsh or unfair as regards the respondent, inasmuch as it was said that before this he could exercise his profession or calling of a patent agent without any registration, without the payment of any fee, and now he can only do so and call himself a patent agent, representing himself as such, by paying an annual fee to get on the register. That is, in a sense, perfectly true; but, on the other hand, it must be remembered that the position of a patent agent on the register, when nobody not on the register can call himself a patent agent, is a position very different, and, in many respects, much more advantageous than that which he occupied before; and I am not prepared to say that there is any hardship in imposing a small and reasonable fee upon a man who obtains that advantage in order that the register, in the interests of the public, may be carefully and properly maintained. Then it is said that a right expressly given him by the statute is interfered with, inasmuch as the statute provides that "Every person who proves to the satisfaction of the Board of Trade that prior to the passing of the Act he had been *bonâ fide* practising as a patent agent shall be entitled to be registered as a patent agent in pursuance of this Act." A complaint is not now made that he was not so registered. It is sought to read this statute as if it ran thus, "shall be entitled to be registered and ever thereafter maintained on the register," which does not appear to me to fall within the language of the Act. But further than that, the argument loses sight of this, that he is only entitled to be registered in pursuance of this Act. Now where is there anything in this Act about his title to be registered at all, or how he is to get on the register, or who is to put him there, or what register is it to be, and kept by whom? Nothing of the sort is to be found in the section. The words "in pursuance of this Act" only become intelligible if you read into the section, as the statute provides you shall, the rules that are made under sub-sect. 2. But if you read into the section, as showing how he is to be registered in pursuance of the Act, the rules that are made under sub-sect. 2, then of course every rule which is *intra vires*, at all events, putting aside for the moment the other question, is to be read into the section, and have just the same effect as if it had been contained in the section or in the Act itself; and, if so, it is impossible to say that he can claim to be registered otherwise than in the manner which the statute, as filled up, if I may say so, by the rules, provides. So far I have dealt with the question whether the rules are *intra vires*, but there is no doubt a very important question which has been argued before your Lordships, namely, whether the question can be canvassed in the courts, whether the rules were such as were in the contemplation of sub-sect. 2 of sect. 1 of the Act of 1888, when once the rules had been made by the Board of Trade and laid as provided on the table of the House. It is said that it is only rules that are properly made under sub-sect. 2 which can become part of the Act, and that they are to be treated as such. Now the words of sub-sect. 2 are: "The Board of Trade shall, as soon as may be after the passing of this Act, and may from time to time, make such general rules as are, in the opinion of the board, required for giving effect to this section, and the provisions of sect. 101 of the principal Act shall apply to all rules so made as if they were made in pursuance of that section." Therefore, any rule, which is a rule, in the opinion of the Board of

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Trade, required to be made in order to carry this Act into effect, is a rule made pursuant to the provisions of sub-sect. 2, and any rule made pursuant to the provisions of sub-sect. 2 is to be dealt with under sect. 101 as if made in pursuance of that section. Now let us see what is to be the effect as regards rules made in pursuance of sect. 101 of the Act of 1883. First of all, "The Board of Trade may from time to time make such general rules and do such things as they think expedient;" and then, "General rules may be made under this section at any time after the passing of this Act, but not so as to take effect before the commencement of this Act, and shall (subject as hereinafter mentioned) be of the same effect as if they were contained in this Act, and shall be judicially noticed." The "subject as hereinafter mentioned" is this: that they are to be laid before Parliament for consideration for forty days, and during those forty days they may be annulled by a resolution of either House. If not so annulled, or until so annulled, what is the effect? They are to be "of the same effect as if they were contained in this Act." I have asked in vain for any explanation of the meaning of those words, or any suggestion as to the effect to be given to them, if, notwithstanding that provision, they are open to review and consideration by the courts. The effect of an enactment is that it binds all subjects who are affected by it. They are bound to conform themselves to the provisions of the law so made. The effect of a statutory rule, if validly made, is precisely the same, that every person must conform himself to its provisions, and if in each case a penalty may be imposed, the penalty is imposed equally for a breach of the rule. But there is this difference between a rule and an enactment, that whereas, apart from some such provision as we are considering, you may canvass a rule and determine whether or not it was within the power of those who made it, you cannot canvass in that way the provisions of an Act of Parliament. Therefore, there is that difference between the rule and the statute. There is no difference if the rule is one within the statutory authority, but a very substantial difference if it is open to consideration whether it be so or not. I own that I feel very great difficulty in giving to this provision, that they "shall be of the same effect as if they were contained in this Act," any other construction than this, that you shall for all purposes of construction or obligation, or otherwise, treat them exactly as if they were in it. No doubt there might be some conflict between a rule and a provision of the Act. Well, there is a conflict sometimes between two sections to be found in the same Act. You have to try to reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other. That would be so with regard to the enactment, and with regard to the rules that would be treated as if in the enactment. In that case, probably, the enactment itself would be treated as the governing consideration, and the rule subordinate to it. Those are points upon which it is not necessary to dwell on the present occasion. Although it is not necessary for the determination of this case to express an opinion upon it, yet, as the matter has been so much canvassed, I think it only right to express the opinion which I entertain, that the words to which I have referred are really meaningless unless they have the effect which I have described, and they seem to me to be the apt and appropriate words for bringing about the effect which I have described. They are words, I believe, only in comparatively recent years to be found in legislation, and it is difficult to understand why they have been inserted unless there was some such object as I have indicated. I have dealt at length with the question whether this rule is *ultra vires* and whether it can be so treated, because it is the ground upon which the decision proceeded in the court below, and, inasmuch as a view was expressed adverse to the validity of the rule, it appears to me well, that, differing as I do from that view, I should express my own opinion. But that does not really conclude this case. The further question remains which was dealt with in some subsequent observations of Lord Young, whether, even assuming that the rule is good, assuming that the name of the defender was properly erased, assuming that he had no right to practise as a patent agent, assuming that by doing so he rendered himself liable to the penalty prescribed, it is open to the Institute of Patent Agents and three practising patent agents to come to the Court of Session and ask for the conclusions to be found in the summons that was issued. Upon that I confess, with all deference to the Lord Ordinary, I cannot but entertain a very strong opinion. You have here, for the first time, a new offence created—the offence of practising as a patent agent without being on the register. But for that enactment creating that offence, the defender has done nothing of which anybody would have a legal right to complain either civilly or criminally. The Legislature having created that new offence has prescribed the punishment for it, namely, a penalty of 20*l*. Can it possibly, under these circumstances, be open for them to bring the individual not before the summary court at small expense to determine the question of his liability to a 20*l*. penalty, but to bring him before the Court of Session with its attendant expense, and to ask the Court of Session to make a declaration that he has been breaking the law in a manner which the Legislature has said subjects him to a penalty, and then, having proved that he has rendered himself liable to a penalty, to ask the Court of Session to interdict him, with this result, that if he were to offend again he would not be subject to the summary procedure and the 20*l*. penalty, but would be liable to imprisonment for breach of the interdict. It seems to me, I confess, scarcely necessary to do more than state the contention to show that it is impossible that it can be supported. If that be the law, the number of cases must have been almost innumerable in which such a proceeding would have been competent, and yet it is absolutely unheard of. I will not dwell upon the grave inconveniences which would result from sanctioning a procedure of that description. The rules of procedure and the amount of penalty are often regarded by the Legislature as of the utmost importance when they are creating new offences, and the law would, I believe, contrary to their intention, be most seriously modified if it were held that a party committing the breach of that which for the first time is made an offence were to subject himself by so doing to proceedings of this description, which might result in a committal to prison.

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For these reasons I think that this action was not competent. It is not necessary to decide whether there are any cases in which a declaration might be asked. The only declaration asked in fact here is a declaration of the law as set out in the 4th sub-section of sect. 1, and a declaration that the defender has broken the law. That is the only declaration asked for. Obviously, the sole object of the action is an interdict. For these reasons, although not on the grounds on which the court below have proceeded, I concur in the result that the action cannot be maintained, and move your Lordships that the appeal be dismissed. Although differing, and I believe all your Lordships differ from the court below in the grounds upon which you are dismissing the action, yet I do not think it ought to make any difference with regard to the costs, because, for the reasons I have given, I think that the proceedings ought not to have been taken, that the defender might well defend himself on any ground that he could, and that, therefore, the appeal ought to be dismissed with costs.

Lord WATSON.—My Lords: I find myself of the same mind with the Lord Chancellor on both the points which he has discussed. I agree that it is impossible to sustain the judgment of the Second Division upon the grounds which have been assigned for it, but that that judgment is a right judgment upon a ground which was pointed out by Lord Young at the close of the advising on the case. It appears to me that, were the House to sustain the present action as a competent one, it would lead to very grave and very unfortunate results. In reality it is a case in which the interference of the civil tribunal was invoked for the purpose of repressing that which the Legislature intended should be dealt with as a crime. I do not think it was intended by the Act of 1888 to create in the patent agents, whose names were on the register, a right which they were to defend against those who were using the term "patent agent" without having their names on the register by means of a resort to the learned Lords of the Court of Session. On the contrary, I think it was the plain meaning of the Legislature that, when a man whose name was not on the register chose to hold himself forth as a patent agent, the full measure of punishment to be inflicted upon him should be a fine within the sum limited, viz., twenty pounds, to be apportioned by a summary court of criminal jurisdiction. If your Lordships should take another view upon this point, I feel assured that there is a great mass of statutes regulating sanitary and other improvements for the benefit of the general public, which every neighbouring member of the public has a certain interest in seeing enforced, as to which it would never do to permit the civil courts to intrude into that domain at all, because I think it is clear upon the face of the legislation that breaches of those laws were intended to be dealt with simply as a matter of police regulation to be punished by a fine. Here, in the Act of 1888, the main intention of the Legislature appears to me to have been to protect poor inventors from being robbed of the merits and fruits of their invention by employing unskilled patent agents who might fail to make a specification and claim in such a form as would secure to them the fruits of their invention. Upon the other point, looking to the view which your Lordships take of the incompetency of this suit, it is certainly not necessary for its decision to observe upon the grounds which were set forth by the learned judges of the Second Division in giving their opinions; but I concur with your Lordships in thinking that, although the question does not arise in this case for judicial determination, there being no competent action before us, still, seeing that the point has been decided in the court below, and that we have heard a full argument upon it, it is right that your Lordships should express an opinion upon the point. I must say that for my own part I have felt very little difficulty in rejecting the view which commended itself to the learned judges of the Appeal Court below. The 1st section of the Act of 1888, by the first sub-section, imposes a prohibition upon persons whose names are not on the register against using the description of "patent agent;" and then the next sub-section lays upon the Board of Trade the duty of making bye-laws or regulations for the purpose of giving effect to that—I mean regulations for establishing and maintaining a register of patent agents; those who had been patent agents before the date of the Act having their names inserted as a matter of course if they complied with the regulations; those who were not in that position, and were subsequently admitted, having their qualifications tested by examination, or in some other mode. Now it appears to me that the whole scheme was left to the discretion of the Board of Trade, and it is impossible for me to say that, looking to those regulations, the Board of Trade have in any measure exceeded that discretion. Nay, it goes further than discretion; the words of the statute are that the Board of Trade "may make such general rules as are, in the opinion of the board, required for giving effect to this section." I should not be of opinion that the board had not strictly complied with their statutory duty unless I were satisfied of this, that the scheme presented by them was such a fantastic or ridiculous scheme that it really did not express the opinion of the Board of Trade. It was by their opinion, not by any judicial opinion, that the matter was to be determined. The Legislature retained, so far, a check that it required that whatever might be the conclusion of the Board of Trade the regulations which they framed should be laid upon the table of both Houses; and, of course, these regulations could have been annulled by an unfavourable resolution upon a motion in either House. But what is to be the effect if no such motion be made or carried, or also (which would be the same thing) if a motion hostile to the scheme be made in both Houses, and carried in both Houses? The statute makes no difference between these cases. The views expressed by the learned judges in the court below, so far as I understand them, would in that case make it quite as competent for the court to inquire at its own hand whether or not the board had been within the statute as in a case where the Legislature had declined to interfere. But I think that all doubt upon that subject, or connected with that subject, is entirely removed by the terms of sect. 101 in the Act of 1883, which for all practical purposes is incorporated with sect. 1 of the later Act—"Any rules made in pursuance of this section"—in applying the earlier statute to the later you must read it as "Any rules made in pursuance of sect. 1, sub-sect. 2, of the Act of 1888;" and assuming, as I have already said and

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am prepared to hold, that the regulations before us were made and duly made by the Board of Trade in pursuance of sect. 1, sub-sect. 2, of the Act of 1888, then in that case these words apply—"Shall be of the same effect as if they were contained in this Act, and shall be judicially noticed." In regard to those words which I have just read, I do not think I can express my meaning more plainly than by saying that I think they mean exactly what they say. Such rules are to be as effectual as if they were part of the statute itself; and they are. I do not know whether the Legislature had anticipated what possibly might occur in some court or other, but they have added what does certainly not detract from the effect of the preceding words—that all courts shall take notice of these rules, and accordingly administer them as if they formed part of the Acts. That is precisely what the court below have failed to do, and had there been occasion to decide the point, I certainly should have disagreed with them upon it.

Lord MORRIS.—My Lords: I am quite of the same opinion as the noble and learned Lords who have preceded me on the two main propositions: first, that the action was incompetent as being brought by persons who had no right to an interdict; and secondly, that the general rules made by the Board of Trade in this case are *intra vires*, and come within the powers conferred upon them by sect. 1, sub-sect. 2, of the Act of 1888, combined with sect. 101 of the Act of 1883. I could add nothing usefully, and therefore would not waste your Lordships' time by saying more, except that I cannot go to the further proposition which, as I understand, the Lord Chancellor has laid down, that it is not competent for courts of justice to consider whether these general rules are *intra vires* or *ultra vires*. I am of opinion that it is not alone competent for the courts of justice to consider, but that it is their bounden duty to consider, whether the rules are *ultra vires*; that there is no general power delegated by the Legislature to the Board of Trade to make general rules in such a way that any general rules which they make are to be considered *intra vires* provided they are laid before both Houses of Parliament, and provided that nobody has taken the trouble either to read them or to make any motion upon the subject. In this case I have arrived at the opinion that the sections can be reasonably read, and ought to be read, in accordance with that rather abstract proposition, sub-sect. 2 of sect. 1 of the Act 1888, which has been repeatedly referred to—"The Board of Trade shall as soon as may be after the passing of this Act, and may from time to time make such general rules as are in the opinion of the board required for giving effect to this section, and the provisions of sect. 101 of the principal Act shall apply to all rules so made as if they were made in pursuance of that section." Sect. 101, sub-sect. 3, which is to be read with that, is, "General rules may be made under this section at any time after the passing of this Act, but not so as to take effect before the commencement of this Act, and shall (subject as hereinafter mentioned) be of the same effect as if they were contained in this Act, and shall be judicially noticed." Now I admit that the words are very strong—the general rules are to have the same effect as if they were embodied in the Act. I accede to that. But what general rules? General rules which are made for "giving effect" to that section; not all general rules—there is no such power in my opinion given to the Board of Trade. What are the general rules which are to have the same effect as if they were contained in the Act? The general rules made under the section—general rules such as the Legislature has, under sect. 101, delegated to the Board of Trade the authority of making. But if a court of justice (before whom all these questions must come) ultimately considers that certain rules are rules which do not come within this section, in my opinion they would be *ultra vires*, and it would be the duty of the court not to regard them as operative. As regards the question of their receiving any judicial sanction from the fact of their being laid before both Houses of Parliament, I cannot concur in that. That is a matter of precaution; they do not receive any *imprimatur* from having been laid before both Houses of Parliament; it is only that an opportunity is given to somebody or other, if he chooses to take advantage of it, of moving that they be annulled. It is a precaution which in ninety-nine cases out of a hundred would be practically a sufficient precaution; but with reference to the abstract proposition which was questioned in the judgment of the Master of the Rolls, which has been cited (*Ex parte Foreman*, 18 Q. B. Div. 393), I have arrived at the conclusion that if the rules were seen not to be such rules as it was contemplated the Board of Trade should have the authority of making under the sections giving them the authority of making rules, it was the duty of the court to determine that they were *ultra vires*.

Lord RUSSELL.—My Lords: I agree in the conclusion at which your Lordships have arrived. In the facts of this case I think the second plea of the respondent is a good answer to the action on the ground that the remedy is not injunction but summary prosecution under sect. 1, sub-sect. 4, of the Act of 1888. As to the broader questions, I think the rules are *intra vires*, and are therefore valid and binding, even apart from the provisions in sect. 101 of the Act of 1883, which is incorporated in, and made part of, sect. 1, sub-sect. 2 of the Act of 1888, namely, that the rules made are to have effect as if contained in the Act itself. But further, I think that, if the rules are to be read as part of the Act (as I think they ought to be), it is not, in this case, competent to judicial tribunals to reject them. Such effect must be given to them by judicial construction, as can properly be given to them, taking them in conjunction with the general provisions of the Act or Acts of Parliament in connection with which they have been formulated.

Interlocutor appealed from reversed; cause remitted to the court below with a direction to dismiss the action with costs, the appellants to pay the costs of this appeal and the costs in the court below.

Solicitors for the appellants, *G. B. Ellis* and *J. H.* and *J. Y. Johnson*, for *Davidson* and *Syme*, Edinburgh.

Solicitors for the respondent, *Mann* and *Taylor*, for *Dove* and *Lockhart*, Edinburgh, and *Borland*, *King*, and *Shaw*, Glasgow.

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Supreme Court of Judicature.

COURT OF APPEAL.

March 9, 10, *and* 20.

(Before LINDLEY, KAY, and SMITH, L.JJ.)

BAIRD *v.* MAYOR, &C. OF TUNBRIDGE WELLS.

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Dedication of surface of land—Soil beneath—"Street"—Public place—Public Health Act 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 39, 149—*Tunbridge Wells Improvement Act* 1890 (53 & 54 *Vict. c. ccxxxv.*), *s.* 93.

A landowner who dedicates land to the public to pass and repass over it, dedicates the surface and no more for the public to use as a way, and all that is below the surface belongs to him as before.

By an agreement, afterwards confirmed by Act of Parliament, and entered into in 1739 *between the lord of the manor and his freehold tenants, it was declared that a certain promenade which formed part of the waste of the manor should remain always open and free for the public use and benefit of persons frequenting Tunbridge Wells, in the manner the same then was or lately had been used. At various times, subsequently, the town authorities of Tunbridge Wells, with the consent of the lord of the manor, made alterations and improvements in the promenade. The public had a right to pass and repass on foot over the promenade from the earliest times.*

By the Tunbridge Wells Improvement Act 1890 *the defendant corporation was authorised to erect and maintain "in any street or public place," conveniences for the use of the public. It was also provided, that the word "street" should have the same meaning as in the Public Health Act* 1875.

Held, that the soil below the promenade was not a "street" repairable by the inhabitants at large within the meaning of the Public Health Act 1875, *and was not vested in the corporation; neither was it a "street or public place" within the meaning of the Tunbridge Wells Improvement Act* 1890; *and therefore the soil below the promenade was vested in the lord of the manor, and the corporation was not entitled to make an excavation and erect a convenience below the promenade without his consent.*

Decision of Grantham, J. reversed.

THIS was an appeal from a decision of Grantham, J., on the 12th April 1893, dismissing the action.

There is a public promenade at Tunbridge Wells, formerly called "The Walks," and now known as "The Pantiles." The defendants are the Urban Sanitary Authority for Tunbridge Wells, and at a certain spot in The Pantiles had made an excavation and built, about nine feet below the surface of the ground, some lavatories, water-closets, and urinals, which were lighted by flat skylights level with the ground. The plaintiffs were lords of the manor of Rusthall, as trustees, and the tenant for life of that manor, and the object of the action was to obtain the removal of these lavatories, &c., or at all events to prevent their being used, on the ground that the defendants had no right to the soil under the promenade.

Before 1739 Tunbridge Wells was a fashionable place of resort, partly on account of its medicinal springs, and "The Walks" had been laid out ever since 1739 as a promenade for the use of visitors, upon land which was part of the waste of the manor. Certain houses had been built on the northern and southern sides of the Walks, and disputes had arisen between the then lord of the manor and some of the freehold tenants, and an agreement was come to which was confirmed by an Act of Parliament. By the agreement, which was dated 21st Nov. 1739, some of these houses were to be the property of the lord, and certain others were to belong to the freehold tenants, and by the fifth clause it was agreed that the lord and the freehold tenants, their respective heirs and assigns, should for ever thereafter "permit and suffer the said medicinal springs or wells of water called Tunbridge Wells, the place or shed near the said springs or wells called Dippers' Hall, and the walks called Tunbridge Wells Walks, and all ways, passages, and open pieces of ground, part of the said premises or leading thereto, which are particularly set forth and distinguished in the plan of the premises hereto annexed, to remain always open and free for the public use and benefit of the nobility or gentry and other persons resorting to or frequently using Tunbridge Wells in the manner the same now are or lately have been used."

By clause 6, no further building was to be built on the premises, nor were the foundations of the existing buildings to be enlarged. By clause 10, sewers might be made from the houses to the brook, "so as such sewers do not in any respect injure or prejudice the said medicinal springs or wells of water, to prevent which it is hereby further agreed that no sewer shall be made nearer to the said springs or wells than thirty feet." By clause 11, it was thereby "further agreed by and between the parties hereto that no necessary house or boghouse shall be made in any part of the premises before mentioned," and no cellar should be sunk more than 6ft. 1in. lower than the pavement of the upper walk.

This agreement was confirmed by an Act of Parliament (13 Geo. 2, c. xi.), which recited it in full, and recited that it would be for the advantage of all the parties interested in the premises to carry it into execution.

At the time of this agreement and Act of Parliament, the Upper Walk was rather higher than the Lower Walk, and the Lower Walk was slightly raised above the road, below which was a carriage-road giving access to the Coach and Horses inn.

In 1793, with the consent of the lord, and by the aid of subscriptions, the level of the Lower Walk was raised to that of the Upper Walk, and a slope was formed between this and the road, which slope was inclosed by a railing, and was planted with trees.

In 1835 Improvement Commissioners were established for the town of Tunbridge Wells. In 1848 those commissioners became the sanitary authority. In 1875, when the Public Health Act was passed, they became the urban sanitary authority, and in 1889 a Royal Charter was obtained incorporating the district into a municipal borough. In the meantime, in 1887

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

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and 1888, with the consent of the lord of the manor, the slope between what was the Lower Walk and the road was done away with, and a retaining wall was built, which encroached about two feet upon the road, and the Walk was made level to the edge of this wall, which was surrounded by an iron railing. Steps at intervals gave access to the road below.

In 1876 some correspondence took place between the lord's agent and the town authorities, in which they, proposing to do some repairs on the Walks with the lord's consent, inquired whether he intended to raise any question as to the right of the public over the Walk, because they had no power to spend the rates on property claimed as private property. The lord's agent answered that the lord did not question the rights of the public over the Parade, but being within the manor he was entitled to be consulted, and he seems to have subscribed 20*l.* towards the improvements then made.

Several Acts of Parliament have been passed relating to the town and borough of Tunbridge Wells, including one in 1835, by which the commissioners were established, and provision made for lighting, watching, cleaning, regulating, and otherwise improving the town, regulating the supply of water, and establishing a market; another in 1846 repealing most of the Act of 1835, and giving similar powers. In 1890 the Tunbridge Wells Improvement Act 1890 (53 & 54 Vict. c. ccxxxv.) was passed. None of these Acts contained any repeal of the Act of 1739, or any express power to interfere with the well or the walks. Sect. 93 of the Act of 1890 provided:

> The corporation may erect and maintain, or permit to be erected and maintained, in any street or public place, or on land belonging to them, or on land belonging to any person with the consent of the owner, lessee, and occupier thereof for the time being, water-closets, urinals, and lavatories for the use of the public, and may charge for the use of such water-closets and lavatories erected and maintained by them such sum as they make think proper, and the corporation may make bye-laws for the management of such water-closets, urinals, and lavatories, and for the conduct of the persons using the same. Every water-closet, urinal, or lavatory erected by permission of the corporation under this section shall be subject to such terms and conditions as the corporation may prescribe with respect to the charges (if any), to be made for the use thereof, and for repairing and keeping the same in proper order, and for closing or removing the same if and when required by the corporation, but nothing herein shall be held to authorise a charge for the use of a public urinal.

Sect. 284 enabled the corporation to erect and maintain shelters, band-stands, lavatories, and other places and conveniences with the consent of the owner and occupier on any land within the borough, or any other land within the borough belonging to the corporation or under their control. And for the purposes of this section the corporation were empowered by agreement to acquire and hold any land within the borough not exceeding in the whole five acres.

Sect. 4, amongst other things, provided that the several words and expressions to which meanings were assigned in the Public Health Acts should have in this Act the same respective meanings.

Sect. 4 of the Public Health Act 1875 provides that 'street' includes any highway and any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not.

Sir *Richard Webster*, Q.C., *Moulton*, Q.C. and *Warrington* for the appellants.—The soil under the Pantiles is not vested in the defendants, and they have no right to excavate the soil and build these conveniences underneath the surface. The Pantiles are still a part of the waste, and the soil is vested in the lord of the manor, except so far as the public have a right to use the surface, in accordance with the agreement and Act of 1739. Whatever dedication there was of the Pantiles to the public was a limited dedication only, in accordance with that agreement and Act. That Act of Parliament was not simply an agreement between the lord and the commoners *inter se*. By reason of the special provisions of the Act of 1739 this is not a "street" or "public place" within the Act of 1875 or the Act of 1890, and any rights the defendants may have over it are subject to the provisions of the Act. The Public Health Act 1875, being a general Act, does not override the special Act of 1739, to which it does not refer. This is not a highway repairable by the inhabitants at large, and therefore the soil does not vest in the defendants under sect. 149 of the Act of 1875. The local authorities have always obtained the consent of the lord of the manor before making any alterations or doing any repairs. The lord of the manor has always acted as the owner of this land, subject to the provisions of the Act of 1739. The word "street" in the Public Health Act 1875 only includes the surface of the soil and so much below it as is required for the purposes of the traffic:

Coverdale v. *Charlton*, 40 L. T. Rep. 88; 4 Q. B. Div. 104;
Rolls v. *Vestry of St. George the Martyr, Southwark*, 43 L. T. Rep. 140; 14 Ch. Div. 785;
Board of Works for the Wandsworth District v. *The United Telephone Company*, 51 L. T. Rep. 148; 13 Q. B. Div. 904.

Sect. 93 of the Act of 1890 only gives the defendants power to erect these conveniences "in" any street and "on" any land under their control. This does not give them any right to excavate and erect them "under" a street or such land. This is shown by the fact that when the Public Health (London) Act 1891 (54 & 55 Vict. c. 76) was passed it was considered necessary to provide, by sect. 44, sub-sect. 2, that for the purposes of making conveniences the subsoil of any road should be vested in the sanitary authority.

Sir *Henry James*, Q.C. and *Upjohn* for the respondents.—The place in question is a "street." It is clearly within the definition in sect. 4 of the Public Health Act 1875. The soil is vested in the defendants, so far as is necessary to give them a right to erect this convenience:

The Fareham Local Board v. *Smith*, 7 Times L. Rep. 443.

It is said it is not a "street," because of the limited and special dedication in the Act of 1739. There cannot be an agreement *inter partes* that there shall be a limited dedication of a piece of ground. The Act of 1739 is only a Parliamentary sanction to an agreement between the lord of the manor and the freehold tenants that their respective rights should be adjusted in manner there set forth. It affects the private rights of those parties only, and not the public. Then this is a highway

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repairable by the inhabitants at large, within sect. 149 of the Public Health Act 1875, and the soil is vested in the defendants. The local authorities have repaired and altered it from time to time, and the public have had a right of way over it from the earliest times. This is a "street" and a "public place" within the Act of 1890. Sect. 93 of that Act gives the defendants power to erect these conveniences in "any" street, and does not limit the power to streets vested in the corporation. Sect. 39 of the Public Health Act 1875 gives the urban authority power to erect conveniences in "proper and convenient situations" without any such limit. "In" any street means also under any street. Sect. 284 of the Act of 1890 gives the defendants power to erect conveniences "on any land under their control."

Sir *Richard Webster* in reply.

Cur. adv. vult.

March 20.—Lindley, L.J.—This is an appeal from a decision of Grantham, J. dismissing the action with costs. The object of the action was to compel the defendants to remove, or at all events discontinue the use of, some lavatories, water-closets, and urinals which they had built under one of the public promenades at Tunbridge Wells. The defendants built those conveniences under the authority, or supposed authority, conferred upon them by sect. 93 of the Tunbridge Wells Improvement Act 1890 (53 & 54 Vict. c. ccxxxv.), which is as follows: [His Lordship then read the section.] The plaintiff is the lord of the manor of Rusthall, and the soil of the *locus in quo* is his property. The surface of that soil is a public promenade, which was enlarged, and in substance made, some years ago by the local authority with the consent of the lord of the manor. The correspondence which took place when this was done, and the evidence given at the trial, convince me that, assuming the *locus in quo* to be a street or public place, it has not become repairable by the inhabitants at large, and is not, therefore, vested in the defendants by the Public Health Act 1875, nor, indeed, by any other Act. Nor does the evidence warrant the inference that the plaintiff is estopped from denying that it is so vested. The defendants had, therefore, no right to erect the lavatories, &c., where they did as owners of the soil in which they were put. The soil belonged to the plaintiff, and the defendants can only justify their proceedings under the Tunbridge Wells Improvement Act 1890, s. 93, which I have read. Is, then, the *locus in quo* a "street or public place" within the meaning of that Act? The promenade itself—*i.e.* the surface of the ground in question—is certainly a "public place," even if it is not a "street" within the meaning of sect. 4 of the Public Health Act 1875. But nothing has been dedicated to the public except the surface, and, after much consideration, I have come to the conclusion that the soil under the surface, not having been dedicated to the public, is not a "street or public place" within sect. 93 of the local Act, and that the defendants had no right, therefore, to erect the lavatories, &c., in that soil without the consent of the plaintiff under that section. For the same reason I have come to the conclusion that the soil in which the lavatories, &c., have been erected was not under the control of the defendants so as to enable them to justify their acts under sect. 284 of the local Act. The case of *The Fareham Local Board* v. *Smith* (7 Times L. Rep. 443) is not opposed to this view, for the wires protected there were the property of the local board, and were attached to posts belonging to them, and erected in the street which was vested in them, and which included the soil in which the posts were erected. The word "street" in the Public Health Act 1875 has been decided to mean a corporeal hereditament consisting of the surface soil itself (*Coverdale* v. *Charlton* (*ubi sup.*) to such a depth as is required for the purposes of traffic (see *Rolls* v. *Vestry of St. George the Martyr, Southwark* (*ubi sup.*). But it was held in *The Board of Works for the Wandsworth District* v. *The United Telephone Company* (*ubi sup.*) that "street" did not mean the space so far above the surface as not to interfere with traffic. Upon the same principle, it appears to me that ground well below the made road or pavement is not a "street" within the meaning of the same Act. If it be said that the ground below is wanted for support, the answer is that, so long as the road is supported, the public have no right to or interest in the soil below. The expression "public place" does not, in my opinion, express more than the word "street" so far as soil below the surface is concerned. This view of the construction and effect of the Tunbridge Wells Improvement Act 1890 renders it unnecessary to consider its effect on the special Act of 1739 giving effect to the agreement between the lord of the manor and the commoners recited in that Act. It is sufficient to say that there is nothing in the Act of 1739 which assists the defendants. But that Act does, in my opinion, confirm the view which I have taken of the limited meaning of "street" in sect. 93 of the local Act of 1890. It only remains to consider to what relief the plaintiff is entitled. An injunction was not seriously pressed for, and there is no necessity for granting an injunction, at least at present. But the plaintiff is, in my opinion, entitled to have the judgment appealed from reversed, and to a declaration that he is entitled to the soil in which the lavatories, &c., have been erected, and that the defendants are not entitled to them, or to the use of them, without his consent. Liberty to apply should be reserved. The defendants, being in the wrong, must pay the costs here and below.

Kay, L.J. (after stating the facts set out above, continued:)—The saving clause in the Act confirming the agreement shows that it was to be binding on the lord of the manor and on all the freehold tenants of the manor, and on all persons claiming under them. The defendants justify what they have done by referring to certain statutes. *Primâ facie* the soil and freehold of the locality is vested in the plaintiffs. The correspondence which took place in 1876 between the lord's agent and the town authorities, and the fact that the lord subscribed towards the improvements then made, were relied on as showing that the lord recognised that the walks were streets within the Public Health Act 1875. But it was pointed out that this is not the necessary inference, because, if they were a pleasure ground and the property of a private person, the urban sanitary authority would, under sect. 164, be at liberty to expend the rates in paving and repairing them. It is argued that these walks are streets, or at any rate they are a public place, and that sect. 93 of the Act of 1890

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empowered the corporation to make this convenience. The Act of 1739, it is urged, is a mere Parliamentary sanction to a contract between the lord of the manor and the freehold tenants which could not be made binding without Parliamentary authority. By sect. 4 of the Public Health Act 1875, "street" in that Act includes, amongst other things, "any road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not," and by sect. 149, when streets are "highways repairable by the inhabitants at large within any urban district," such streets "and the pavements, stones, and other materials thereof, and all buildings, implements, and other things provided for the purposes thereof, shall vest in and be under the control of the urban authority." In *Coverdale* v. *Charlton* (*ubi sup.*) it was held that these words did not give the property in the soil under the street, but merely the surface and such part of the soil as could be used for the ordinary purposes of a street. In *Rolls* v. *Vestry of St. George the Martyr, Southwark* (*ubi sup.*) this was explained to mean only the surface, and with the surface such right below the surface as was essential to the maintenance and occupation and exclusive possession of the street, and the making and maintaining of the street for the use of the public. In *Board of Works for the Wandsworth District* v. *United Telephone Company* (*ubi sup.*), Lord Esher, adopting the words of Lord Bramwell, that "street" comprehends "a surface of such thickness as the local board may require for the purposes of doing to the street that which is necessary for it as a street, and also of doing those things which are commonly done in and under the streets," says that "street" comprises a depth which enables the urban authority to raise the street and to lay down sewers. Bowen, J. does not go so far, and seems to hold that only a statutory right of property was intended to vest. But I am clearly of opinion that these walks are not repairable by the inhabitants at large, although with the consent of the lord of the manor certain repairs have been done upon them by the urban authority. Therefore they are not vested in the urban authority. Further, although it is not necessary to decide the point, my opinion is that the walks are a pleasure ground set apart, as described in the agreement and statute of 1739, together with the wells or medicinal springs, for the public use and benefit in the manner in which the same were then used. The definition of street in the Public Health Act 1875, sect. 4, is wide, as I have pointed out; but, looking to the nature of these walks, and the dedication shown by the Act of 1739, I do not think these walks are within it. In my opinion a pleasure ground, though within a town, is not necessarily a street. It would be absurd to say that Hyde Park is a street, even if the Crown had no rights in it. Whatever rights the corporation of Tunbridge Wells may have must, I think, depend upon sect. 93 of their Act of 1890. There is nothing in this statute which vests in them the soil under the walks. Assuming that the words "public place" include the walks, I should be of opinion that the section would permit them to place a convenience upon the walks, but not underneath them. There is no evidence that, at the time when this Act was passed, it was usual to make such constructions underground. The statute of 1739 had a larger effect than merely confirming the agreement recited in it. An agreement between several persons may be revoked by assent of all the parties or their successors. But one effect of this statute was to make this agreement irrevocable. Another, and for the present purpose more important effect, was to give the sanction of an Act of Parliament to the peculiar dedication to the use of the public of the medicinal wells, and of the walks and pleasure grounds mentioned in the agreement. I have no doubt that the public, suing by the Attorney-General, could after this statute have enforced the provisions in their favour, and have obtained an injunction to restrain any interference with them. All the conditions of the dedication were sanctioned in like manner, and my opinion is that any attempt to erect a convenience on these walks might have been restrained by the public suing by the Attorney-General as being contrary to the dedication which Parliament sanctioned by the Act of 1739. By the ordinary rule of construing statutes, the Act of 1890 must be read as not repealing or interfering with the statute of 1739, to which it does not refer, if it does contain provisions in favour of the public. I am inclined to think that it does contain such provisions, and that the prohibition against erecting conveniences in the walks is one of them. But, if this be not so, at least the agreement and Act of 1739 contains a description and limitation of the dedication for public use of the wells and walks, and this being so, I cannot read sect. 93 as including these walks in the public places mentioned in that section. Even if they are included, I cannot see that the corporation had any right to make any convenience beneath the walks in the subsoil, which undoubtedly belongs to the plaintiffs. I think there should be a declaration that the corporation had no such right, but I am not inclined to interfere by injunction.

Smith, L.J.—This is an action brought by the plaintiffs, in whom the manor of Rusthall is vested, to restrain the defendants from maintaining an underground convenience constructed by them under the "Pantiles," at Tunbridge Wells. Grantham, J. gave judgment for the defendants, and the plaintiffs appealed. The action was originally launched upon two grounds: first, that the convenience constituted a nuisance; and secondly, that it had been constructed by the defendants upon the plaintiffs' property without justification. The first ground has been abandoned, and the case has proceeded upon the allegation that the defendants have trespassed upon the plaintiffs' property. It is not disputed that the place where the convenience is erected is the plaintiffs' property, but the defendants justify under the Public Health Act 1875, sects. 39 and 149, and also under sect. 93 of the Tunbridge Wells Improvement Act 1890 (53 & 54 Vict. c. ccxxxv.). To these defences the plaintiffs reply that neither the Public Health Act 1875 nor the Tunbridge Wells Improvement Act 1890 apply, because of the special legislation which took place in the year 1739, and also because the place in which the convenience is situated is not a street or a public place within the meaning of either of those Acts. It becomes necessary, therefore, first of all to see what this legislation was. It appears that an agreement bearing date the 21st Nov. 1739 was entered into between the lord of the manor of the

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one part, and the freehold tenants of the other part, which recited that disputes had long subsisted between the lord and the tenants as to the inclosing of the medicinal springs, called "Tunbridge Wells" and of the Tunbridge Wells Walks, *i.e.*, the "Pantiles," and also concerning the erection of messuages, shops, and other buildings near to the walks which were alleged by the tenants to form part of the waste of the manor whereby their common of pasture and other rights in the waste were interfered with, and that to determine and adjust these disputes and differences the agreement had been come to between the parties. It was provided by this agreement (*inter alia*) that the messuages, shops, and buildings which were then in dispute should be divided into three lots and drawn for, two of such lots to belong to the lord and one to the freehold tenants; that (clause 5) the lord and the freehold tenants should for ever thereafter permit the medicinal springs and the Tunbridge Wells Walks, and all ways, passages, and open pieces of ground, part of the manor or leading thereto, which were particularly set forth in a plan annexed to the agreement, to remain always open and free for the public use and benefit of the nobility and gentry and other persons resorting to or frequenting Tunbridge Wells, in the manner the same then were or lately had been used; that (clause 6) neither the lord or the freehold tenants should at any time thereafter build any messuage on any part of the premises but those then built upon, or enlarge any of the present foundations; that (clause 10) the lord and the tenants from their respective messuages might make sewers to the brook belonging to Lord Abergavenny, so that such sewers did not in any respect injure or prejudice the medicinal springs, to prevent which it was agreed that no sewer should be made nearer to the said springs than thirty feet; that (clause 11) no necessary house or bog-house should be made in any part of the premises, but that those then in being should continue. It appears to me obvious that this is an agreement come to for the mutual benefit of the lord and the tenants *inter se* and nothing more. It is simply an agreement to settle the disputes which had long subsisted between them, and to determine what should or should not be done by the respective parties in relation thereto in the future. It is a mistake to say that it was an agreement entered into by the lord and the tenants for the benefit of the public. That was not its object at all. Clause 5, which was so much pressed upon us, when read in conjunction with the recital that the object was to put an end to the existing disputes between the lord and the tenants as to the inclosing of the springs and walks, and as to the buildings already erected, does not appear to me to indicate that the agreement was come to for the purpose of benefiting the public but, for the purpose of mutually benefiting the parties thereto, the one having desired that the springs and walks should be inclosed, and the other desiring that they should be kept open. That the freehold tenants would benefit by the springs and walks being kept open is obvious, for this would naturally attract strangers to their town and enhance their trade, and this is the real object they had in view. But it was argued that, as Parliament in the year 1739 had passed an Act which "ratified, established, and confirmed" this agreement, it was to be taken as if the agreement was an Act of Parliament passed in the interests of the public, and that it became an Act of Parliament passed for a special purpose binding upon the whole world. The object of the Act of 1739 is clearly stated in its preamble, which recites that, "whereas it would be for the advantage of all the parties interested in the premises that the said agreement should be carried into execution, in regard that the great expenses which would necessarily attend the further prosecution of the suits that have arisen and are still depending between the parties, will thereby be prevented; yet such agreement cannot be rendered effectual to answer the intention of all the parties without the aid of an Act of Parliament." Who are "all the parties interested in the premises?" Obviously the lord and the tenants. They are the persons dealt with throughout the agreement, not the public who may or may not go to Tunbridge Wells. As, however, the agreement is confirmed by statute, and is made irrevocable, it may be that the agreement and statute have conferred rights on the public to use the Pantiles, and to take water from the springs, and it may be that these rights could be enforced by an information by the Attorney-General: but I do not desire to be taken as deciding this point. But even if this be so, the Act of Parliament cannot be regarded as a statutory enactment conferring special rights on the lord of the manor or on the tenants, and exempting them from the provisions of subsequent general Acts conferring rights on other bodies. The rule that a special Act is not repealed by a subsequent general Act unless an intention to repeal is expressed, or is necessarily implied, is laid down in numerous cases, of which *Hawkins* v. *Gathercole* (6 De G. M. & G. 1); *Thorpe* v. *Adams* (23 L. T. Rep. 810; L. Rep. 6 C. P. 125); and *Fitzgerald* v. *Champneys* (5 L. T. Rep. 233; 30 L. J. 777, Ch.) are good examples. I am of opinion that the Act of 1739 is not a special Act within the meaning of this rule. I pass now to consider the subsequent Acts referred to above. The first is the Public Health Act 1875. Can the defendants justify what they have done under sects. 39 and 149 of this Act? This depends upon whether the *locus in quo* was a street which was a highway repairable by the inhabitants at large, so as to vest the site where the convenience has been erected in the defendants. The facts are these: On the 21st Nov. 1739 the site of the convenience was an open space within the meaning of clause 5 of the agreement of that date. In 1793 this site was converted into a slope, which was inclosed by rails and planted with trees. There can be no doubt as to the right of the public to pass and repass on foot over the Pantiles from the earliest times, and this is not disputed by the appellants. In the year 1876 a question arose between the lord of the manor and the local authority as to the repairs of the Pantiles, and it was agreed that if the local authority desired to do the repairs they might do so without any previous application to the lord. This licence to the local authority was expressly confined to mere repairs and restorations, and was not to include any alterations in the general aspect of the Parade. Thereupon the corporation thenceforward executed the repairs. In the month of October 1888 the defendants, with the consent and approval of the lord of the manor, at the cost of over 500*l.*, built

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a retaining wall, the foundation of which they placed at a point just outside the foot of the old slope, and they filled up with soil the space between the back of this retaining wall and the face of the old slope. They then levelled the top of this embankment, and made it part of the Pantiles, and placed on the edge thereof a palisade of iron rails. The photograph given in evidence clearly shows what was done. Upon the top so levelled the public have, since 1888, passed and repassed at their free will and pleasure on foot, as over the other parts of the Pantiles. It appears to me that the top so levelled and used by the public on foot is a street within the meaning of the Public Health Act 1875. The interpretation section of that Act, viz., sect. 4, enacts: "In this Act, if not inconsistent with the context, the following words and expressions have the meanings hereinafter respectively assigned to them; 'street' includes any . . . road, lane, footway, square, court, alley, or passage, whether a thoroughfare or not." The cases of *Taylor* v. *Corporation of Oldham* (35 L. T. Rep. 696; 4 Ch. Div. 395), approved of in this court in the *Midland Railway Company* v. *Watton* (54 L. T. Rep. 482; 17 Q. B. Div. 30), and again re-affirmed in this court in *Hill* v. *The Wallasey Local Board* (69 L. T. Rep. 641; (1894) 1 Ch. 133), have decided that it is immaterial whether the road or footway be public or private property. The question is not whether the local authority could make a sewer through the Pantiles. I should have thought that sect. 16 of the Public Health Act of 1875 enabled them to do so, and that under sect. 54 they could also have constructed water-mains (see *Hill* v. *The Wallasey Local Board* (*ubi sup.*), and I feel great difficulty in saying that they could not. The suggestion made that the local authority might thereby destroy the springs has no weight with me, for such a body would be the last to do anything which would destroy that valuable adjunct to their town. But by the Public Health Act of 1875 the local authority have no similar powers when they desire to provide and maintain the conveniences mentioned in sect. 39, and unless they have property of their own whereon to erect them they cannot do so under that Act. Is, then, the site upon which the local authority have placed the convenience complained of a street which is a highway repairable by the inhabitants at large? If not, the *locus in quo* is not vested in them, but still remains the property of the plaintiffs. It appears to me that it is not. The evidence leads me to the conclusion that it was not a highway repairable by the inhabitants at large, at any rate up to June 1876, and I can find no indication that since that date any of the formalities required by the Highway Act 1835, before liability to repair can be cast upon the public, have been fulfilled. Nor do I find that the local authority have given the notice prescribed by sect. 152 of the Public Health Act of 1875, or by sect. 63 of the Tunbridge Wells Improvement Act 1890, which is the same thing, to constitute it a highway repairable by the inhabitants at large. It is not, therefore, a street which is a highway repairable by the inhabitants at large. But it was said that, even if this were so, the plaintiffs were estopped from denying that it was such a highway because of what took place in June 1876 and subsequently in Oct. 1888. But is this so? All that the lord of the manor permitted in June 1876 was that the local authority might repair the Pantiles if they desired to do so, without asking his leave, expressly reserving all his other rights in the *locus in quo*. It seems to me that the inference ought not to be drawn, that he consented to the place becoming a highway repairable by the inhabitants at large so as to divest him of his property therein. It was clearly not the intention of the parties, and I do not draw this inference. In Oct. 1888 he undoubtedly consented to the retaining wall and other works being executed by the corporation; but it is quite consistent with this that he was willing that the public should have rights of passage over the surface then constructed as they had exercised from the earliest times over the rest of the Pantiles, but not that he should be divested of his property. For these reasons, in my judgment, the defendants cannot justify what they have done under the Public Health Act 1875. I now come to the justification under sect. 93 of the Tunbridge Wells Improvement Act 1890. This Act does not incorporate, but is in addition to, the Public Health Act 1875. In some instances the powers given to the local authority by the Act of 1890 overlap those given by the Public Health Act 1875, and in many instances the Act of 1890 gives powers to the local authority in addition to those given by the Act of 1875, and this sect. 93 is an example of such additional powers given to the local authority. [His Lordship then read sect. 93:] This power to erect these conveniences in any street or public place was new, and is in addition to any powers to be found in the Public Health Act of 1875. By referring to sect. 4 of the Act of 1890 it will be seen that the word "street" therein is to have the same meaning as in the Public Health Act 1875, except in certain cases not material to this case. If then the question had been whether the local authority could have erected the convenience complained of upon the surface of the Pantiles, which for the reasons above given is a "street" within the meaning of the Act of 1890, and also it seems to me a "public place," my answer would have been "Yes," for the simple reason that the statute says they may. But now arises this point: does the statute enact that the local authority can do this below the surface of land which is not their property? This convenience reaches down nine feet under the surface, two feet of which are imbedded in soil below that which was tipped behind the retaining wall by the corporation in 1888. The cases of *Coverdale* v. *Charlton* (*ubi sup.*), *Rolls* v. *Vestry of St. George the Martyr, Southwark* (*ubi sup.*), *The Board of Works for the Wandsworth District* v. *The United Telephone Company* (*ubi sup.*), and *The Fareham Local Board* v. *Smith* (*ubi sup.*), were referred to in the argument to show how much of the surface and subsoil of a street vests in a local authority; but these were all cases in which it was admitted that the streets had vested in the local authority; whereas in the Act of 1890 I can find no clause which vests any of the streets in the local authority excepting sect. 43, which has no application to the present case, and, as the Pantiles is not a highway repairable by the inhabitants at large, it in no way vests in the corporation. These cases have, therefore, no application to the present case. The question comes to this: Is a corporation, which is empowered to erect conveniences in any street or

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public place or on land belonging to them, and charge for their use, entitled to erect the same under a street or public place in land which does not belong to them? A landowner, when he dedicates his land to the public to pass and repass over it, dedicates the surface and no more for the public to use as a way. All that is below the surface he still retains to himself as before, and, unless there is some statutory enactment vesting the way in somebody else, the landowner is just as much owner of the soil of the way and all below it as he was before he dedicated it, subject only to the right which he has granted to the public to use its surface as a way. Now, when a statute enacts that a corporation may erect a building in a street over which they have only a right of way as one of the public, what does that mean? Does it mean that they may only utilise what the landowner has already dedicated to the public; or does it mean that they may take away from the landowner what he has not dedicated to the public, and which still remains his own? It seems to me that the true answer is, that it only entitles the corporation to use what the owner has dedicated to the public, and it does not entitle the corporation to take the landowner's land for nothing. If the corporation desire to erect buildings upon another man's land they can do so by paying for it, for the Lands Clauses Consolidation Acts are incorporated in the Act of 1890. It was said that to place a sewer in a street would certainly mean under a street, and in this I agree; but without the special powers given to a corporation they could not place a sewer in a street which has not vested in them. Moreover, the words of the Act of 1890 are "erect in a street," which rather points to building upon the surface, and not underground. At the time when the Act of 1890 was passed, it does not seem that these conveniences were ordinarily placed underground, though since that date it has become a common practice to do so, and by the Public Health (London) Act 1891 (54 & 55 Vict. c. 76), s. 44, power is given to a sanitary authority to provide public conveniences and the subsoil of the road exclusive of the footway adjoining any building is therein expressly vested in the authority for that purpose. I therefore come to the conclusion that the defendants cannot, under the Act of 1890, justify the erection of this convenience underground in land which has never been vested in them, and I agree that the appeal must be allowed.

Solicitors for the plaintiffs, *Burn* and *Berridge*.
Solicitors for the defendants, *Sole, Turner*, and *Knight*.

Friday, April 20.

(Before Lindley and Lopes, L.JJ.)

Yorkshire (West Riding) County Council v. Holmfirth Urban Sanitary Authority. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Nuisance—Pollution of stream—Local authority—Old system of drainage—No aggravation of nuisance—Rivers Pollution Prevention Act 1876 (39 & 40 *Vict. c.* 75), *ss.* 3, 10, 20.

Proceedings were taken in the County Court, against a local board under sect. 10 *of the Rivers Pollution Prevention Act* 1876, *to restrain them from knowingly permitting sewage matter to flow into a stream. That statute provides by sect.* 3, *that, where sewage matter is carried into any stream along a channel used at the date of the passing of the Act, no one shall be deemed to have committed an offence against the Act if he shows that he is using the best practicable and available means to render the sewage matter harmless.*

The defendants had succeeded to an old system of drainage, by which the sewage matter was carried into the stream, and the judge dismissed the action on the ground that they had done nothing to aggravate the nuisance.

Held, that that was not a sufficient answer to the complaint; that there was evidence that the defendants had knowingly permitted sewage matter to flow into the river; and that the case must be remitted to the County Court judge to consider whether they had used the best practicable and available means to render it harmless.

Glossop *v.* Heston and Isleworth Local Board (40 *L. T. Rep.* 736; 12 *Ch. Div.* 102) *and* Attorney-General *v.* Guardians of Dorking Union (46 *L. T. Rep.* 573; 20 *Ch. Div.* 595) *distinguished.*

Decision of Divisional Court affirmed.

In 1884 the Holmfirth Local Board was constituted, and as the urban sanitary authority took over an old system of drainage by which the sewage of the district was conveyed through rubble drains to a mill tail, when it flowed into the river Holme. At various times between March 1892 and April 1893 the board substituted about 5000 yards of glazed pipes for the rubble drains, and, in order to straighten the sewer, changed the outfall so that the sewage was discharged directly into the stream instead of into the mill tail.

The West Riding County Council on the 29th June 1893, before the passing of the Rivers Pollution Prevention Act 1893, took proceedings in the County Court against the board, under sects. 3 and 10 of the Rivers Pollution Prevention Act 1876, to restrain them from causing or knowingly permitting sewage matter to flow into the river Holme.

At the hearing, after the plaintiffs' case had been completed, and after the defendants had called two or three witnesses, the County Court judge held that there was no evidence that any offence had been committed under the Act. He found that the sewers were practically in the same condition as before the passing of the Act, and that the substitution of pipes for rubble drains was not of itself sufficient to bring the defendants within the Act, and he gave judgment for the defendants.

The plaintiffs appealed, and the Divisional Court (Cave and Wright, JJ.) held, on the 14th March 1894, that there was evidence on which the judge ought to have held that the defendants were knowingly permitting the sewage to fall into the river within sect. 3 of the Act of 1876, and that he ought to have called on them to prove, if they could, that they had adopted the best method of rendering the sewage harmless, and they directed the matter to be sent back to him with an expression of their opinion that there was evidence that an offence had been committed under sect. 3.

From this decision the defendants, by leave, appealed.

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

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Lawson Walton, Q.C. and Sir *George Morrison* for the appellants.—The defendants have not done anything to aggravate any nuisance from the old system of drainage which they took over. They are not "knowingly permitting" sewage matter to flow into the stream within sect. 3 of the Rivers Pollution Prevention Act 1876, because they cannot prevent it. Unless it is shown that the pollution of the stream is owing to some distinct act of the board, the Act does not apply. This is, therefore, a case in which an injunction ought not to be granted:

Glossop v. *Heston and Isleworth Local Board*, 40 L. T. Rep. 736; 12 Ch. Div. 102;
Attorney-General v. *Guardians of Dorking Union*, 46 L. T. Rep. 573; 20 Ch. Div. 595;
Attorney-General v. *Clerkenwell Vestry*, 65 L. T. Rep. 312: (1891) 3 Ch. 527.

In *Kirkheaton District Local Board* v. *Ainley* (67 L. T. Rep. 209; (1892) 2 Q. B. 274) the defendants had created a distinct new source of pollution. The court did not intend in that case in any way to impeach *Attorney-General* v. *Guardians of Dorking Union* (*ubi sup.*). The plaintiffs have misconceived their remedy. The only effective way of getting rid of this nuisance is to institute a new system of drainage. Therefore, they ought either to have applied for a *mandamus* or to have complained to the Local Government Board under sect. 299 of the Public Health Act 1875.

Finlay, Q.C. and *C. M. Atkinson* for the respondents.—The defendants can prevent this sewage flowing into the river, and therefore they "knowingly permit" it to do so. They can make cesspools or a sewage farm. The judgments of Lord Esher, M.R. and Bowen, L.J. in *Kirkheaton District Local Board* v. *Ainley* (*ubi sup.*) show the defendants are liable. [They were stopped by the Court.]

Walton in reply.

LINDLEY, L.J.—This case comes before us in such a shape that our decision will decide very little except that the learned County Court judge ought to reconsider the matter. The plaintiffs have entered a plaint in the County Court under sect. 10 of the Rivers Pollution Prevention Act 1876, and they complain that the defendants, who are the Holmfirth Urban Sanitary Authority, have committed an offence against that Act, either by causing or by knowingly permitting sewage matter to fall or flow into a certain stream. The Act of Parliament under which this plaint is issued is not the Public Health Act of 1875; it is an Act passed in 1876, and it contains a preamble which is important: "Whereas it is expedient to make further provision for the prevention of the pollution of rivers, and in particular to prevent the establishment of new sources of pollution." That preamble shows that the previous Acts of Parliament did not, in the opinion of the Legislature, go far enough to prevent the pollution of rivers; and decisions on the Public Health Act of 1875, or upon any other earlier Act, will be of very little, if any, use in construing the provisions of an Act which is deliberately intended to extend the previous legislation. The Act of Parliament with which we have alone to deal provides as follows:—Sect. 3: "Every person who causes to fall or flow, or knowingly permits to fall or flow, or to be carried into any stream any solid or liquid sewage matter shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act." Pausing then for a moment, the first question which arises is whether the nominative "every person" applies to such a body as the Holmfirth Urban Sanitary Authority. That question must be answered in the affirmative, because sect. 20 says, "'Person' includes any body of persons, whether corporate or unincorporate." "Person," therefore, in sect. 3 is not confined to an ordinary individual, but extends to and includes an urban sanitary authority. Now the next question is, whether that person causes to fall or flow, or knowingly permits to fall or flow, or to be carried into any stream, any sewage matter. The facts of this case are apparently these: Before the urban sanitary authority became in a position to control the sewers, before the sewers were vested in them, there were in existence old sewers which were used by the inhabitants of Holmfirth, and what the defendants have done, as I understand it, is this: they have repaired the old drains by putting in some new pipes—I suppose the ordinary glazed sewer pipes—and they have straightened the sewers so as to shift the outfall, which used to be in the old mill tail, into the river. The substitution of the pipes has not been a small matter, because they have substituted, we are told, some 5000 yards, which is about three miles. What the effect of that may be I do not know. Whether the old sewers were so out of condition that a good deal of leakage took place, so that the sewage which flowed into the river was less than it is now that these new glazed pipes are put in, I do not know. But the learned judge of the County Court finds as a fact, and I accept his finding, that there has been no material increase of sewage—that the straightening of the sewers and the substitution of glazed pipes for the rubble drain have not appreciably increased the mischief. Under these circumstances I do not know that the defendants have caused this sewage to flow into the river; but have they knowingly permitted it? *Primâ facie* I take it that the owner of a sewer which discharges itself into a river does knowingly permit that discharge. If the person who is the owner of the sewer could show that he does not knowingly permit it, because he cannot prevent it, it would be competent for him to do so, but there is no evidence of that sort here. It may be, and probably is true, that individuals have a right to pour their sewage into this sewer. It does not follow from that that the local board have no power to prevent that sewage matter from falling into the river undeodorised and undealt with. At all events, no evidence has been adduced before the learned County Court judge by the defendants to show that what is done is that which by law they cannot prevent. Well, under these circumstances, it appears to me a *primâ facie* case has been made out against them, that they do, in the terms of this Act of Parliament, knowingly permit this sewage matter from their own sewers to fall into this river. That being so, what is the duty of the learned County Court judge? His duty is to consider under sect. 10 what ought to be done. But he has not done that. He has stopped short. He has construed this Act of Parliament in favour of the defendants, and has in substance held that he has nothing to do with the case except to dismiss the plaint,

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because the defendants have done nothing. In my judgment, he has misconstrued sect. 3. He has held that the defendants have not committed any breach of sect. 3, because they have simply allowed matters to go on as they were, and has treated as immaterial the substitution of the glazed pipes for the rubble and the straightening of the sewer. There I think he is wrong, because he has disregarded the latter part of sect. 3, which is important, and provides: "Where any sewage matter falls or flows, or is carried into any stream along a channel used, constructed, or in process of construction at the date of the passing of the Act for the purpose of conveying such sewage matter, the person causing or knowingly permitting the sewage matter so to fall or flow, or to be carried, shall not be deemed to have committed an offence against this Act if he shows to the satisfaction of the court having cognisance of the case that he is using the best practicable and available means to render harmless the sewage matter so falling, or flowing, or carried into the stream." Now, the learned County Court judge has not gone into that question. He has held that the defendants, having done nothing except let matters go on as they were before, are not within the earlier part of the section. I think he ought to have gone further and ascertained whether they could or could not have done that which, if they had done, would have been an excuse under the clause which I have just read. Sect. 10, which is the section under which this plaint is taken out, runs thus: "The County Court having jurisdiction in the place where any offence against this Act is committed may"—not shall—"by summary order require any person to abstain from the commission of such offence, and where such offence consists in default to perform a duty under this Act, may require him to perform such duty in manner in the said order specified. The court may insert in any order such conditions as to time or mode of action as it may think just, and may suspend or rescind any order on such undertaking being given or condition being performed as it may think just, and generally may give such directions for carrying into effect any order as to the court seems meet." Then there is power to obtain information from experts, and so on. The learned County Court judge has not got so far as to make, or attempt to make, any order under this section. It is obvious to my mind that the word "may" there means "may," not "shall," because amongst other things which the judge can do, and which perhaps in ninety-nine cases out of a hundred he ought to do if the circumstances warrant it, is to grant an injunction. An injunction is always discretionary. The court will not grant injunctions to compel people to do what they cannot do, and that is really one part of the decision in *Glossop* v. *Heston and Isleworth Local Board* (*ubi sup.*) and *Attorney-General* v. *Guardians of Dorking Union* (*ubi sup.*). If the learned County Court judge comes to the conclusion that an injunction will be of no use, or if he finds that he is unable to make any order which will work, it is not incumbent upon him to make an order which will be useless when he has made it. But it is his duty, as I understand this Act of Parliament, to apply his mind to the case to see if any, or what, order can be made which will have the effect of compelling the defendants to keep this foul matter out of the river. He has not gone so far. All we decide, and all the Divisional Court decided, is that he has stopped too soon, and that the case ought to go back for further consideration. With reference to the authorities, I do not think there is any difficulty. I do not think that *Glossop* v. *Heston and Isleworth Local Board* (*ubi sup.*), or *Attorney-General* v. *Guardians of Dorking Union* (*ubi sup.*), touch this case. If the learned County Court judge had granted an injunction, and it could be shown that the injunction could not be complied with, that would have been a reason for invoking those authorities; but we have not reached that stage of the proceedings. It may be, for anything I know, that the learned County Court judge will come to the conclusion that any order which he may make under sect. 10 is not the right order to make. If that is so, he need not make it. That appears to me to get rid of those cases altogether. As I read the decisions, both *Glossop* v. *Heston and Isleworth Local Board* and *Attorney-General* v. *Guardians of Dorking Union* proceeded upon grounds which have no application to a plaint before a County Court judge under sect. 10 of this Act. They have application in inducing him not to grant injunctions in cases where he sees an injunction cannot be complied with, or where he sees that an injunction is wrong and a *mandamus* right. If he comes to that conclusion, well and good. But he has not got so far. The case of *Attorney-General* v. *Clerkenwell Vestry* (*ubi sup.*) is to the same effect. It is not the practice of the court to grant an injunction against a man to compel him to bring actions against a number of people. An equity lawyer never heard of such a thing. That is the ground of the decision of Romer, J. in that case. Therefore, we are only deciding that it is the duty of the learned County Court judge to apply his mind to this case, and see what order, if any, he can properly make. If he can make a proper order he ought to make it; if he cannot, he cannot.

Lopes, L.J.—I am entirely of the same opinion. I have very little to add. I think that the learned judge has acted prematurely in this instance. He seems to have put a construction upon this sect. 3 which I do not think it bears. He appears to have thought that, if the defendants had done nothing, and had merely permitted things to remain in *statu quo*, they would not be brought within the purview of this section. I do not think that is the right view. I am not prepared to say that they have done nothing. On the contrary, they have made a very considerable alteration. They have substituted for the old rubble drains three miles of glazed pipes. What the effect of that may be, whether it caused more sewage to fall or be carried into the river, I am not prepared to say, but I cannot say that they have done nothing. Even if they have done nothing I do not think that would be a sufficient answer, because it is very possible, by their having done nothing on an occasion when they ought to have done something, they may have caused that to happen which was intended to be prevented by this section. Well, then, there are answers which no doubt might be made out by the defendants. I presume that ,if they could prove that they could not prevent this sewage falling into the stream, that at any rate would be an answer to the plaint,

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because I find Bowen, L.J. says, in *Kirkheaton District Local Board* v. *Ainley* (1892) 2 Q. B. 284): "It might possibly be an answer to the complaint that they had neglected their duty to deal with the sewage in their sewers, if they could show that they were actually without the means of disposing of it, and had not the power in any reasonable way to dispose of it; but I shall wait until a local board can satisfy me that it is in such an unfortunate position before I decide that question. In this case there does not appear to me to be anything to show that the plaintiffs are in that position. On the contrary, on the materials before me, I cannot but think there are means by which they could deal with the sewage in these sewers so as to prevent its finding its way into the stream. If they have the power they are bound to do so. Therefore, I think that they themselves are within the section as persons who permit the sewage to flow into the stream." It appears to me that those expressions of the learned Lord Justice are applicable to this case. One is unwilling to express any decided opinion with regard to any matter which might arise on the evidence before the County Court judge; but it does suggest itself to one's mind, whether by cesspools or filtration, or something else, the fall into the river might not be prevented. I entirely concur with my brother Lindley in thinking that the learned County Court judge has acted prematurely in this matter, and that the case ought to go back to him in order that he may hear the evidence, and then determine what, in his opinion, ought to be done under sect. 10 of this Act. The appeal must be dismissed with costs.

Solicitors for the appellants, *Learoyd, James*, and *Mellor*, agents for *Learoyd* and *Co.*, Huddersfield.

Solicitors for the respondents, *Badham* and *Williams*, agents for *Trevor Edwards*, Wakefield.

Friday, May 4.

(Before LINDLEY, LOPES, and KAY, L.JJ.)

DREW *v.* GUY. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Restrictive covenant—Construction—Baker's shop—Restaurant—"Similar business."

The lessee of certain premises covenanted that he would not carry on there the business of a keeper of a restaurant similar to that carried on by the tenant of a certain public-house to which a fully licensed restaurant was attached.

For some time the lessee carried on the business of a refreshment house, including the sale of cold meat, without any objection from the lessors. He then assigned the lease to the defendant, who, in addition to the articles formerly sold, commenced selling soups, entrées, hot meats, and vegetables. The defendant had no licence, and his establishment presented the appearance of a confectioner's shop.

Held, that the defendant was carrying on a similar business within the meaning of the covenant, but that he was at liberty to carry on business in the same way as his assignor.

Decision of Kekewich, J. reversed.

(*a*) Reported by W. C. BISS, Esq., Barrister-at-Law.

BY an indenture, dated the 7th Jan. 1887, the plaintiffs granted a lease for a term of eighteen years of No. 331, Vauxhall Bridge-road, to one Raven, who was a licensed victualler and the proprietor of the Windsor Castle public-house, which adjoined the premises. Raven covenanted, amongst other things, not to use the premises for any trade or business other than that of a restaurant keeper, "a licence for such purpose having been previously obtained." Raven also held the Windsor Castle under a lease from the plaintiffs. Both the public-house and the restaurant were fully licensed.

By an indenture, dated the 22nd June 1889, a house and shop, No. 327, Vauxhall Bridge-road, were demised by the plaintiffs to the Aërated Bread Company for a term of twenty-eight years from the 25th March 1889. The lease contained a covenant that the lessees, their successors and assigns, would not use, exercise, or carry on, or permit or suffer to be used or carried on, in or upon the demised premises, certain trades or businesses mentioned, including that of a brewer, distiller, licensed victualler (being a publican), "or keeper of a restaurant similar to that carried on by the tenant of the Windsor Castle public-house."

The business carried on by the Aërated Bread Company on the premises was described in an affidavit of Susannah Mothersole, the manageress, who stated that the following things were sold there, viz., cold roast beef, ham, tongue, brawn, pressed beef, sausages, potted meat, hot and cold beef pies, veal and ham pies, eggs, cakes, pastry, jams, tartlets, scones, and other similar articles, mineral waters of various kinds, tea, coffee, and cocoa. Neither Raven nor the plaintiffs ever complained of these articles being sold there.

In June 1892 the Aërated Bread Company assigned the lease to the defendant Guy. At first he carried on the business in the same way as the Aërated Bread Company, but in Oct. 1893 he, in addition to the articles above-mentioned, began to sell soup, entrées, hot joints, chops, steaks, vegetables, and hot sweets. It was alleged that soon after this date Raven's business began to decrease, and the plaintiffs objected to the defendant making the alteration on the ground that it was a breach of the covenant not to keep a restaurant similar to that carried on by the tenant of the Windsor Castle. The defendant agreed to cease selling these additional articles, and issued the following circular, dated the 4th Jan., to his customers:

Café Restaurant, 327, Vauxhall Bridge-road.—Difficulties having arisen between the proprietor and the lessors owing to an obscure clause in the lease, the proprietor has been advised to discontinue for the present, and pending a legal settlement, the sale of chops, steaks, hot meats, and entrées. He hopes, however, to substitute at lunch various vegetarian dishes, which he trusts may not prove unacceptable to his customers.

The plaintiffs were not satisfied, and required the defendant to sell only those things which the Aërated Bread Company had sold when in possession of the premises, and on the 30th Jan. the writ in this action was issued, claiming an injunction restraining the defendant and his agents from carrying on the trade or business of a keeper of a restaurant similar to that carried on by the tenant of the Windsor Castle, in violation of the covenant in the lease of the 22nd June 1889.

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The defendant contended that his business was not similar to that carried on by Raven, on the ground that he had no wine or spirit licence, that he supplied hot meals from twelve to three only, that his establishment presented the appearance of a confectioner's shop, that he employed waitresses in place of waiters, and that his charges were much lower.

The case was heard by Kekewich, J. on the 3rd April, when he dismissed the action, being of opinion that there were great dissimilarities between the business carried on by the defendant and the tenant of the Windsor Castle, especially having regard to the fact that the defendant's premises were not licensed.

The plaintiffs appealed.

Warmington, Q.C. and *Dickinson* for the appellants.—The defendant has broken his covenant, the object of which was to prevent any competition beyond the competition of a business as carried on by the Aërated Bread Company. "Similar" in this covenant means "so as to interfere with." The fact that the defendant's premises are not licensed does not make his business dissimilar within this covenant:

Fitz v. *Iles*, 68 L. T. Rep. 108; (1893) 1 Ch. 77.

The sale of these vegetarian dishes is an infringement.

Renshaw, Q.C. and *Bramwell Davis* for the respondent.—The defendant is entitled to carry on a restaurant of some sort. The tenant of the Windsor Castle cannot carry on the business of a simple restaurant, but is bound to carry on such a business as requires a licence, for his lease refers to a licence being obtained, and this covenant was to prevent the defendant from carrying on the business of a public-house so as to compete with the tenant of the other house. The fact, therefore, that the defendant does not sell alcoholic drinks is important. Each establishment must be looked at as a whole and contrasted with the other, and then they are plainly dissimilar. The fact that the defendant sells some of the same things as are sold at the other establishment is not a breach of the covenant:

Stuart v. *Diplock*, 62 L. T. Rep. 333; 43 Ch. Div. 343:

Lumley v. *Metropolitan Railway Company*, 34 L. T. Rep. 774.

Dickinson in reply.

LINDLEY, L.J.—This is an appeal from Kekewich, J. refusing to grant an injunction restraining the defendant Guy from carrying on the trade or business of a keeper of a restaurant alleged to be similar to that carried on by the tenant of the Windsor Castle public-house, in contravention, as it is contended, of a covenant which I will read presently. In order to understand the covenant it is necessary to observe that, at the time when the lease of the 22nd June 1889 was granted to the Aërated Bread Company, a Mr. Raven was the lessor's tenant of the Windsor Castle and another house which adjoined or was part of the Windsor Castle, and which was used by him as a restaurant in conjunction with the Windsor Castle. In June 1889 the lease to the Aërated Bread Company was granted, and it contained the covenant in question, which I will read. It provides that the lessees, their successors and assigns, shall not "use, exercise, or carry on, or permit or suffer to be used, exercised, or carried on, in or upon the demised premises or any part thereof, the trade or business of a slaughterman, tallow chandler (being a melter of tallow), soap maker, tobacco-pipe maker, or burner of tobacco pipes, brewer, distiller, licensed victualler (being a publican), keeper of a restaurant similar to that carried on by the tenant of the Windsor Castle public-house, glass maker, or any other art or trade which shall be dangerous or a nuisance to the adjoining neighbourhood, nor the trade of a butcher, tobacconist, or greengrocer, so long as such last-mentioned trades respectively should be continued to be carried on by other tenants of the lessors in the premises Nos. 1 and 2, Wilton-road, near the demised premises, and No. 329, Vauxhall Bridge-road." For the present purpose this covenant may be shortened into "will not carry on, or permit or suffer to be carried on, in or upon the demised premises, the trade or business of a keeper of a restaurant similar to that carried on by the tenant of the Windsor Castle public-house." Now, it is conceded that the Aërated Bread Company might use the premises demised to them for the purposes of their business, and we have that business described in an affidavit of Mrs. Susannah Mothersole, who was a manageress of the Aërated Bread Company before and at the time when the lease was assigned to the defendant. She states that, as such manageress, she sold for the company, at 327, Vauxhall Bridge-road, cold roast beef, ham, tongue, brawn, pressed beef, sausages, potted meat, hot and cold meat pies, veal and ham pies, eggs, cakes, pastry, jams, tartlets, scones, and other articles, together with mineral waters of various kinds, tea, coffee, and cocoa. It is obvious that the Aërated Bread Company, having taken a lease of the premises, would be at liberty to sell these things there. This is not disputed, nor is it disputed that Guy, their assignee, might do the same. But what he says is, that he may do more. What he may do is anything that is consistent with this covenant. He is entitled to carry on a restaurant; but he is not entitled to carry on a restaurant which is similar to that carried on by the tenant of the Windsor Castle. The question, therefore, which we have to determine is, what is the meaning of "similar" in this case? Now there are unquestionably several dissimilarities between the restaurant carried on by Raven and that carried on by the defendant. For one thing, the defendant has no licence either for the purpose of selling alcoholic liquors or for the purpose of keeping his restaurant open after certain hours—he has no licence at all; whereas Raven has such licences, and that constitutes a marked difference. But does that constitute a difference which prevents the two businesses from being similar? The answer depends upon the meaning of the word "similar," having regard to what it is which the covenant refers to. The similarity, in my opinion, is, that the defendant claims to carry on a business which on the evidence will, I think, seriously compete with that of Raven. Then, is a restaurant, of which it can be said that its proprietor claims to carry on a business which will seriously compete with the restaurant of someone else, "similar" to that other restaurant? I do not think that the difference of selling or not selling beer or wine, or the difference of the size of the houses, or the difference between having

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men waiters and women waiters, and the number of them, and all that, can be sufficient to prevent the two businesses being similar within this prohibition. The thing we must look at must be, what was in the contemplation of the parties when they entered into the covenant? I think it cannot be said that the defendant does not seriously compete with Raven. It seems to me to be impossible to look at the case as it has been laid before us without seeing that he desires to carry on the business of a keeper of a restaurant as far as he can without a licence. I think, therefore, the appeal must be allowed, but the order should be drawn so as to specify that the injunction is not to prevent the defendant selling such things as are set out and described in Mrs. Mothersole's affidavit. This will leave open the question, should it become necessary to decide it, as to whether or not the covenant applies to the selling of vegetarian articles, which seem to me to come very near the line.

LOPES, L.J.—I am of the same opinion. The terms of the covenant clearly allow the defendant to keep a restaurant, but such a restaurant only as is not similar to that carried on by the tenant of the Windsor Castle public-house. The first question then is, what does "similar" here mean? It seems to me that it means "similar so as to compete with the tenant of the Windsor Castle public-house." If that be so, the next question is, is the defendant carrying on a business so as to compete with that of Raven? It has been already pointed out by Lindley, L.J. that there are certain very substantial elements of dissimilarity between the business of Raven and that of the defendant. There is, for example, the fact that one has and the other has not a licence for selling alcoholic liquors, though I do not think that of itself is sufficient to constitute dissimilarity for the purpose of this covenant, and there are other dissimilarities, such as the differences between the prices charged at the two establishments, though that again I do not think is sufficient. But, assuming that the defendant does supply hot joints, and suppose a person is desirous of obtaining a dinner, it is very likely that he would go to the establishment of the defendant and not to Raven's. The cheapness of the former would be an inducement. But the great thing to consider is the particular sort of dinner that might be wanted by such a person as I have supposed. If he wanted a hot dinner he would not have gone to this restaurant while it was in the occupation of the Aërated Bread Company; but if the defendant supplies hot joints and the other things complained of, there is no reason why he should not go to the defendant's establishment. I am clearly of opinion that the defendant is not entitled to supply hot joints. As to whether or not he can sell vegetarian dishes such as are proposed, that is a matter which is very near the line, and must be left to the discretion of the defendant. The appeal must be allowed, and the order will be in the form mentioned by Lindley, L.J.

KAY, L.J. concurred.

Solicitors for the appellants, *Wilkinson* and *Son*.

Solicitors for the respondents, *Timbrell* and *Deighton*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Thursday, July 5.

(Before ROMER, J.)

WOOD *v.* COOPER. (*a*)

Injunction—Building scheme—Lease—Restrictive covenants — "Building" — "Annoyance" — Hoarding or screen—Obstruction of view.

The plaintiff, who was tenant for life of freehold land, with power to grant building leases, by a lease dated the 11*th Nov.* 1878, *and made in pursuance of a building scheme, demised to A. B., for ninety-nine years, a piece of ground, with a dwelling-house erected on it by the said A. B., who by the same lease covenanted that he, "his executors, administrators, and assigns, would not, without the licence and consent in writing of the lessor . . . for that purpose first obtained, erect or build, or cause or permit to be erected or built, upon the said piece of ground, or upon any part thereof, any other building whatsoever save and except a stable and coach-house [which might be erected, as therein mentioned], and also that he . . . his executors, administrators, or assigns, would not do or suffer to be done on the said premises or any part thereof any act, matter, or thing which might be or become an annoyance, nuisance, or disturbance to the neighbourhood or to any tenant of the lessor." The piece of land comprised in the lease was ultimately assigned to the defendant.*

By a lease, dated the 14*th Sept.* 1881, *the plaintiff demised a piece of land, adjoining that previously demised to A. B. as aforesaid, to R. G., who thereby covenanted for self and assigns to erect a dwelling-house on the demised land within twenty-one years, according to plans to be approved by the lessor's architect, and also entered into covenants similar to those contained as above mentioned in A. B.'s lease. The premises comprised in the lease of Sept.* 1881, *were ultimately assigned to F. N., who in* 1893 *built a house according to plans approved by the lessor's architect, and overlooking the defendant's garden. The defendant thereupon erected a hoarding, or trellis-work screen, nearly sixty feet long and nearly twenty feet high, close to the partition wall on his own side thereof, and about eighteen feet from the nearest part of the house built by F. N. The plaintiff brought an action for an injunction, and contended that the screen was both a "building" and an "annoyance" within the meaning of the covenants.*

Held, (1) *that the hoarding or screen was a "building" within the meaning of the covenant, though the case was somewhat near the border line; and* (2) *that the putting up of such a structure was certainly a breach of the covenant against annoyance "to any tenant of the lessor," being an "annoyance" within the meaning of that covenant to F. N., who was such a tenant; and that an injunction must accordingly be granted,*

Tod-Heatley *v.* Benham (60 *L. T. Rep.* 241; 40 *Ch. Div.* 80) *followed.*

EDWARD WOOD, the plaintiff, was in 1878 and previously the tenant for life of a freehold estate

(*a*) Reported by R. H. DEANE, Esq., Barrister-at-Law.

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at Ealing, in the county of Middlesex, with power to grant building leases.

Albert Cooper, the defendant, was a tenant of the plaintiff, under a building lease, which had been assigned to him.

The action was for an injunction to restrain the defendant from committing breaches of certain restrictive covenants contained in his lease.

In the year 1878 the plaintiff began to carry out a building scheme on the estate of which he was tenant for life. There was a form of building lease used on the estate, but it was subject to variations to suit particular cases.

It was part of the scheme that there should be a new road running approximately north and south through the estate, and this road was known as Woodville-road.

By an indenture of lease, dated the 11th Nov. 1878, the plaintiff demised to Alfred Bailey, his executors, administrators, and assigns, a piece of ground lying on the west side of Woodville-road, with a dwelling-house on it, which had been erected by the lessee, and was then known as Rood Ashton House, but now called Grimston Lawn. The lease was for a term of ninety-nine years from Michaelmas-day 1878. By the same indenture the said Alfred Bailey covenanted for himself, his heirs, executors, administrators, and assigns, with the plaintiff, his heirs and assigns, and also as a separate covenant with the person or persons for the time being in remainder expectant on the determination of the term, their heirs and assigns (referred to in the said indenture as the "lessor parties),"

That he the said Alfred Bailey, his executors, administrators, and assigns, would not, without the licence and consent in writing of the lessor parties for that purpose first obtained, erect or build, or cause or permit to be erected or built, upon the said piece or parcel of ground hereby appointed and demised, or upon any part thereof any other building whatsoever, save and except a stable and coach-house [which might be erected as therein mentioned], and also that he the said Alfred Bailey, his executors, administrators, or assigns, would not do or suffer to be done on the said premises, or any part thereof, any act, matter, or thing which might be or become an annoyance, nuisance, or disturbance to the neighbourhood or to any tenant of the lessor parties.

By an indenture of the 3rd July 1879 the hereditaments comprised in the lease of Nov. 1878 were assigned to Richard Grice for the residue of the term, subject to the lessees' covenants contained in the said lease, and by an indenture of the 2nd Sept. 1887 the same hereditaments were assigned to the defendant, subject to the said covenants.

By an indenture of lease of the 14th Sept. 1881, the plaintiff demised to the said Richard Grice, his executors, administrators, and assigns, for a term of ninety-nine years from Michaelmas-day 1881, a further piece of ground, part of the said estate, and situate on the west side of Woodville-road aforesaid, and immediately adjoining the northern boundary of the land comprised in the lease of the 11th Nov. 1878. The said lease of Sept. 1881 contained a covenant by Richard Grice, for himself and his assigns, to erect one dwelling-house on the demised land within twenty-one years, at a cost of at least 1200*l.*, or two dwelling-houses at a cost of at least 800*l.* each, according to plans and on sites to be approved by the lessor's architect. The lease also contained covenants by the lessee against erecting any other buildings (except a stable and coach-house), and also against doing any act, &c., which might be or become an annoyance, &c., to the neighbourhood, or to any tenant of the lessor parties, similar to the covenant contained in the lease of Nov. 1878.

By an indenture of the 27th April 1888 Grice assigned the hereditaments comprised in the lease of Sept. 1881 to George Nesbit, and by an indenture of the 22nd Oct. 1892 Nesbit assigned the same to Frederick Neale for the residue of the term of ninety-nine years, and subject to the lessee's covenants in the same lease contained.

In 1893 Neale obtained the approval of the lessor's architect to his plans for a house to be built on the land comprised in the lease of Sept. 1881, and he had completed the house in Jan. 1894. There were several windows in the side of Neale's house next to the defendant's garden, and overlooking it, the boundary wall between the two properties being about seventeen feet from the nearest part of Neale's house, and over thirty feet from the main wall of it. The house was occupied by Neale's family on the 26th Feb. 1894. On the very next day the defendant began erecting a hoarding, or trellis-work screen, nearly sixty feet long and nearly twenty feet high on his side of the boundary wall separating his garden from Neale's, and about eighteen feet from the nearest projecting part of Neale's house, and thirty-two feet from the south main wall thereof, and, though warned to desist, completed it.

The plaintiff alleged that the screen was a building, and also that it was an annoyance within the meaning of the covenant aforesaid, and he accordingly claimed an injunction to restrain the defendant, &c., from erecting or permitting to remain erected on the premises demised by the lease of the 11th Nov. 1878, or any part thereof, any hoarding, screen, or other erection so as to be an annoyance, nuisance, or disturbance to the neighbourhood or to the said Frederick Neale or any other tenant of the plaintiff, and from otherwise committing a breach of any of the lessee's covenants contained in the said lease.

The defendant denied that he had committed any breach of the covenants.

The case was heard before Romer, J. on the 5th July.

Neville, Q.C. and *T. H. Carson* for the plaintiff.—This hoarding is a "building" within the meaning of the covenant against erecting "any other building" on the premises. Even if that is not so, it is unquestionably a breach of the covenant against doing anything on the premises which might be or become an annoyance to the neighbourhood or to any tenant of the lessor, as it is undoubtedly an "annoyance" within the meaning of that covenant to the tenant Neale. A wooden structure of considerable size, and likely to last a considerable time, though not let into the ground, or fixed on masonry, has been held to be a building within the Metropolitan Building Act 1855:

Stevens v. *Gourley*, 1 L. T. Rep. 33; 7 C. B. N. S. 99.

Foster v. *Fraser* (69 L. T. Rep. 136; (1893) 3 Ch. 158) was quite a different case, the object of the covenant there being to provide that the houses built should conform to a particular character. In this case the words are "will not erect . . .

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any other building whatsoever." A wall 8½ feet high was held not to be a building within such a covenant in *Bowes* v. *Law* (22 L. T. Rep. 267; L. Rep. 9 Eq. 636); but in that case the question was complicated by the existence of a "lean-to" vinery against a higher wall, and that was held to be a breach of the covenant. Upon the second part of our case (the question of annoyance) the judgments of the Lords Justices in the recent case of *Tod-Heatley* v. *Benham* (60 L. T. Rep. 241; 40 Ch. Div. 80) are conclusive in our favour, though the facts of that case are not on all-fours with those here. The observations there of Cotton, Lindley, and Bowen, L.JJ., on the subject of "annoyance," appear especially in point here. Now, certainly this hoarding is an "interference with the pleasurable enjoyment" of our house, by obstructing our view, by interfering with the access of light and air, by intercepting the direct rays of the sun to part of the house and garden, and in other ways. It is therefore covered by the definitions of annoyance in the case referred to.

Bigham, Q.C., and *Frederic Thompson* for the defendant.—The first question is, what these covenants mean; and the second, whether they have been infringed in this case. The covenant meant what ordinary people would mean by the word "building." No ordinary sensible man would call this trellis-work a building. A building means an inclosure—walls inclosing a space. A hoarding is not a building. The lessor has no right to strain the construction of the word in his own favour. The word in the first covenant is "building," not "erection." "Building" there must be *ejusdem generis* with the dwelling-house, stable, and coach-house referred to in the context. The position is the same as if Neale were entitled to ancient lights, as far as regards the amount of interference with light; and there is no material interference with it here. Secondly, the annoyance contemplated by the covenant is something very different from the annoyance felt by the Neales. It was intended to guard against such annoyances as noisy gatherings, school treats, and entertainments of that description. This screen does not substantially obstruct the light, although it prevents the Neales having quite such a full view into our garden as they would otherwise enjoy. *Tod-Heatley* v. *Benham* (*ubi sup.*) must be considered in relation to its own facts. In that case the risk was a serious one, but it is not so here.

Neville, Q.C. in reply.—The words "building" and "erection" are used in this covenant interchangeably, or as convertible terms. [He was stopped.]

ROMER, J.—I do not think I want to hear you further, Mr. Neville. In my opinion what the defendant has done is a breach of his covenant, or a covenant that is binding upon him, in two respects. In the first place, although the case is somewhat on the border line, I come to the conclusion that what the defendant has put up—this screen—is a building within the meaning of the covenant which binds the lessee, not without the licence and consent in writing of the lessors, the parties to the lease, being first obtained, "to erect or build, or cause or permit to be erected or built, upon the said piece or parcel of ground hereby appointed and demised, or upon any part thereof, any other building whatsoever, save and except a stable and coach-house." This screen is a very substantial erection, and a firm one. It seems to me that it is intended to be, and unless restrained would remain, a permanent part of the wall, close to which or against which it is erected. At any rate, it will act in the same way, as far as the plaintiff's house is concerned, as if it had been a wall added to a portion of the former existing wall. I think, undoubtedly, if it had been built of brick it would have been admitted to be a breach of the covenant, and I do not think the fact that it is made of wood, under the circumstances, makes any difference. As I have said, it is a permanent erection, and a substantial one, and intended to act as such. I think, under the circumstances, that it is a breach of the covenant to which I have just referred. In the second place, I have no doubt whatever in my own mind that it is a breach of the covenant that the lessee "will not do or suffer to be done on the premises any act, matter, or thing which might be or become an annoyance . . . to any tenant of the lessor." To my mind, undoubtedly, what the defendant has done is an annoyance to Mr. Neale, the tenant of the lessor. I think, in the first place, that it does substantially interfere with the access of light to the windows on the ground floor of this building, and that notwithstanding some parts of the expert evidence; and I feel satisfied beyond that, and irrespective of that, that it causes an annoyance to Mr. Neale, the tenant, within the meaning of the words used in the covenant. It falls within the definition of the word "annoyance" in a covenant like this, which was given by the three Lords Justices in the case of Tod-Heatley v. Benham (*ubi sup.*). In the first place, to adopt the language of Cotton, L.J. (60 L. T. Rep. at p. 224; 40 Ch. Div. at p. 94), I am satisfied by the evidence before me that reasonable people having regard to the ordinary use of the Neales' house for pleasurable enjoyment, would be annoyed and aggrieved by what has been done by the defendant—it would be an annoyance and a grievance to reasonably sensible people. It is an act which is an interference with the pleasurable enjoyment of the house, as stated by Cotton, L.J. Then, to adopt the words of Lindley, L.J. (60 L. T. Rep. at p. 245; 40 Ch. Div. at p. 96), I think it does raise an objection in the minds of reasonable men, and is an annoyance within the meaning of the covenant. It raises objections within the minds of reasonable men; and, to adopt the language of Bowen, L.J. (60 L. T. Rep. 244-5; 40 Ch. Div. at p. 98), I think it is "a thing which reasonably troubles the mind and pleasure, not of a fanciful person, or of a skilled person who knows the truth, but of the ordinary sensible English inhabitant of a house—if you find there is anything which disturbs his reasonable peace of mind, that seems to me to be an annoyance, although it may not appear to amount to physical detriment to comfort." I have come to the conclusion, therefore, that this is a clear breach of the last-mentioned covenant, as well as of the first, and on both grounds I think the plaintiff is entitled to succeed. The simple form will be to order the defendant to pull it down—you do not ask for damages, of course—and to pay the costs.

Solicitors for the plaintiff, *Hulberts* and *Hussey*.

Solicitors for the defendant, *Simpson* and *Cullingford*.

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Thursday, July 5.

(Before ROMER, J.)

Re LORD STRATHEDEN AND CAMPBELL (deceased); ALT *v.* LORD STRATHEDEN AND CAMPBELL. (*a*)

Will—Charitable gift—Bequest of annuity to regiment on appointment of next lieutenant-colonel—Gift conditional on uncertain future event—Validity—Rule against perpetuities—Uncertainty.

A testator by his will bequeathed an annuity "to be provided to the 'Central London Rangers'" (a volunteer regiment), "on the appointment of the next lieutenant-colonel." The plaintiff had been at the date of the will, and still was, lieutenant-colonel of the regiment, the testator having been at the date of the will, and of his death, the honorary colonel. The plaintiff brought this action for a declaration that the annuity was a valid bequest, and was now vested in him as commanding officer of the regiment, and claiming that a sufficient part of the testator's estate might be appropriated to provide for the annuity, or that the same might be otherwise properly secured.

The defendant, who was the executor of the will, contended that the bequest was void for infringing the rule against perpetuities, and also for uncertainty, as no appointment of a lieutenant-colonel had been made since the date of the will, and such an appointment might never be made.

Held, that the gift was conditional on the appointment of the next lieutenant-colonel, which appointment might not be made for an uncertain time, or might never be made, and the gift, therefore, depended on an uncertain future event, and was consequently void, as transgressing the limits of the rule against perpetuities.

Dictum of Lord Selborne. L.C., in Chamberlayne *v.* Brockett (27 *L. T. Rep.* 92; *L. Rep.* 8 *Ch. App.* 206), *followed.*

THE plaintiff was William James Alt, commanding officer of the 22nd Middlesex Rifle Volunteer Corps, otherwise known as the "Central London Rangers."

The defendant was the present Lord Stratheden and Campbell.

It appeared that the late Lord Stratheden and Campbell, who died on the 21st Jan. 1893, by his will, dated the 16th Nov. 1892, appointed the defendant (then the Honourable Hallyburton Campbell), the Honourable Francis Lawley, and Cecil Cowper executors of his said will, and bequeathed an annuity of 100*l.* a year "to be provided to the Central London Rangers on the appointment of the next lieutenant-colonel."

The will was proved on the 1st March 1893 by the defendant alone, power being reserved for the other two executors to come in and prove.

At the date of his death the testator was honorary colonel of the said regiment. The plaintiff at the date of the will had been, and still was, lieutenant-colonel of the regiment.

On the 11th Nov. 1893 the plaintiff's solicitor wrote to the defendant's solicitors as follows:

> As regards the annuity of 100*l.* a year bequeathed by the testator, I must now request that your client will secure the payment thereof to the regiment, and should be glad to hear from you in what manner and form you propose that the same should be secured.

(*a*) Reported by R. H. DEANE, Esq., Barrister-at-Law.

The defendant's solicitors wrote in reply on the 15th Nov. as follows:

> We have now seen Lord Stratheden with reference to your letter, and we are instructed to inform you that his Lordship is not prepared to offer any security for the annuity, the validity of which he does not admit.

The plaintiff accordingly brought this action claiming: (1) a declaration that the annuity of 100*l.* was a valid bequest and was now vested in the plaintiff as the commanding officer of the said volunteer corps; (2) that a sufficient part of the estate of the said testator might be appropriated to provide for the said annuity, or that the same might be otherwise properly secured; (3) in the alternative, that its capitalised value might be calculated and paid to the plaintiff; (4) administration of testator's estate so far as necessary.

The case was heard by Romer, J. on the 5th July.

Neville, Q.C. and *St. John Clerke* for the plaintiff.—This is a valid gift. It is definite, and entitled to be secured by the setting apart of a sum of money. The question whether the gift is good or not really arises upon the death or resignation of the present commanding officer. They referred to

Aaron v. *Aaron*, 9 Ha. 821.

Birrell, Q.C. and *Methold* for the defendant.—This is a charitable gift and is conditional on an uncertain event, namely, the appointment of the next lieutenant-colonel, which may never be made, and the date of which is at all events uncertain. The gift, therefore, fails as being contingent on an uncertain event, and therefore invalid as infringing the rule against perpetuities. It is also void for uncertainty. They referred to

Commissioners of Income Tax v. *Pemsel*, 65 L. T. Rep. 621, at p. 637; (1891) A. C. at p. 583;
Bowen v. *Churchill*, 69 L. T. Rep. 752; (1893) 3 Ch. 421;
Chamberlayne v. *Brockett*, 27 L. T. Rep. 92; L. Rep. 8 Ch. App. 206:
Clowes v. *Hilliard*, 4 Ch. Div. 413.

Neville, Q.C. in reply.

ROMER, J.—I am sorry to say I do not see my way to uphold the validity of this gift. As was pointed out by Lord Selborne in *Chamberlayne* v. *Brockett* (*ubi sup.*) "if the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises; if it is so remote and indefinite as to trangress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*." Applying that to the present case, I look to see, in the first place, is this gift conditional, and what is the condition? Well, unfortunately, it appears to me that it clearly is conditional. The annuity is not to be paid except on the appointment of the next lieutenant-colonel, and if a lieutenant-colonel is not appointed, the annuity is not to commence or be paid. That being so, it being conditional, can I say that the condition must arise within the time that is prescribed by the rules of law against perpetuities? I am sorry to say I cannot. If I could construe it as a conditional gift on the death of the present lieutenant-colonel, the difficulty would be

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got over; but I do not see my way to construe that gift so. It is a gift conditional on the appointment of the next lieutenant-colonel. Now the next lieutenant-colonel may not be appointed for some time after the death of the present commanding officer; he never may be appointed at all: and consequently it appears to me that this is a gift conditional upon an event which transgresses the limit of time prescribed by the rules of law against perpetuities. Therefore, reluctantly, I feel myself bound to hold that this gift fails, and I must dismiss the action.

Solicitor for the plaintiff, *J. Perry Godfrey.*

Solicitors for the defendant, *Walters, Deverell,* and *Co.*

June 20 *and* 22.

(Before ROMER, J.)

COLLIS *v.* LAUGHER. (*a*)

Right to light—Obstruction—Injunction—Ancient lights—Time from which period of prescription begins to run—Actual enjoyment—Unfinished house—Prescription Act (2 *&* 3 *Will.* 4, *c.* 71), *s.* 3.

In an action for an injunction to restrain the defendant from obstructing the access of light to the windows of the plaintiff's house, it appeared that the house was finished externally, the openings for the windows being made, and the roof completely slated, more than twenty years before the issue of the writ in the action, but the house was not fit for habitation, the window frames and sashes were not in, or the floors laid, till less than that period before the issue of the writ.

Held, that not only was it unnecessary that the house should be either occupied or completely fit for habitation before the statutory period of twenty years uninterrupted enjoyment of the access of light could begin to run, but it was immaterial even that the window frames and sashes had not been put in, or the floors finished, or gas or water laid on, provided that light had come through the window openings for the benefit of the building; and the plaintiffs were accordingly entitled to their injunction.

Courtauld *v.* Legh (19 *L. T. Rep.* 737; *L. Rep.* 4 *Ex.* 126) *followed.*

THIS was an action to restrain the defendant, &c., from obstructing the access of light to any of the windows of the plaintiff's house.

The plaintiffs were John Collis, the owner, and Charles Brand, the lessee of a house and shop in Potter-street, Bishops Stortford.

The defendant was Henry Laugher, the owner of property on the north side of and immediately adjacent to the plaintiffs' house, and overlooked by two of the windows of it on that side.

The plaintiffs claimed that their windows were ancient lights and had remained for more than twenty years immediately preceding the commencement of the action in the same situation, and that the plaintiffs and their predecessors had during that period enjoyed the free access of light to their said house through the said windows as of right and without interruption until the acts of the defendant in May 1893 which were the subject of complaint in the action.

(*a*) Reported by R. H. DEANE Esq., Barrister-at-Law.

In the month of May 1893 the defendant had a hoarding put up on his property, eighteen inches from the said two windows so as to intercept the access of light thereto.

On the 21st June 1893 the plaintiff John Collis gave the defendant notice to remove the obstruction, and on the 9th Aug. 1893, the plaintiffs' solicitors wrote to the defendant threatening legal proceedings unless the hoarding were forthwith removed.

The defendant denied that the windows were ancient lights, or had been where they were for twenty years immediately preceding the action, or that the plaintiffs had enjoyed free access of light as of right and without interruption for the period necessary under the Prescription Act to make the windows ancient lights.

Sect. 3 of the Prescription Act (2 & 3 Will. 4, c. 71) is as follows:

> That when the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

Sect. 4 enacts that the period of years mentioned

> Shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorising the same to be made.

There were questions of fact involved as to the exact dates at which the house had been finished externally and internally, and at which the windows had been put in, the house been ready for occupation, and actually occupied. There was also a question of law as to which of these stages a house must have reached before the statutory period of twenty years enjoyment of uninterrupted access of light begins to run.

The plaintiffs commenced this action on the 16th Jan. 1894 for (1) an injunction to restrain the defendants, &c., from erecting or permitting to remain erected on his premises any hoarding or other erection which darkened or interfered with the access of light to any of the windows of the plaintiffs' house; (2) damages; (3) costs and further relief.

On an application for an interlocutory injunction before Chitty, J., on the 9th Feb. 1894, the defendant by his counsel undertook without prejudice to remove forthwith, and not to re-erect till after the trial, so much of the said hoarding as darkened or interfered with the access of light to either of the said windows, but it was by consent expressly provided that the defendant was to have the same benefit by way of defence to the action as he would have had if the obstruction had not been removed; and on those terms the motion was ordered to stand over till the trial of the action.

The action came on for trial before Romer, J., on the 20th June 1894. The learned judge found

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on the evidence that the house was finished externally, with the openings for the windows, and the roof completely slated, before the 16th Jan. 1874 (viz., on the 13th Dec. 1873), but that it was not fit for habitation till some time after that date, the window sashes not having been put in or glazed, the floors not laid, and the gas and water not completely laid on till some time after the said 16th Jan. 1874.

Neville, Q.C. and *Howland Jackson* for the plaintiffs.—The question is whether there has been access of light to these windows for twenty years. The plaintiff must show something over nineteen years enjoyment of the access of light, in order to acquire the right to it; but a clear twenty years is necessary before the issue of the writ:

Flight v. *Thomas*, 11 Ad. & E. 688; 8 Cl. & Fin. 231.

He had an inchoate right after nineteen years and a day, and that right became absolute after twenty years was completed. These windows were in existence in Dec. 1873, and the obstruction was put up in May 1893. The period of prescription under the Act commenced to run from the time when the windows first existed as apertures through which light came into the house, and it was immaterial when the windows were glazed, and even when the frames and sashes were put in. It is not necessary for the house to be either actually occupied or even habitable:

Courtauld v. *Legh*, 19 L. T. Rep. 737; L. Rep. 4 Ex. 126.

Continuous user is not necessary:

Cooper v. *Straker*, 59 L. T. Rep. 849: 40 Ch. Div. 21.

Oswald, Q.C. and *O. L. Clare* for the defendant.—In *Courtauld* v. *Legh* (*ubi sup.*), the house had been completely finished structurally a long time, including the roof, floors, and windows, and only the internal fittings and decorations were not complete, because such things are often postponed till a tenant has been found who might like to have a voice in their selection. But here there were no floors, no window sashes, frames, or glass. There was in fact nothing but the mere carcase of the house with the openings for the windows. It would be a very great extension of *Courtauld* v. *Legh* (*ubi sup.*) to decide that that is sufficient. Under sect. 3 of the Perscription Act three things are necessary: (1) access of light; (2) enjoyment; (3) enjoyment *qua* dwelling-house (where the building is a dwelling-house as in the present case). How could there have been enjoyment of it as a dwelling-house, being in the state it was, a mere carcase, without floors, glass, or even window sashes, but with merely the bare openings for the windows? In such a state, it was not habitable even by a caretaker. They referred to

Harris v. *De Pinna*, 54 L. T. Rep. 38, 770; 33 Ch. Div. 238.

ROMER, J.—I think the plaintiffs are entitled to succeed in this action. It appears to me that the plaintiffs' dwelling-house has, within the words of sect. 3 of the Prescription Act, enjoyed the access and the use of light by means of these windows referred to in the pleadings for the whole period of twenty years before the commencement of this action, and that without interruption, treating interruption as defined by sect. 4. The evidence adduced on behalf of the plaintiffs has, I think, satisfactorily and completely established that their house was finished as a building by the 13th Dec. 1873. Completed, I mean, in this sense, that all external work was done, the walls were finished, and the windows placed in the positions they have ever since occupied as and for windows. The joists were in for the different landings, and the roof was put on and completely slated or tiled in. The building externally, for all external purposes, was completed, and wind and weather tight. It is true that it was not completely finished inside so as to be actually fit for habitation by the 16th Jan. 1874; for example, in the windows the sashes were not put in, and still less the glass. Probably the floors were not completely laid on the joists, and it is plain that the gas and the water were not completely laid on. But it is not necessary, in order that time may run in favour of the owners of a building like this, that it should either be occupied or be completely fit for habitation. That is shown by the decision of the court in *Courtauld* v. *Legh* (*ubi sup.*), from which case the present only differs in matters of detail, and in matters, in my opinion, of unimportant detail. Through these windows—and I use that term, of course, not as meaning a complete window in the most modern sense, as fitted with sashes and glass, but as an opening through which light for the building can be obtained, and the benefit of the light—through these windows, as from the 13th Dec. 1873, this building has enjoyed the light; light has come through these windows, or window openings, from that time for the benefit of this building. For example, how was it that the gas man who went in to lay the gas on on the 5th Jan. was able to do it completely? Doubtless he, for example, availed himself of the light coming through these windows when he had to do that part of his work which was on the part of the house adjacent or near to these windows. This house, in fact, has enjoyed the benefit of the light coming through these windows as from the 13th Dec. 1873 completely. This being so, the plaintiffs have, in my opinion, established their right to come to the court on the 16th Jan. 1894 and seek for the injunction they ask as against the defendant. The obstruction put up by the defendant has been removed, but that has been done under an arrangement between the parties by which it has been agreed that the question of right should be tried as if the obstruction still continued. Under those circumstances, all I need do is to grant an injunction (for I presume that will be the form the defendant would prefer in this case) against him to restrain him from interfering with the plaintiffs' two ancient lights in the statement of claim mentioned.

Solicitors for the plaintiff, *Thorneycroft* and *Willis*, for *Baker* and *Thorneycroft*, Bishop Stortford.

Solicitors for the defendant, *Walker*, *Son*, and *Field*, for *W. Gee* and *Son*, Bishops Stortford.

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Thursday, June 14.

(Before ROMER, J.)

NOYES *v.* PATERSON. (*a*)

Vendor and purchaser—Title—Voluntary deed—Subsequent sale for value by voluntary grantee—Requisitions — Repudiation of title — Specific performance—13 Eliz. c. 5—27 *Eliz. c.* 4.

The mere existence of a voluntary deed in the title of a vendor is not, of itself, sufficient to justify a purchaser in repudiating the contract directly he discovers that fact.

BY a memorandum of agreement of the 29th Sept. 1893, the plaintiff, John George Noyes, agreed to sell to the defendant, Peter Hay Paterson, a freehold messuage known as Layston Cottage, Buntingford, Herts, with certain lands, for 610*l.* A deposit of 61*l.* was paid. The purchase was to be completed on the 16th Oct. 1893. No abstract of title was delivered until the 23rd Oct. 1893. It appeared that the property in question had been the subject of a voluntary deed, dated the 22nd Aug. 1884, and made by one W. J. Clark, who thereby, in consideration of natural love and affection, gave to his wife, Rebecca Clark, certain freehold property and houses, including this Layston Cottage, and the piece of land occupied therewith. There was a recital in the deed as to the grantor's debts not exceeding 100*l.* On the 25th Dec. 1866 Clark died. In July 1888 his widow conveyed the house and land in question, for value, to one Martin, and on the 17th Jan. 1889 Martin conveyed it to the plaintiff, J. G. Noyes. Mrs. Clark had retained the title deeds of all the property after her husband's death, and on both these sales the necessary titledeeds passed to the purchaser. In the abstract of title given to the defendant, as above stated, there was a distinct reference to this voluntary deed in another deed, and it was stated that there was a covenant for its production. A requisition was made on behalf of the purchaser that this voluntary deed should be abstracted, and the original produced. Accordingly, a supplemental abstract of the voluntary deed was sent. By a letter of the 8th Nov. 1893 the solicitor of the purchaser wrote repudiating the contract, and claiming a return of the deposit, on the ground that a good title could not be made by the plaintiff. This action was then brought, and specific performance claimed.

Oswald, Q.C. and *Boone* for the plaintiff.—There is no question here of any claim by creditors, and the purchaser is not entitled to repudiate the contract owing to the mere existence of the voluntary deed. No doubt, during the interval between the date of that deed and the death of Mr. Clark, it was possible for him to have made an assurance of this property for value; but, having regard to the lapse of time, and the fact that the title deeds were in the possession of Mrs. Clark at his death, it would be almost ridiculous to anticipate any litigation now. This case comes within the rule laid down in Fry on Specific Performance, 2nd edit., p. 389, as to what are not doubtful titles It is conceived that the court would consider the title not to be doubtful; (1) "where the probability of litigation ensuing against the purchaser in respect of the doubt is not great, the court . . . must govern itself by a moral certainty, for it is impossible, in the nature of things, there should be a mathematical certainty of a good title:"

Spencer v. *Topham*, 22 Beav. 573.
Dart's Vendors and Purchasers, 5th edit., vol. 2., pp. 900, 901.

There have been two devolutions of title here since the voluntary deed. We rely upon the statute 27 Eliz. c. 4. No case is sought to be made out under 13 Eliz. c. 5. Most of the cases which have arisen as to voluntary deeds have been those of frauds upon creditors, or under the Bankruptcy Acts:

Halifax Joint Stock Banking Company v. *Gledhill*, 63 L. T. Rep. 623; (1891) 1 Ch. 31.

There is no case exactly in point; the nearest to it in principle are:

Smith v. *Garland*, 2 Mer. 123;
Re Briggs and Spicer, 64 L. T. Rep. 187; (1891) 2 Ch. 127;
Re Brall; Ex parte Norton, 69 L. T. Rep. 323; (1893) 2 Q. B. 381.

Neville, Q.C. and *Eve* for the defendant.—We rely upon *Re Briggs and Spicer* (64 L. T. Rep. 187; (1891) 2 Ch. 127). Such a title as this cannot be forced upon an unwilling purchaser. Till the case came into court we were not aware of Clark's death. That alters the case which we had intended to present to the court. [ROMER, J.—It seems to me that practically you get a good title. It is hardly possible to suppose that a purchaser from Clark would have made no claim since 1886.] The nature of this deed should have been stated before:

Re Marsh and Earl Granville, 48 L. T. Rep. 947; 24 Ch. Div. 11.

We ought to be permitted to make requisitions upon it.

ROMER, J.—I will not preclude the defendant from making any requisition as to any sale of this property during Mr. Clark's life. I cannot help seeing that there was an immediate repudiation of the contract directly the circumstances became known as to the voluntary deed of gift, and the defendant clearly thought, and I think erroneously, that the mere fact of there having been a voluntary deed would justify him in repudiating the contract. It is very difficult, in a case of this kind, to trace how much of the litigation is due to this; but, looking upon the matter broadly, I think that the costs should be paid by the defendant up to and including judgment. There will be judgment for specific performance, with a reference as to title in the usual way.

Solicitors for the plaintiff, *Barfield* and *Barfield*.
Solicitor for the defendant, *John Evans*.

(*a*) Reported by G. MACAN, Esq., Barrister-at-Law.

June 14 *and* 25.

(Before ROMER, J.)

ASTEN *v.* ASTEN. (*a*)

Will—Construction—Specific devise—Number of house left in blank—Void for uncertainty.

A testator, who had four sons, devised to his eldest son in fee "all that newly-built house, being No. —, Sudeley-place . . . with the piece of ground in the rear thereof." He then

(*a*) Reported by G. MACAN, Esq., Barrister-at-Law.

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bequeathed three other houses, in almost similar terms, to his other three sons. In each case the number of the house was left in blank. The testator had recently erected these four freehold houses in Sudeley-place; they were unnumbered at the date of his will, but were numbered shortly before his death. The will contained no residuary devise.

Held, that, as the testator had himself intended to select the house for each son, and the descriptions in the will were indistinguishable, the devises must be held void for uncertainty, and the eldest son declared to be entitled as heir-at-law.

AT the date of his will, Robert Asten, formerly of Colchester, in the county of Essex, a retired farrier, was seised of four freehold houses in Catsfield-road (afterwards St. Alban's-road), Colchester, together with pieces of freehold ground at the rear of the said houses. By his will, dated the 13th Oct. 1888, after appointing two of his sons, George Asten and Alfred Asten, executors and trustees, and bequeathing his personal estate for division among his four sons, George Asten, Robert Nelson Asten, John Thomas Asten, and Alfred Asten, in equal shares, he bequeathed unto George Asten and his heirs (together with other land and houses),

All that newly-built house. being No. — Sudeley-place, Catsfield-road, with the piece of ground in the rear thereof abutting upon Rawstorn-road, all the aforesaid houses and ground being in Colchester aforesaid.

And he thereby devised to Robert Nelson Asten,

All that newly-built house, No. — Sudeley-place, Catsfield-road, together with the piece of ground in the rear thereof, and abutting upon Rawstorn-road in Colchester,

to hold to Robert Nelson Asten for life, and afterwards to his trustees, upon trust to make certain payments out of the rents, for Elizabeth Asten, the wife of R. N. Asten, and subject thereto, as therein mentioned. And the testator devised in fee to John Thomas Asten,

All that house, being No. — Sudeley-place, Catsfield-road, together with the piece of ground in the rear thereof abutting upon Rawstorn-road, all in Colchester aforesaid.

And the said testator devised to Alfred Asten, in fee,

All that house, being No. — Sudeley-place, Catsfield-road, Colchester, aforesaid. together with the piece of ground in the rear thereof abutting upon Rawstorn-road.

The will contained no residuary devise. The testator died on the 19th Oct. 1891, and the will was proved on the 11th March 1892, by the two executors therein named.

The numbers of the four houses were all left in blank in the will. It appeared that they had been built by the testator himself in the summer and autumn of 1888. The piece of ground in the rear of the houses was fenced off from the adjoining land, but was not divided between the said houses, and was unbuilt upon. The four houses were not in fact numbered at the date of the will, and continued unnumbered till the spring of 1891, when the corporation of Colchester caused them to be numbered, and they then became known as 11, 13, 15, and 17 Sudeley-place, and were let to quarterly tenants. The testator was not entitled to any houses in Sudeley-place other than those four.

George Asten was the eldest son and heir-at-law of the testator, and brought this action against his three brothers, and Elizabeth Asten, claiming that the testator died intestate as to the said four houses, and that they descended to him as heir-at-law.

Neville, Q.C. and *G. B. Freeman* appeared for the plaintiff.—These devises of the four houses are void for uncertainty. Where there are two or more houses, or closes of land, which answer to a description in a will, and there is nothing in the devise to indicate which the testator intended to go to the devisees, that result will follow:

Richardson v. *Watson*, 4 B. & Ad. 787;
Boyce v. *Boyce*, 16 Sim. 476.

Where the testator has sanctioned the election by the devisees as to which they will take, the devise may not be held void for uncertainty, as in

Duckmanton v. *Duckmanton*, 5 H. & N. 219; and
Tapley v. *Eagleton*, 12 Ch. Div. 683.

But here the terms of the will show that the testator did not intend the sons to have an election.

Hopkinson, Q.C. and *Whinney*, and *W. Corvell Davies*, for the defendant—The court will lean against an intestacy. The testator clearly intended to give one house to each son, and the court will aid that if possible. [ROMER, J.—Assuming that, is there any evidence as to which house he intended to give to each? Do you ask for an inquiry?] No, we do not ask for an inquiry as to that. We submit that there is a right of selection by the sons implied by law in a case of this kind, and that it is governed by the cases of

Duckmanton v. *Duckmanton*, 5 H. & N. 219; and
Tapley v. *Eagleton*, 12 Ch. Div. 683.

The sons would select according to seniority, and no possible injustice will be done.

ROMER, J.—I am sorry that I feel myself obliged to hold that the testator died intestate as to these four houses. The law which is applicable is, I think, clear. A testator who has several properties, all having the same description, may, by his will, give one of them to a legatee, and leave the choice of that one to the legatee, and such a gift is clearly valid. And the fact that the legatee is to be able to select may appear either by express words contained in the will, or by reasonable inference from it, and, *primâ facie*, if the testator gives one of such properties to the legatee without saying more, then the reasonable inference is that the testator intended the legatee to select; and this, whether the fact that the testator had some such property appears on the face of the will, as in the case of *Duckmanton* v. *Duckmanton* (5 H. & N. 219), or whether the fact otherwise appears, as in *Tapley* v. *Eagleton* (12 Ch. Div. 683). And I myself should be prepared to hold that, where a testator gives one of such properties to each of several legatees, then he intends, *primâ facie*, to give the right of selection to the legatees according to the priority of the bequests. And this appears to have been the view of Martin B. and Watson, B. in *Duckmanton* v. *Duckmanton* (p. 222 of 5 H. & N. 219). But, in all these cases, it is of course essential that the will should not show that the testator was bequeathing any particular one of the properties to the legatee who desires to select, for the selection by the testator is incompatible with the view that he intended the legatee to select. If a will shows

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lished, each part that is separate and clearly distinguished in the volume itself is separately published within the meaning of sect. 2. To hold the contrary would lead to absurdities, and obviously to great injustice being done. That has been pointed out in the course of the argument before me, and I need not go into it in more detail in this judgment. If that were not the correct view, amongst other results this would flow, that if the author of one story joined with the author of another story and published them in one volume, neither author could sue for an infringement of his story so published unless he took pains first to take his own story from the book in which the two stories had been published, and publish it separately and by itself. In my opinion, such an absurd result is not caused by the Copyright Act. As I have said, I think the true construction of the words "separately published," in sect. 2, is that which I have indicated. It follows that, in my opinion, in this case there was a separate publication of these stories in the *Weekly Dispatch*, and that the plaintiff accordingly acquired the copyright under sect. 3 of the Act. The plaintiff, therefore, had the copyright. He had one more thing to do to enable him to sue. He was bound to register before he could sue. He has registered. The question is whether that registration is a proper one. It is said that it is not, and for this reason: It is said that with regard to this portion of the author's general work, "Birds of the Night," this portion of it which was called "The Cabman's Story," that it was a separate work in itself, and that it was published on the 19th Nov. 1893, whereas the registration by the plaintiff states the date of the first publication of his work to be the 8th Sept. 1893. But this objection fails when the facts are really looked at. "The Cabman's Story," as I have pointed out, was only part of a series of stories constituting one work. I think that the plaintiff is right in saying that he comes within the provisions of sect. 19 of the Act. I think he was the proprietor of the copyright in the work, which had been published in a series of books or parts, the series, I need scarcely say, being these stories, the first of which was published on the 8th Sept. 1893. And the first part of this work of the plaintiff's was in fact published in the *Weekly Dispatch* of the 8th Sept. 1893. That being so, sect. 19 applies. It is clear that his registration is accurate, and that he is able to sue by reason of that registration, or rather he is not prevented from suing from not having complied with the provision as to registration. That point, taken by the defendants, also failing, it follows that the plaintiff is clearly entitled to the relief which he asks in respect of the production of this story by the defendants. He is entitled clearly to an injunction, and that injunction will go in the usual form. And then damages are asked for. On the question of damages it has been agreed that I, doing the best I can, am to assess the amount of damage which the plaintiff has sustained by reason of this infringement of his copyright. Doing, therefore, the best I can, and bearing in mind what can be said, *pro* and *con*, I assess the amount at 25*l.*, and I order the defendants to pay the costs of the action.

Solicitor for the plaintiff, *F. Tatton.*

Solicitor for the defendants, *G. H. Hoyle.*

QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

Thursday, May 24.

(Before WILLIAMS, J.)

FIGG *v.* MOORE BROTHERS. (*a*)

Bankruptcy—Execution—Goods held by sheriff for twenty-one days—Act of bankruptcy—Payment out after twenty-one days—Rights of execution creditor—Bankruptcy Act 1883 (46 & 47 *Vict. c.* 52), *ss.* 45, 46—*Bankruptcy Act* 1890 (53 & 54 *Vict. c.* 71), *ss.* 1, 11.

By the Bankruptcy Act 1890, *s.* 1, "*a debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any court, or in any civil proceedings in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days.*"

A creditor who has issued execution against the goods of a debtor must, in order "to be entitled to retain the benefit of the execution against the trustee in bankruptcy of the debtor." have completed the execution by seizure and sale, or' 'by the receipt or recovery of the full amount of the levy," before the goods have been held by the sheriff for twenty-one days. For by the above section such possession by the sheriff for twenty-one days is an act of bankruptcy, of which the execution creditor will be taken to have notice. and will defeat the rights of the execution creditor under an execution not completed until after the date of such act of bankruptcy.

Ex parte Villars; Re Rogers (30 *L. T. Rep.* 104; *L. Rep.* 9 *Ch.* 432) *distinguished.*

THIS was an action by Figg, who was trustee in the bankruptcy of Messrs. Leichtenstein and Breeze, who formerly traded as the Alliance Iron Company against the defendants, claiming 41*l.* 0*s.* 11*d.* from them for the bankrupt's estate.

On the 23rd Sept. 1892 the defendants obtained judgment against Leichtenstein and Breeze for 41*l.* 0*s.* 11*d.*, including costs.

On the 26th Sept. the sheriff seized certain of the judgment debtors' goods.

On the 11th Oct. the judgment debtors met their creditors at a meeting called together by circular and offered them terms which were declined. The debtors intimated to the meeting that they had suspended or were about to suspend payment of their debts; the defendants did not attend the meeting, and had no notice of what took place there, though they received a circular.

On the 17th Oct. the sheriff had been in possession for twenty-one days. On the 19th Oct. he was paid out, and on the 21st Oct he wrote to the defendants and informed them of the fact.

The sheriff thereupon retained the balance of 41*l.* 0*s.* 11*d.*, after deducting the costs of the execution from the moneys paid to him for fourteen days pursuant to sect. 46 of the Bankruptcy Act 1883, and on the 2nd Nov., having received no notice of any bankruptcy petition presented against the debtors, paid the money over to the defendants.

A receiving order was made on the 30th Nov. against the debtors on a creditor's petition, on which they were adjudicated bankrupt.

(*a*) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

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By the Bankruptcy Act 1890, s. 1:

A debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days.

Sinclair Cox (*Lawson Walton*, Q.C. with him) for the plaintiff.—The plaintiff relies on the acts of bankruptcy committed on Oct. 11 and 17. [WILLIAMS, J.—The onus is on the defendants to make out a title.]

H. Wace for the defendants.—The defendants were not present, and were not aware of what took place on the 11th Oct. By execution they obtained a good security for their debt, having no notice of an available act of bankruptcy, and this is not affected by the act of bankruptcy of Oct. 17:

Edwards v. *Scarsbrook*, 3 B. & S. 280;
Slater v. *Pinder*, 24 L. T. Rep. 631; L. Rep. 6 Ex. 228.

The defendants' rights have not been taken away by sect. 45 of the Bankruptcy Act 1883. That section provides, sub-sect. 1: "Where a creditor has issued execution against the goods of a debtor . . . he shall not be entitled to retain the benefit of the execution . . . against the trustee in bankruptcy of the debtor, unless he has completed the execution . . . before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. (2) For the purpose of this act an execution against goods is completed by seizure and sale":

Re Pearson, 3 Mor. 187;
Ex parte Brooke; *Re Hassall*, 30 L. T. Rep. 103; L. Rep. 9 Ch. 301.

The execution creditors ought not to lose the benefit of their security because of sect. 1 of the Bankruptcy Act 1890, which makes it an act of bankruptcy if the sheriff remain in possession for twenty-one days. The principle of *Ex parte Villars* (30 L. T. Rep. 104; L. Rep. 9 Ch. 432) applies here, and the execution creditor's title is not avoided by his own act. Lastly, the defendants can retain this money, as there is nothing to show it was the debtors' money.

Sinclair Cox in reply.—Sect. 11 of the Bankruptcy Act 1890 enacts that, "Where any goods of a debtor are taken in execution and before the sale thereof, or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, but the costs of the execution shall be a first charge on the goods or money so delivered, and the official receiver or trustee may sell the goods, or an adequate part thereof, for the purpose of satisfying the charge." This section must be read with sect. 45 of the Act of 1883, and they show that the execution was in no sense completed until the 19th Oct., two days previous to which, *i.e.*, the 17th Oct., an act of bankruptcy had by reason of sect. 1 been committed, of which the defendants knew. As to the money, the presumption is that it was the debtors'.

WILLIAMS, J.—This is a new point, but, as I have had the benefit of the arguments on both sides, I need not consider the matter further, but will decide it now. [His Lordship stated the facts.] It seems to me that, as regards the act of bankruptcy committed on the 11th Oct., the defendants are not affected by that, as they had no knowledge of it. Now, apart from any express statutory enactment, a judgment creditor who levies execution gets by the common law a good title by the seizure of the sheriff, if he has no notice of any available act of bankruptcy committed by the debtor. It follows, then, that, as the sheriff had seized prior to any act of bankruptcy of which the defendants had knowledge, by the common law the defendants are entitled to the benefit of the execution unless their right is taken away by any statutory enactment. The first question is, then, has sect. 45 of the Bankruptcy Act 1883 taken away that right? It provides, sub-sect. 1, that, "Where a creditor has issued execution against the goods of a debtor . . . he shall not be entitled to retain the benefit of the execution . . . against the trustee in bankruptcy of the debtor, unless he has completed the execution . . . before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor," and then sub-sect. 2 says: "For the purpose of this Act an execution against goods is completed by seizure and sale," or, reading in sect. 11 of the Bankruptcy Act 1890, "receipt or recovery of the full amount of the levy." The execution here was clearly not completed until the 19th Oct., when the sheriff was paid out. That being so, had the defendants "completed the execution . . . before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtors, or of the commission of any available act of bankruptcy by the debtors?" It seems to me they had not done so before the "notice of the commission of any available act of bankruptcy by the debtors," because on the 17th Oct., two days before the 19th Oct., an act of bankruptcy had been committed under sect. 1 of the Bankruptcy Act 1890, and of that act the defendants must be taken to have had notice. Under these circumstances it seems to me that the defendants' common law rights are lost. It was said that *Ex parte Villars* applied here, but that case is clearly distinguishable. It was there held that an act of bankruptcy brought about by seizure and sale of a trader's goods did not render inoperative the seizure and sale itself so as to deprive the creditor of the fruits of his diligence. In such a case it is obvious that the act of bankruptcy is not committed until immediately after the completion of the transaction on which it is founded; here, however, at the time the transaction was completed by the money being paid over to the sheriff, the execution creditors had notice that two days previously this act of bankruptcy had been committed, because they cannot be heard to say that they did not know that the sheriff had been holding the goods for twenty-one days. It was then said that there was no evidence that the money was part of the debtors' property. I agree; but *primâ facie* it must be taken to be the money of the debtors, and that presumption is not displaced by the defen-

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dants' evidence. There must therefore be judgment for the plaintiff.

Judgment for the plaintiff.

Solicitors for the plaintiff, *Rodgers* and *Co.*
Solicitors for the defendants, *Dale* and *Co.*

Tuesday, May 8.

(Before WILLIAMS, J.)

DIBB *v.* BROOK. (*a*)

Bankruptcy—Partnership—Execution against firm—Subsequent bankruptcy of one partner—Claim by his trustee to proceeds of execution—Bankruptcy Act 1890 (53 & 54 *Vict. c.* 71), *s.* 11, *sub-sect.* 2.

The trustee in bankruptcy of one partner is not entitled to the proceeds of an execution completed against the partnership assets prior to the bankruptcy in which he is trustee.

THIS was an appeal from the decision of the judge of the Manchester County Court.

On the 11th Oct. 1892 Messrs. Brook and Son recovered judgment against Messrs. Cockshott and Kelvey for 47*l.* 5*s.* 9*d.* On the 13th Oct. execution was levied on the partnership property of the debtors, and on the 21st Oct. the property was sold to satisfy the judgment.

On the 3rd Nov. a petition was presented by Cockshott, on which adjudication followed, the respondent Dibb being appointed trustee in the bankruptcy. The trustee claimed the proceeds of the sale in the hands of the sheriff as against the execution creditors, and in July 1893 the trustee obtained an order dissolving the partnership of Cockshott and Kelvey, and appointing himself receiver of the partnership property. An interpleader issue was accordingly stated to try the question as to whom the 44*l.* 5*s.* 9*d.*, the net proceeds of the sale of the goods of the partnership of Cockshott and Kelvey, and seized by the sheriff of Cheshire under the *fi. fa.* belonged.

The County Court judge decided that the 44*l.* 5*s.* 9*d.* belonged to Dibb the trustee upon the authority of a passage in Lindley on Partnership, 6th edit., p. 692, where the author, in commenting on sects. 45, 46 (3) of the Bankruptcy Act 1883, and sect. 11 of the Bankruptcy Act 1890, says: "The above clauses apply as well to cases where one partner is bankrupt, and the same partner is the execution debtor, as to those where all the partners are bankrupt, and all are execution debtors; it will also be probably held to apply where one partner only is bankrupt, and the execution is against the firm for a partnership debt; provided the court is in a position to ensure a proper distribution of the assets of the firm amongst the creditors thereof."

The execution creditors appealed.

By sect. 45 of the Bankruptcy Act 1883:

(1.) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor, unless he has completed the execution or attachment before the date of the receiving order, and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor.

(2.) For the purposes of this Act, an execution against goods is completed by seizure and sale, an attachment of a debt is completed by receipt of the debt; and an execution against land is completed by seizure, or in the case of an equitable interest by the appointment of a receiver.

By sect. 11 of the Bankruptcy Act 1890:

(1.) When any goods of a debtor are taken in execution, and before the sale thereof or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the sheriff that a receiving order has been made against the debtor, the sheriff shall, on request, deliver the goods and any money seized or received in part satisfaction of the execution to the official receiver, but the costs of the execution shall be the first charge on the goods or money so delivered, and the official receiver or trustee may sell the goods, or an adequate part thereof, for the purpose of satisfying the charge.

(2.) Where under an execution in respect of a judgment for a sum exceeding twenty pounds, the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or money paid, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made against the debtor thereon, or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver, or, as the case may be, to the trustee, who shall be entitled to retain the same as against the execution creditor.

Herbert Reed, Q.C. and *Clarke Williams* for the appellants.—The learned judge was wrong. He felt himself bound by a passage in Lindley on Partnership, but that passage is controlled by the cases cited in the notes, and all they decide is, that, if before the execution is executed the property ceased to be the property of all the partners as execution debtors, and vested in a trustee in bankruptcy of one of the partners, the court will restrain the execution and order an account and distribute the estate amongst the joint creditors and hand over the surplus to the solvent partner; this interference of the court being justified by the fact that the solvent partner had allowed the execution to be put in, and so had abdicated his right to administer the joint estate:

Barker v. *Goodair*, 11 Ves. 78:
Dutton v. *Morrison*, 17 Ves. 193.

For, as a rule, the solvent partner has the right to administer the estate:

Ex parte Owen; Re Owen, 50 L. T. Rep. 514 13 Q. B. Div. 113;
Woodbridge v. *Swan*, 4 B. & Ad. 633;
Harvey v. *Crickett*, 5 M. & S. 336.

The trustee then has no claim to these joint assets, nor can he claim them under sect. 11 (2) of the Bankruptcy Act 1890, for that sub-section can only be applied when the debtor whose goods are seized and the debtor under the bankruptcy petition are the same person.

Muir Mackenzie for the respondent.—The learned judge was quite right, and the trustee is entitled to the proceeds of this execution. The passage cited from Lindley on Partnership governs this case, and if the Act of Parliament be construed by analogy to those decisions the result is the same. The effect of the execution against the firm was to make each partner commit an act of bankruptcy; the trustee's title then

(*a*) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

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relates back, and so the proceeds of the execution belong to the trustee and the solvent partner to be administered by them. During the fourteen days mentioned in sect. 11 (2) the money was not the property of the execution creditor at all, for it is in the course of transit, and therefore the case of *Dutton* v. *Morrison* (*ubi sup.*) applies, and as the section prevents the execution creditor from getting a title during the fourteen days the trustee therefore gets a right to the proceeds of the execution. The sheriff wishes to know to whom he ought to hand over the money, and we say it belongs to the trustse.

Reed, Q.C. in reply.

Williams, J.—I am of opinion that the judgment of the learned County Court judge on this interpleader issue is wrong. I think he ought to have given judgment for the defendant, and I gather from the judgment that he thought so too, but he said that he considered that he was bound by a passage in Lindley, L.J.'s book upon the Law of Partnership. To my mind that is altogether wrong in principle. The County Court judge was bound to exercise his own judgment, and the only thing that could control that judgment was decided cases. If there were decided cases, and especially those of a superior court, he was bound to follow the principles laid down in those decisions, but he could not, in any proper sense of the word, be said to be bound by a statement which was merely a dictum, and not a judicial decision. With regard to the statement itself, it is this: "The above clauses apply as well to cases where one partner is a bankrupt, and the same partner is the execution debtor, as to those where all the partners are bankrupt and all are execution debtors." So far one cannot quarrel with that. "It will also be probably held to apply where one partner is bankrupt and the execution is against the firm for a partnership debt." It seems to me, with great deference to Lindley, L.J.'s authority, if he put that passage in his book, that the last proposition is inaccurate. I see that the reader is referred in the note to the cases of *Barker* v. *Goodair* (1 Ves. 78); *Dutton* v. *Morrison* (17 Ves. 193); and also *Re Wait*. I do not suppose the passage in the text means to go beyond what is decided by those cases. All those cases really decide is this, that if before the execution is executed something happens which makes the property cease to be the property of all the partners as execution debtors, and vests an interest in somebody else, that somebody else being the trustee in the bankruptcy of one of those partners, that then the Court of Bankruptcy, exercising in this respect the jurisdiction of a court of equity, will, in the interest of the joint creditors, restrain the execution creditor from going on with his execution, and will take upon itself to order an account to be taken, and then will distribute the proceeds of the joint estate, that is, an account to be taken of the joint estate, and then will distribute the proceeds among the joint creditors rateably, and hand over the surplus, if any, to the solvent partner. The decision in those cases, and the principle acted on in those cases, was undoubtedly an interference with the right of a solvent partner, but, as I understand, is an interference which is justified by the fact that the execution had been put in, and that the solvent partner, allowing that to be done, has abdicated his right of administering the joint estate. That is the way I understand those cases, but there is nothing in those cases in the slightest degree to suggest that the judges who acted upon them thought that the joint assets vested in the assignee in bankruptcy. Under those circumstances I think there is nothing in those cases at all either to show that the trustee in bankruptcy gets a title to these joint assets in the present case, and still less to show that the Act of Parliament and this 11th section of the Act of Parliament is by some analogy to those decisions to be construed as applying in a case like the present. The real fact of the matter is, first, that you are not entitled to construe an Act of Parliament by any analogy of the sort; and secondly, that if you were entitled to construe the Act of Parliament by any such analogy, the analogy would not help you here. Under those circumstances I prefer to construe the Act irrespective of this passage, and doing so I have only to say again, as I said in the course of the argument, that I fully assent to the proposition that the words of the Act of Parliament only entitle you to apply this 2nd sub-section of the 11th section in cases where the debtor whose goods are seized and the debtor of a bankruptcy petition of which the sheriff receives notice in the fourteen days are the same person. There is nothing in this section which divests the title in these goods themselves out of the solvent partner, or which vests the title in the proceeds in the trustee in this bankruptcy; and even if the words were different from what they are, it would not be convenient to strain the law in that direction, because it would not be at all convenient that, upon the bankruptcy of one partner, merely because an execution was put in upon the partnership goods and carried on to the point of sale, that the proceeds of the goods should become vested in the trustee in the bankruptcy of the individual partner. Under those circumstances, thinking as I do that there was no title whatever in this trustee, I think that the judgment of the learned County Court judge was wrong. With regard to the point that was made, that possibly Mr. Dibb had a title as receiver in this action for dissolution of this partnership, I do not think that that is a matter that we can take into consideration here at all, and I rather think that the learned County Court judge was of that opinion. He decided the case simply upon the ground that he was bound to decide that sect. 11 (2) gave a title to the trustee in the bankruptcy of the one partner to the proceeds of this execution levied upon the partnership goods. I do not think he could have found otherwise.

Kennedy, J.—I am of the same opinion. This was the trial of an interpleader in which the plaintiff had to make out against the defendants in the issue that he was entitled to the property. Did he make out his title? In my opinion he did not. He seeks to make it out under sect. 11, and it was under that section that I understand the learned County Court judge held that he was entitled to these proceeds. I think that the words of the section do not cover a case of this kind. At any rate, they do not cover it, in my opinion, in such a way as to give this trustee of one of the two joint debtors the right to say "I have a title to the proceeds of the execution levied upon the joint estate." In truth, the learned County Court judge appears to have been guided by the expression of

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opinion, as he considered it, in a book of very high authority; but whether the construction placed upon that passage be right or not, looking at the authorities which are cited in reference to that passage by the author, it appears to me that the sheriff has failed to bring this case within any principle decided in the cases referred to in the note which my brother Williams has already called attention to. It is quite clear to me, so far as one can express a positive opinion about anything, that the subsequent proceedings in 1893 under which Mr. Dibb became receiver under an order of the court in winding-up the partnership cannot affect his title in this issue. He cannot better it in any way, and under those circumstances I am of opinion that this appeal must be allowed.

Appeal allowed.

Solicitors for the appellants, *May, Sykes,* and *Batten,* for *J. Cooke,* Hyde.

Solicitor for the respondent, *The Solicitor to the Board of Trade.*

Tuesday, July 17.

(Before WILLIAMS and KENNEDY, JJ..)

Re CROOK; *Ex parte* THE SHERIFF of SOUTHAMPTON. (*a*)

Bankruptcy—Execution—Duty of sheriff—Advertising sale.

A sheriff, in executing a writ of fi. fa., *should have regard to the interests and instructions of the execution creditor so far as reasonable.*

There is no duty imposed upon a sheriff to hold the goods seized under a fi. fa. *for a period of five days before sale, as is the case with a County Court bailiff.*

THIS was an appeal from the Southampton County Court.

A judgment had been obtained against the debtor, and a writ of *fi. fa.* was handed to the sheriff to be executed by him. Prior to the sending of the writ the judgment creditor wrote to the sheriff as follows: "You will be receiving a *fi. fa.,* which we desire pressed without delay." The sheriff, on receipt of the writ on the 11th Jan., at once levied, and on the 12th, 13th, and 14th Jan. advertised the goods as for sale on the 15th Jan., and had an inventory of them made. On the 12th Jan. a receiving order was made against the debtor. The sheriff sent in to the official receiver an account of his costs. The registrar on taxation disallowed all the costs incurred in advertising the sale and making out an inventory of the goods, upon the ground that the sheriff did not allow a reasonable time to elapse after he had seized, and before he gave notice of sale, and computed such reasonable time as five days, by analogy, as he said, to the case of a County Court bailiff, who is bound to hold the goods for five days before selling them.

The sheriff appealed.

J. F. P. Rawlinson for the appellant.—The registrar was wrong. He said the sheriff ought to hold the goods for five days like a County Court bailiff; there is no such duty imposed upon a sheriff. His duty is to obey the orders of the execution creditor, and he is told here to act with expedition, which he does. He is therefore entitled to his costs, unless he has been guilty of any misconduct, and of that no suggestion can be made. Sect. 11 of the Bankruptcy Act 1890 defines a sheriff's duties.

Whinney for the respondent.—The registrar has exercised his discretion, and the court will uphold it. He deals with the dates, and then gives his decision. [WILLIAMS, J.—Yes; he says that to sell within these dates is unreasonable.] The law requires of the sheriff that the goods shall be "publicly advertised by the sheriff on and during three days next preceding the day of sale:" (sect. 145 of the Bankruptcy Act 1883.) He acted unreasonably here in advertising at once the sale of the goods, and not holding them for five days at least, as is the case with a County Court bailiff.

WILLIAMS, J.—I am of opinion that the decision was wrong, and that these costs ought not to have been taxed off. If I thought that the registrar had exercised his discretion and arrived at the conclusion that these expenses had been unreasonably incurred, I should not have reviewed his taxation; but, though he began his report as if he had exercised his discretion, the remainder of it shows that he only disallowed these costs on the general principle that it was not reasonable for the sheriff to act so hastily, but that he ought to wait five days in analogy to the rule in the County Court. I do not agree. A sheriff in executing a writ of *fi. fa.* should have regard to the interests and instructions of the execution creditor so far as reasonable. Here the execution creditor tells him to hurry on, and on that the advertisements are inserted and the inventory made. This is not the case of a sheriff incurring expenses after he knew that it was impossible a sale could be held by him. The registrar has laid down a general rule in analogy to the County Court practice. This appeal must therefore be allowed.

KENNEDY, J.—I agree.

Appeal allowed.

Solicitors for the appellant, *Lovells* and *Pitfield.*

Solicitors for the respondent, *Morgan, Price,* and *Mewburn.*

Tuesday, July 17.

(Before WILLIAMS and KENNEDY, JJ.)

Re SANDERS; *Ex parte* SANDERS. (*a*)

Bankruptcy—Petition—Proof necessary at hearing—Bankruptcy Act 1883 (46 & 47 *Vict. c.* 52). *s.* 7 *Bankruptcy Rules* 1886, *rr.* 160, 162.

The affidavit of verification which is required by sect. 7 *of the Bankruptcy Act* 1883 *as a condition precedent to the right to file a petition, cannot be relied upon at the hearing of the petition, if contested, as proof of any of the matters which are required to be proved at such hearing.*

A petitioning creditor must be prepared to prove at the hearing of a contested petition all matters in dispute, whether the same are included or not in the debtor's notice to dispute.

THIS was an appeal by a debtor from a receiving order made against him in the Dudley County Court.

The petition was as follows:

Lancaster, Speir, and Co. by Charles Rolfe, its secretary . . . duly authorised under the seal of the

(*a*) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

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company to present this petition, hereby petitions the court that a receiving order be made in respect of the estate of W. H. Sanders. . . .—(Signed) Lancaster, Speir, and Co. Limited, by Henry Charles Rolfe, Secretary.

It was objected by the debtor at the hearing in the County Court that there was no proof that the secretary was authorised under the company's seal to sign the petition, and to make the affidavit in support of the petition.

The registrar decided that such proof was unnecessary, and made a receiving order against the debtor. The debtor appealed.

By sect. 7 of the Bankruptcy Act 1883:

(1.) A creditor's petition shall be verified by affidavit of the creditor, or of some person on his behalf, having knowledge of the facts, and served in the prescribed manner. (2.) At the hearing the court shall require proof of the debt of the petitioning creditor, of the service of the petition, and of the act of bankruptcy, or, if more than one act of bankruptcy is alleged in the petition, of some one of the alleged acts of bankruptcy, and, if satisfied with the proof, may make a receiving order in pursuance of the petition.

Muir Mackenzie for the appellant.—The registrar was wrong. A receiving order could not be made without proof that the formalities required by sect. 148 of the Bankruptcy Act 1883 had been complied with. That section enacts: "For all or any of the purposes of this Act a corporation may act by any of its officers authorised in that behalf under the seal of the corporation." Here there was no proof that the secretary had been authorised under the corporation seal. The ordinary affidavit verifying the petition is no proof at all. It is required by sect. 7 (1), which says: "A creditor's petition shall be verified by affidavit of the creditor, or of some person on his behalf having knowledge of the facts and served in the prescribed manner." Then sub-sect. 2 goes on: "At the hearing the court shall require proof of the debt of the petitioning creditor, of the service of the petition, and of the act of bankruptcy:" The proof required here is quite different from the affidavit of verification. It is on rule 258 of the Bankruptcy Rules 1886 that the right to hear this petition is based. That rule says: "A bankruptcy petition against, or a bankruptcy notice to any debtor to any company or copartnership duly authorised to sue and be sued in the name of a public officer or agent of such company or copartnership, may be presented by or sued out by such public officer or agent as the nominal petitioner for and on behalf of such company or copartnership on such public officer or agent filing an affidavit stating that he is such public officer or agent, and that he is authorised to present or sue out such petition or bankruptcy notice." This rule was considered in *Re Collins; Ex parte Dan Rylands* (64 L. T. Rep. 742), and the case of *Re Calthrop* (L. Rep. 3 Ch. 252; 18 L. T. Rep. 166) deals with the question of the signature to the petition. The affidavit of verification is no evidence of authority, which is essential, as otherwise the court does not know if the officer is authorised to sign.

Reed, Q.C. and *Hansell* for the respondent.—The registrar was right. Hundreds of petitions are presented by companies, and the invariable practice is for a secretary to make an affidavit, and the affidavit here says: "I am the secretary, and duly authorised under seal of the company to present such petition." The petition was served, and notice is given disputing the debt, and the secretary attended at Dudley. If Mr. Mackenzie is correct, then the minute-book showing the secretary's appointment must always be in court. Here there was no application to adjourn at all, which probably would have been granted. In *Re Takington; Ex parte Takington* (9 Ch. 298) it was held that a debtor might sustain an application to have a debtor's summons dismissed for irregularity, although he had not distinctly denied the debt in his affidavit.

Mackenzie in reply.

WILLIAMS, J.—In my judgment this appeal must be dismissed, and on the facts before us it is clear that the debtor's solicitor waived the objection. It is, however, desirable that it should be understood how this matter now lies. At present it is a condition precedent to the right to file a petition that there should be an affidavit of verification; and, according to my view of the matter, when that affidavit or such witnesses as the registrar thinks it necessary to call before he allows copies of the petition to be sealed, have satisfied the registrar of the performance of the conditions precedent, then the affidavit of verification has served its purpose, and is, so to speak, dead, and I do not think that any reliance ought to be placed on it at the hearing. Now, at that hearing, the debtor may appear or not as he chooses; if he does not appear the court may require proof of such statements in the petition as it thinks right, and no doubt if it chooses to look at the affidavit of verification when it is making up its mind as to the statements in the petition it can do so, but this has no application to the case of a contested hearing. When there is a contested hearing the debtor appears, and if he opposes the petition he ought, under rule 160, to give a notice. That rule is as follows: "Where a debtor intends to show cause against a petition he shall file a notice with the registrar specifying the statements in the petition which he intends to deny or dispute, and transmit by post to the petitioning creditor and his solicitor, if known, a copy of the notice three days before the day on which the petition is to be heard." Then rule 162 says: "On the appearance of the debtor to show cause against the petition, the petitioning creditor's debt, and the act of bankruptcy, or such of those matters as the debtor shall have given notice that he intends to dispute, shall be proved, and if any new evidence of those matters, or any of them, shall be given, or any witness or witnesses to such matter shall not then be present for cross-examination, and further time shall be desired to show cause, the court shall, if the application appears to the court to be reasonable, grant such further time as the court may think fit." Now there are three matters mentioned in that rule which are identical with the three mentioned in sect. 7, sub-sect. 2, and with regard to these three the affidavit of verification cannot be used as part of the proof. There is no express provision as to matters which are not in the debtor's notice, nor where the debtor raises at the hearing a point not included in the matters of dispute in that notice. In practice, however, if a debtor requires proof of any material matter, and that proof is not forthcoming, the court

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generally will not dispense with such proof simply because it is not a matter of dispute mentioned in the notice, but will grant an adjournment to have the matter proved; I entirely agree that the debtor is in mercy, and if the registrar or County Court judge says he does not wish proof of matters outside the notice, he is then acting within his discretion. I should not like it to be supposed that persons who are petitioning may rely upon being called on to prove anything except what is in the debtor's notice, for of course bankruptcy proceedings are quasi criminal matters, and every petitioner when he goes into court to support an opposed petition ought to go provided with proof of all things, and it seems to me that a prudent petitioner would be armed with that proof. If raised before me I should require proof of any matters, whether in the notice or not, yet, if the court is satisfied that an objection is merely dilatory, then it need not require proof of matters outside the notice of objection, as it would assist, by so doing, the object desired. If a requisition had been made here by the debtor, the court ought to have asked the petitioner if he was prepared to meet the objection, and if not I should have granted an adjournment, unless I was satisfied that the objection was merely a dilatory objection. Here the registrar called on the solicitor, who explained that there had been an express resolution appointing the secretary, and the secretary was in court. Under these circumstances, there is no substance in the objection, and this appeal must be dismissed; whatever may be the debtor's objections, the petitioning creditor ought to be ready to prove everything.

Kennedy, J.—I concur, and agree on the grounds given by Williams, J.

Appeal dismissed.

Solicitors for the appellant, *Green* and *Underhill*, for *Foster*, of Wolverhampton.

Solicitors for the respondent, *Heath*, *Parker*, and *Brett*.

Supreme Court of Judicature.

COURT OF APPEAL.

June 29 and July 2.

(Before Lindley, Lopes, and Davey, L.JJ.)

Reischer v. Borwick. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Marine insurance—Proximate cause of loss—"Damage received in collision"—Loss of vessel while being towed to place of repair after collision.

A tug was insured against "the risk of collision and damage received in collision with any object." The policy did not include the perils of the sea. The tug ran against a floating snag which did it considerable injury, including damage to the engine-room machinery, and amongst other things broke the cover of the condenser, leaving an opening about twenty square inches in area. The tug commenced leaking, and there being danger that the water would come into the ship through the ejection pipes and the hole in the condenser cover, the pipes were plugged from the outside.

While she was being towed to a place of repair, a plug came out and the water rushed into the engine-room through the ejection pipes and the hole in the condenser cover, and she began to fill rapidly. An attempt to again plug the ejection pipes failed, and the vessel sank.

Held, that the collision, and not the towing, was the proximate cause of the loss, and that the insurers were liable under the policy for a total loss.

Decision of Kennedy, J. affirmed.

The action was brought upon a marine policy, by which the steam-tug *Rosa* was insured against "the risk of collision and damage received in collision with any object, including ice," whilst in the Danube or its tributaries. The policy did not include perils of the sea. During the currency of the policy, whilst the *Rosa* was engaged upon a trip in the Danube, she ran against a floating snag, which first struck the bottom of the ship and then fouled the port paddle-wheel and damaged the vessel. That damage included serious injury to the engine-room machinery, and among other things the breaking of the cover of the condenser, which left an opening some twenty square inches in area. In consequence of the damage received the vessel commenced leaking, and there was imminent danger of the entrance of water through the ejection pipes and the connection therefrom into the ship through the broken condenser cover. As speedily as possible those pipes were plugged from the outside. The collision occurred on the night of the 4th March 1892. The captain immediately sent for assistance to the owner, and assistance came in the shape of a tug called the *Olga*, which arrived on the 6th March, and on the night of the 6th commenced to tow the vessel to a place where she could be repaired and the damage made good. On the morning of the 7th, while she was being towed by the *Olga*, a large quantity of water poured into the engine-room through the hole in the condenser cover which had been made by the collision with the snag, and caused the vessel to fill rapidly. This inrush of water was caused by the plug which had been placed in the ejection pipe on the port side of the *Rosa* having suddenly fallen out. The towing was then stopped, and an attempt was made to stop up the aperture in the ejection pipe, through which the vessel was filling, but without success; and in order to prevent the *Rosa* from sinking in deep water, as otherwise she would have done, the *Olga* towed her towards the southern bank of the river, but whilst this was being done the *Olga* suddenly took the ground, and then the *Rosa* became stranded and partly submerged, and was abandoned.

The plaintiff claimed damages for the total loss of the vessel. The defendants paid into court a sum sufficient to satisfy their liability, if any, for the damage sustained by the collision with the snag up to the time when the vessel was taken in tow by the *Olga*, but with a denial of liability. With respect to the subsequent damage they contended that they were under no liability, on the ground that the proximate cause of that damage was not the collision, but the towing to a port of repair. Kennedy, J. overruled this conten-

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

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tion, and gave judgment for the plaintiff for the full amount claimed.

Pickford, Q.C. and *J. A. Hamilton* for the appellants.—The collision was not the proximate cause of the loss of the ship. The actual cause was the towing of the ship through the water, and the defendants are not liable:

Pink v. *Fleming*, 63 L. T. Rep. 413; 25 Q. B. Div. 396;

The ship was lost by perils of the sea:

Dudgeon v. *Pembroke*, 36 L. T. Rep. 382; 2 App. Cas. 284, 295;

Davidson v. *Burnand*, 19 L. T. Rep. 782; L. Rep. 4 C. P. 117.

The coming out of the plug was not a necessary consequence of the collision. The defendants are only liable for damage received in the collision, not for a loss which can be traced to the collision.

Cohen, Q.C. and *C. C. Scott* for the respondent.—This is an insurance against loss by collision and damage received in collision. If the water had immediately come in through the hole in the condenser cover and caused the ship to sink, the defendants would without doubt have been liable under the policy to pay the sum insured in case of such loss. The collision caused the hole, and before that hole could be repaired the ship was lost through the water coming in through it. Therefore the defendants are equally liable. The loss can be traced to the damage received in the collision. The last cause was the hole in the condenser cover caused by the collision.

Pickford in reply.

Cur. adv. vult.

July 2.—Lindley, L.J.—There is no doubt that, in considering the liabilities of underwriters of marine insurance policies, it is a cardinal rule to regard "proximate" and not "remote" causes of loss. This rule is based on the intention of the parties as expressed in the contract into which they have entered; but the rule must be applied with good sense, so as to give effect to, and not to defeat, those intentions. The risks insured against in this policy are: "the risk of collision (as per clause attached), and damage received in collision with any object, including ice." The "risk of collision as per clause attached" refers to collisions with other ships, and may be disregarded. The other risk refers to and includes such a collision as took place in the present case, viz., a collision between the ship insured and a snag in the river which she was navigating. She was injured by a peril insured against, and liability to make good that injury has arisen, and is not denied. The extent of that liability is the matter in dispute. Is the liability confined to repairing the injured parts? If not, does the liability extend to making good all loss or damage which is, in fact, attributable to the injury occasioned by the collision? The liability of the underwriters cannot, I think, be restricted to repairing the injured parts, and, indeed, counsel for the underwriters did not seriously contend that it could. If the ship had sunk, and been lost under such circumstances as to render the inference unavoidable that the collision caused the loss, it is plain that the cost of repairing the damage would not be the measure of the liability of the underwriters. The moment, however, that this conclusion is arrived at, it is difficult to see on what principle liability for a loss occasioned by that injury can be excluded, except upon the ordinary principles applicable to remoteness of damage. The fact that some fresh cause arises, without which the injury would not have led to further loss, is, I think, in such a case far from conclusive. Assume that this ship would have floated in calm water notwithstanding the injury she had sustained by the collision, and suppose that, before such injury could be made good, the water became so rough as to get into her and sink her, by reason only of her injured condition, such loss would, in my opinion, be proximately, though not exclusively, caused by the collision, and would fall on the underwriters of a policy worded as this policy is. It may be that such a loss would also be covered by a policy against perils of the sea in the ordinary form; but this does not, in my opinion, show that no liability attaches under a policy such as the present. Policies may be so worded as to overlap and cover some risk common to them all. The sinking of this ship was proximately caused by the internal injuries produced by the collision, and by water reaching and getting through the injured parts whilst she was being towed to a place of repair. The sinking was due as much to one of these causes as to the other; each was as much a "proximate" cause of her sinking as the other, and it would, in my opinion, be contrary to good sense to hold that the damage by the sinking was not covered by this policy. Negligence or mismanagement on the part of those on board the ship is not suggested. To stop up the ejection pipes was right and proper, and, although one of them became unstopped, and water reached the injured parts through this unstopped pipe, this was not the result of negligence. All was done that could be done to save the ship and get her out of harm's way, and she sank because, notwithstanding all efforts to keep water out of her, water got into her through the hole in her condenser cover which had been caused by the collision. I feel the difficulty of expressing in precise language the distinction between causes which co-operate in producing a given result. When they succeed each other at intervals which can be observed, it is comparatively easy to distinguish them and to trace their respective effects, but under other circumstances it may be impossible to do so. It appears to me, however, that an injury to a ship may fairly be said to cause its loss if, before that injury is or can be repaired, the ship is lost by reason of the existence of that injury—*i.e.*, under circumstances which, but for the injury, would not have affected her safety. It follows that if, as in this case, a policy is effected covering such an injury, it will in the circumstances supposed extend to the loss of the ship, for in the case supposed the injury will really be the cause of that loss—the *causa causans* and not merely the *causa sine quâ non*. I am not aware of any authority opposed to this view. It is consistent with the judgment in *Pink* v. *Fleming* (*ubi sup.*), which is more favourable to the appellants than any other authority cited or known to me. In my opinion the judgment appealed from is correct, and this appeal must be dismissed, with costs.

Lopes, L.J.—This is a policy indemnifying the insurers against "the risk of collision" (by which I understand collision with other ships) "and

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damage received in collision with any object, including ice." The question is, under the circumstances of this case, was the damage "received in collision" with a snag in the river Danube? It is admitted that damages for the injury sustained by the condenser are recoverable, but it is contended that what subsequently happened was not attributable to the collision as a proximate cause, but to some intervening and independent cause. [His Lordship then stated the facts set out above.] In cases of marine insurance it is well-settled law that it is only the proximate cause that is to be regarded and all others rejected, although the loss would not have happened without them. Damage received in collision must therefore in this case be the proximate cause of the loss to entitle the plaintiff to recover. The damage received in the collision was the breaking of the condenser, and it was the broken condenser which really caused the proximate loss. The tug was continuously in danger from the time the condenser was broken, and the broken condenser never ceased to be an imminent element of danger, though that danger was mitigated for a time by the insertion of the plug in the outside of this vessel. The cause of the damage to the condenser was the collision, and the consequences of the collision (that is, the broken condenser) never ceased to exist, but constantly remained the efficient and predominating peril to which the damage now sought to be recovered was attributable. It was contended that the towing the tug through the water after the collision was the proximate cause of the loss now sought to be recovered. It was, however, admitted that this was a reasonable and proper act in the circumstances. This may have been a concurrent cause, and one without which the loss would not have happened, but in my judgment it is not, but the broken condenser is, the proximate cause. The appeal must therefore be dismissed.

Davey, L.J.—In this case the appellants admit that damage done by water coming through a hole caused by a collision with any object is damage against which the assurers are bound to indemnify the assured. What is the *causa proxima* of the damage caused in this case? The only answer seems to me to be the inroad of the water through the hole in the condenser. What made the hole in the condenser? The collision made the hole in the condenser, and the broken condenser was a continuing source of risk and danger. The failure of the attempt to mitigate or stop the damage arising from the breach in the condenser cannot, in my opinion, be justly described as the cause of the ultimate damage. I therefore agree in the judgments which have been given.

Solicitors for the plaintiffs, *Vanderpump* and *Rye*.

Solicitors for the defendants, *Watkins, Johnson, Rodd*, and *Whatton*.

Thursday, July 5.

(Before Lindley, Lopes, and Davey, L.JJ.)

Grand Junction Waterworks Company v. The Brentford Local Board. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Water company—Fire-plugs—Cost of maintaining—Liability of local authority—Implied request—Waterworks Clauses Act 1847 (10 & 11 *Vict. c.* 17), *ss.* 38-42—*Public Health Act* 1875 (38 & 39 *Vict. c.* 55), *s.* 66.

The defendant board was constituted in 1874, *and as the urban sanitary authority of the district had the control and management of the streets. The plaintiffs under the powers of a special Act of* 1852, *which incorporated the Waterworks Clauses Act* 1847, *had before* 1874 *fixed certain fire-plugs in the district and had since maintained them, and now brought an action to recover the cost of such maintenance for six years prior to the date of the action, alleging that they were fixed at the defendants' request.*

It was admitted that there was no express request, but it was contended that a request ought to be implied amongst other things from the user of the plugs by the defendants, and from their statutory duty to fix and maintain plugs.

Held, that sect. 66 *of the Public Health Act* 1875 *imposed no duty on the defendants which could be enforced by the plaintiffs; that "such fire-plugs" mentioned in sect.* 40 *of the Waterworks Clauses Act* 1847 *referred to fire-plugs fixed under sect.* 38 "*at the request of the town commissioners*"; *and that there was nothing in the evidence upon which the court ought to imply any such request by the defendants, or any agreement between the plaintiffs and defendants under sect.* 66 *of the Public Health Act* 1875, *and therefore the defendants were not liable.*

Decision of Lawrance, J. reversed.

This action was brought to recover the cost of maintaining certain fire-plugs in the streets of the Brentford district for a period of six years prior to the commencement of the action.

The plaintiffs fixed and maintained the fire-plugs in question under the powers of their special Act of 1852, which incorporated the Waterworks Clauses Act 1847.

The defendant board was constituted in 1874, and were the urban sanitary authority of the district, and as such had the control and management of the streets.

The defendant board denied that they requested the plaintiffs to fix any of the fire-plugs. The plaintiffs admitted that most of the plugs had been fixed before the defendant board was constituted, and that there had been no actual request by them that any of the plugs should be fixed; but they contended that a request ought to be implied from the fact that the plugs had been used by the defendants, and from their statutory duty to fix and maintain fire-plugs. It was proved that the defendants had applied to the plaintiffs to keep the plugs flush with the level of the road, and had from time to time requested the plaintiffs to allow a turncock to go round with their officer to point out the position of the fire-plugs, so that the defendants might indicate their position under sect. 66 of the Public Health Act 1875.

(a) Reported by W. C. Ess, Esq., Barrister-at-Law.

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The question depended on the true construction of sects. 38 to 41 of the Waterworks Clauses Act 1847, and sect. 66 of the Public Health Act 1875.

Sect. 38 of the Waterworks Clauses Act 1847 provided that "the undertakers, at the request of the town commissioners" (represented in this case by the defendants), "shall fix proper fire-plugs in the main and other pipes belonging to them" at distances therein mentioned. Sect. 39 provides that "the undertakers shall from time to time renew and keep in effective order every such fire-plug."

Sect. 40 provides that "the cost of such fire-plugs and the expense of fixing, placing, and maintaining the same in repair . . . shall be defrayed by the town commissioners."

Sect. 41 provides for maintenance of a fire-plug at the request of a private owner and at his expense.

Sect. 42 provides that water may be taken from the mains to extinguish fires without charge.

Sect. 66 of the Public Health Act 1875 imposes on the urban authority the duty of providing and maintaining fire-plugs, empowers them to enter into an agreement with any water company for this purpose, and provides that they shall indicate the position of such fire-plugs.

On the 17th April Lawrance, J. held that the defendants, having a statutory duty to maintain the fire-plugs under sect. 66 of the Public Health Act 1875, were liable for the full amount claimed.

From this decision the defendants appealed.

Murphy, Q.C. and *J. Earle* for the appellants. —There was no express or implied request on the part of the defendants. It is admitted there was no express request, and no request can under the circumstances be implied. With reference to the user, the defendants are in the same position as private individuals. They have no duty under sect. 66 of the Public Health Act 1875 towards the plaintiffs. The letters written by the defendants, with reference to the fire-plugs being above or below the level of the roads, were written in their character of surveyors of highways.

Jelf, Q.C. and *Baugh Allen* for the respondents. —There is abundant evidence of an implied request in the correspondence between the plaintiffs and the defendants, and the minutes of the meetings of the board. The defendant board adopted the fire-plugs which were in existence when they were appointed in 1874, and therefore it is not necessary to prove any express request on their part. They have a statutory duty to make provision for putting out fires, and are empowered to contract for that purpose, and therefore the court will infer an agreement with the plaintiffs in the terms of their statutory obligation. Considering that these plugs have been in use for so many years, the court will infer that the defendants took them over when they were appointed, and requested the plaintiffs to leave them where they then were. Though the plaintiffs are bound to find the water for putting out the fires gratis, they are not bound to provide these plugs without payment. The plugs are either in their places at the request of the plaintiffs, or they are not entitled to have them there. By sect. 3 of the Waterworks Clauses Act, the defendants now represent the "town commissioners." The liability of the defendants is the same as if the plugs had been fixed at their request.

Lindley, L.J. — The question in this case depends upon the true construction of the Acts of Parliament, and upon such inferences as are proper to be drawn from what has taken place. The action is one by the Grand Junction Waterworks Company against the Brentford Local Board, and the object is to compel the Brentford Local Board to pay the expense of maintaining certain fire-plugs, which have been put down and kept in order by the Grand Junction Waterworks Company under the statutory obligations which are imposed upon them. We must look at the source of the alleged obligation to pay, and it is put in two ways. First of all, it is said there is a statutory obligation. Of course, if there is, the action is maintainable. Then it is said, if there is not a statutory obligation, at all events there is a contractual obligation — an obligation arising from an agreement to pay which is to be inferred from the conduct of the parties, because it is admitted that there is no clear agreement in writing to pay for these things, still less an agreement under seal. Now, let us look at the statutory obligation. The learned judge considered that the statutory obligation arose under sect. 66 of the Public Health Act 1875, but the counsel for the respondents feels that it is difficult to maintain that view, and therefore he does not rest his case upon that section. It is necessary, however, to refer to it, because it seemed to the learned judge to be conclusive upon the subject. The section is this: "Every urban authority" (that includes the defendants) "shall cause fire-plugs, and all necessary works, machinery, and assistance for securing an efficient supply of water in case of fire to be provided and maintained, and for this purpose they may enter into any agreement with any water company or person." That, I apprehend, does impose upon the defendants a statutory obligation, which can be enforced either by indictment or by information by the Attorney-General; but I do not see that this section imposes any obligation as to the payment of these expenses. It is not an obligation in favour of the waterworks company. It is not as if the statute imposed upon them the duty of paying the Grand Junction Waterworks Company. It is a section introduced for another object altogether, and with great deference to the learned judge I think he has rather misconceived the scope and purport of that section. Therefore we must consider the sections in the Waterworks Clauses Act 1847. Now, the statutory obligation is to be found, if at all, in sects. 38 to 42 of that Act. Sect. 38 provides, "The undertakers" (that is, the waterworks company), "at the request of the town commissioners, shall fix proper fire-plugs in the main and other pipes belonging to them" for extinguishing any fire. Then by sect. 39 the undertakers are to renew and keep in effective order every such fire-plug, and deposit a key at each place where any public fire-engine is kept, and at such other places as may be appointed by the town commissioners. Now, pausing there for a moment, the obligation to fix and the obligation to renew and to keep in order is clearly imposed upon the waterworks company. Now, as regards the cost, sect. 40 says, "The cost of such fire-plugs and expense of fixing,

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placing, and maintaining the same in repair, and of providing such keys as aforesaid, shall be defrayed by the town commissioners." That makes it clearly a statutory obligation on the town commissioners to pay the cost of such fire-plugs as are referred to in sect. 40. The question is what they are. The expression "such fire-plugs" is a little ambiguous, and it may mean one of two things, either proper fire-plugs in the main and other pipes, or the fire-plugs fixed at the request of the town commissioners under sect. 38. The real meaning is to be gathered from the next section, 41: "The undertakers shall, at the request and expense of the owner or occupier of any work or manufactory situated in any street in which there shall be a pipe of the undertakers, place and maintain in effective order a fire-plug." Now, I take it from that it is quite obvious that the scheme of the Act is this: You the company are to fix these things, and you the company are to keep them in order. Who is to pay? If you fix them at the request of the town commissioners, they are to be at the expense of the town commissioners; if you fix them at the request of other people, they are to be at the expense of those other people. That is the true meaning of these sections, so that I read "the cost of such fire-plugs" in sect. 40 as "the cost of fire-plugs fixed at the request of the town commissioners." If this case cannot be brought within the class of fire-plugs fixed at the request of the town commissioners, there is no statutory obligation on them to pay. Now, let us look at the facts. There is nothing to show that these fire-plugs were fixed at the request of the town commissioners, the evidence is all the other way. It is not proved, in fact, that the plugs, with reference to which this dispute has arisen, were put in at the request of the defendants. There is no request of the kind. That being so, we have to ask ourselves whether we can infer some contract to pay for these plugs apart from the statute. That is possible, because under sect. 66, which I have read, there is power to make contracts of this sort. Now, what sort of agreement must you have? Let us take these fire-plugs *en bloc*. I think it is quite plain that under sect. 174 of the Public Health Act 1875 the agreement must be under seal. There is no such agreement here. Therefore, in order to make the defendants liable you must prove as many agreements as there are fire-plugs. But then can you infer as a fact that there has been any agreement on the part of the defendants to pay the expense of keeping in repair each of these fire-plugs? The answer is, "No; the materials do not warrant it." I do not say such an inference might not be drawn, but to do it on this evidence would be twisting the evidence, and would be drawing an inference which the facts do not warrant. That exhausts the case. With what is fair or unfair we have nothing to do. These are statutory obligations; they are not ordinary dealings between man and man, and as the statutory theory is not made out, and the agreement theory cannot be supported, I think the appeal must be allowed and judgment must be given for the defendants.

Lopes, L.J.—I agree. Sect. 40 of the Waterworks Clauses Act 1847 says, "The cost of such fire-plugs, and the expense of fixing, placing, and maintaining the same in repair, and of providing such keys as aforesaid, shall be defrayed by the town commissioners." Therefore it becomes important to see what the meaning of "such fire-plugs" is. I think that is made clear by sects. 38, 39, and 41, and the conclusion I come to is this, that "such fire-plugs" means fire-plugs which are fixed at the request of the town commissioners. If that is so, the important matter to consider in this case is whether these fire-plugs can be said to have been fixed at the request of the defendants, who are the successors of the town commissioners. Is there any evidence of that? To my mind, there is no evidence of any request at all. It seems to me impossible to contend for one moment that there is any evidence of any request. The defendants were not in existence at the time these fire-plugs were fixed. I can see no evidence, therefore, of any statutory obligation. But then it may be said, if there is not a statutory obligation, there may be an obligation by contract, and sect. 66 is relied upon with regard to that. But I can see no evidence whatever of any agreement at all. If the kind of agreement set up is an agreement to pay for these in a mass, then the difficulty would arise with regard to there being no agreement under seal. If, on the other hand, it is an agreement set up in respect of each particular fire-plug, the thing is very improbable in itself, and, further than that, there is no evidence of any such agreement. I think, therefore, that the present appeal must be allowed.

Davey, L.J.—Notwithstanding the very ingenious and extremely able argument of Mr. Jelf, I am of the same opinion, and I really have nothing to add, and need not repeat the reasons which have been already given by the other members of the court. I only desire to say that Mr. Jelf's ingenious theory of a request after the local board had come into existence to have pipes fixed, and the reply, "Why, the pipes are there already." "Oh, very well, let us treat them as if they had been put pursuant to our request," seems to me to fail on several grounds. In the first place, there is no evidence of any such request; and in the next place, even if there were, I do not think the plugs can be held, contrary to the fact, to have been constructively fixed in pursuance of such request. I do not think that would be a satisfaction of the statute, and it would come round to what Lindley, L.J. has described as a contract under the powers of the 66th section to render themselves liable for the maintenance of the fire-plugs in the same way as if they had been fixed at their request, and of that I confess I can see no evidence. The evidence relied on by Mr. Jelf, in the minutes of the defendant board, seems to me not altogether in his favour, and at any rate is far from enough to support such an inference as he desires us to draw.

Solicitors for the plaintiffs, *Bircham* and *Co.*

Solicitors for the defendants, *Woodbridge* and *Sons.*

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July 2, 3, *and* 16.

(Before LINDLEY, LOPES, and DAVEY, L.JJ.)

ROCHDALE CANAL COMPANY *v.* BREWSTER. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Poor rate—Exclusive occupation—Non-rateability of persons to whom dock accommodation is appropriated—Occupation reserved to owners—Licence or demise—Replevin.

An occupation of land which is at all times subject to the control of the owner is not such an occupation as to render the occupier rateable to the poor.

Allan v. Liverpool (30 *L. T. Rep.* 93; *L. Rep.* 9 *Q. B.* 180) *and* The London and North-Western Railway Company *v.* Buckmaster (31 *L. T. Rep.* 835; 33 Ib. 329; *L. Rep.* 10 *Q. B.* 70, 444) *approved and followed.*

Decision of the Divisional Court (*Wright and Bruce, JJ.*) *affirmed.*

SPECIAL case stated by consent for the opinion of the court, from which the following facts appeared:—

The plaintiffs were the company of proprietors of the Rochdale Canal and the defendants were William Robert Brewster and others, the overseers of the poor for the township of Bootle-cum-Linacre in the county of Lancaster.

In a poor rate for that township made the 27th March 1893 for the twelve months commencing on that date the plaintiffs were rated as occupiers of property described as "cranes, quays, land, and water berths." The whole of such property was rated together at 400*l.* gross estimated rental and 360*l.* rateable value, the amount of the rate being 37*l.* 10*s.*

The property formed part of one of the Liverpool Docks known as the South Carriers' Dock. The Liverpool Docks are vested in and managed by the Mersey Docks and Harbour Board under and by virtue of (amongst other Acts) the Mersey Dock Acts Consolidation Act 1858 (20 & 21 Vict. c. xcii.) and certain bye-laws made by the board thereunder.

By sect. 64 of that Act:

The board may from time to time, if they shall deem it expedient, but not otherwise, and upon such terms and conditions and upon payment of such rents or other sums of money, and subject to such restrictions and regulations as they shall think proper, set apart and appropriate any particular portion of any dock, wharf, quay, warehouses, sheds, or other works, with the appendages thereto, for the exclusive accommodation and use of any canal or railway company, or of any company or firm or individual engaged in carrying on any particular trade, who shall be desirous of having such exclusive accommodation for the reception of the vessels and goods belonging to or employed and conveyed by them: Provided that every company, firm, or individual to whom such exclusive accommodation as aforesaid shall be afforded, and their vessels, crews, servants, and other persons employed by them or under their control, shall be subject to the general rules and regulations of the board applicable to their docks, wharves, warehouses, sheds, and works, and the vessels entering the same and the crews and other persons employed in and about such vessels.

By sect. 80:

The exclusive jurisdiction and management of the quays of the board is hereby vested in the board, and shall not be interfered with by any person whomsoever.

By sect. 82:

The board may construct such depots and sheds for the reception of goods, and may construct and erect such steam engines, cranes, hoisting and weighing machines, and other apparatus for facilitating the loading and discharge, or the masting or unmasting of vessels, and tanks for watering horses and cattle, and may provide such other conveniences upon or near the quays as they shall think expedient for the accommodation of the trade of the port of Liverpool, and may make reasonable charges for the use of any of such depots, sheds, steam engines, cranes, hoisting and weighing machines, and other such apparatus and conveniences as aforesaid, and may let any such sheds, and also any portions of the quays which, with or without such sheds as they may think fit to appropriate as special berths for vessels in any particular trade or otherwise, for such periods and at and on such rents, terms, and conditions as they may deem expedient.

In May 1892 the plaintiffs, who had other dock accommodation for their business at a place in the city of Liverpool, and not within the said township, entered into an arrangement with the board that the board should appropriate to the use of the plaintiffs the berth, quay space, and cranes referred to in the said rate, and the arrangement was embodied in an agreement dated the 6th April 1893.

The board thereby agreed to set apart and appropriate to the use of the plaintiffs, and the plaintiffs agreed to occupy upon the terms and conditions thereinafter contained, the berth and quay space described in clause 1 of the agreement.

By clause 2, the appropriation of the premises was to be deemed to have commenced on the 6th June 1892, and was to be determinable at any time by either party giving six calendar months' notice in writing.

By clause 3, the plaintiffs agreed to pay to the board the yearly rent of 454*l.* 10*s.*

By clause 4, the rent was to be paid free from any deduction whatsoever, except the property tax, and the landlord's legal proportion of the sewerage and water rates (if any) and such other rates and taxes as were legally chargeable to the board as landlords, and to be payable as provided in that clause.

By clause 5, the plaintiffs agreed to pay all rates, taxes, and assessments, payable in respect of the premises during the continuance of such appropriation (except as aforesaid).

By clause 6, the plaintiffs agreed to maintain and keep the whole of the premises in good tenantable repair:

By clause 7, the plaintiffs agreed at all times to allow the servants and officers of the board to have free access to all parts of the premises appropriated as aforesaid, and at all times and in all respects to conform to such bye-laws, rules, and regulations of the board as were then in force, or as thereafter might from time to time be made by the board, and be applicable to the premises or any part thereof.

By clause 8, the plaintiffs agreed not to use the premises for any purposes other than such as were directly connected with or incidentally necessary to their business.

By clause 9, the plaintiffs agreed not to assign or underlet the premises without the consent of the board.

Clauses 10, 11, and 12 related to the working of

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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the water space at the berth and the premises, and the repair of the two cranes erected thereon.

Clause 13 empowered the board to re-enter the premises if the rent reserved should be unpaid for the space of one calendar month, or if there should be any breach by the plaintiffs of the conditions contained in the agreement.

Clause 14 contained the usual provision for quiet enjoyment of the premises by the plaintiffs.

The quay space appropriated to the plaintiffs lay between the docks and the street, and was not fenced in or divided in any way therefrom, and was traversed by persons passing from one part of the docks to another.

Between the 6th June 1892 and Sept. 1892 the plaintiffs occasionally used the berth, quay space, and cranes. In that month the handles of the cranes (without which it was impossible to work or use them) were removed by the plaintiffs, and from that time the cranes had never been used at all. Nor had the plaintiffs had occasion to use the quay space and berth. During that period, however, the berth had in fact occasionally been used by other persons, but not with the consent of the plaintiffs or of the board.

On the 22nd Aug. 1893 the plaintiffs gave the board notice of their intention to determine the agreement.

On the 4th Nov. 1893 the defendants demanded from the plaintiffs payment of the said rate (which had not been appealed against), and the plaintiffs having refused to pay the same the defendants summoned them before the magistrates to show cause why a distress-warrant should not issue.

The plaintiffs contended before the magistrates that the rate was bad on the ground that the plaintiffs were not the occupiers of any or (at any rate) of some parts of the rated property, and cited the cases of *Allan* v. *Liverpool* (30 L. T. Rep. 93; L. Rep. 9 Q. B. 180) and *London and North-Western Railway Company* v. *Buckmaster* (31 L. T. Rep. 835; 33 Ib. 329; L. Rep. 10 Q. B. 70, 144), but the magistrates were of opinion that their duty was to enforce the rate, and accordingly the distress-warrant issued.

On the 19th Dec. 1893 the defendants made a levy under such warrant, and thereupon the plaintiffs (having first duly given security as required by 51 & 52 Vict. c. 43, s. 135) commenced an action of replevin.

This special case was then stated, and came on to be heard before a divisional court (Wright and Bruce, JJ.) on the 14th April 1894, when the following judgments were delivered:—

Wright, J.—The parties interested can easily arrange that in future the burden of the rating shall fall as they intend, but, as the thing stands, I cannot but think that the rate was wrongly made. In the first place, I doubt whether the Act of Parliament intends anything in the nature of a real letting of any part of the docks. Sect. 64 carefully avoids using any words appropriate to an actual demise. In sect. 72, which applies, apparently, as well to parts of the premises which have been appropriated under sect. 64 as to others, the board are given the power of laying down rules just the same as elsewhere. By sect. 80 the exclusive jurisdiction and management of the quays by the board is vested in the board, and shall not be interfered with by any person whomsoever. And there are many powers in the Act which I should think might be interfered with as regards their full and complete exercise if the board had authority to make actual demises of any part of their premises. No doubt sect. 82 does, towards the close of it, use the single word "let." After empowering the board to provide various kinds of machinery and to erect sheds, it does say that they "may let any such sheds, and also any portions of the quays which, with or without such sheds, they may think fit to appropriate as special berths for vessels in any particular trade or otherwise, for such periods and at and on such rents, terms, and conditions as they may deem expedient." That point has been considered by Lord Blackburn in *Allan* v. *Liverpool* (30 L. T. Rep. 93; L. Rep. 9 Q. B. 180), and he certainly did not think it at all clear that the word "let" was used in that section in the sense of giving exclusive occupation. It is true that in *Allan's* case (*ubi sup.*) no express decision was given upon that 82nd section. But I cannot help thinking that Lord Blackburn uses expressions which show that he would have taken the same view if the question there had arisen under the 82nd section as he took under the 64th section; and, in any case, the 82nd section does not cover by any means the whole of the premises which we are now dealing with. I think there is probably no power to create a real demise of premises in this way. But then, looking at the agreement itself, it seems to me that, although the dock company have tried to go as far as they can with safety in the direction of using words of demise, they have felt that they could not safely go beyond a certain point. They have carefully limited themselves to words of appropriation, and have taken care so to word the agreement that it shall not, on the face of it, be inconsistent with the requirements of the Act, namely, that all appropriations of portions of the docks shall be subject to the bye-laws, rules, and regulations of the board. Then, further, I do not see any real and substantial difference between the agreement in this and the agreement and minute in *Allan's* case (*ubi sup.*) and the other cases reported with it, and I think *Allan's* case (*ubi sup.*) is an authority which binds us.

Bruce, J.—I am of the same opinion. It seems to me that it is clear that sect. 64 does not confer upon the board any power to let any portion of their works in the sense of giving exclusive occupation to the person to whom the particular portion of the works may be appropriated. And on that part of the case I think that *Allan's* case (*ubi sup.*) is a conclusive authority binding upon us. *Allan's* case (*ubi sup.*) was decided not merely upon the construction of the agreement. Certainly the judgment of Quain, J. in that case, and I think of Archibald, J., rested on the construction which the court put upon the words of the 64th section. Then it is said that the 82nd section gives power to the board to let. I doubt very much whether the 82nd section applies to such a case as this. First of all, I doubt whether, when the word "let" is used in the 82nd section, it is so used in the sense of giving the board any right to hand over the exclusive occupation to any class of persons. I rather think that that was decided in *Allan's* case (*ubi sup.*). The words of the 82nd section are that the board may let sheds and portions of the quays, with or without the sheds,

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which they may think fit to appropriate as special berths for vessels in any particular trade or otherwise. I am very much inclined to think that the power to let there is the power to let the quays which they think fit to appropriate as special berths for vessels engaged in a particular trade or otherwise, that is, as berths for certain particular kinds of vessels engaged in a special trade or engaged in some other trade. But this is not an agreement entered into with the owners of a particular class of vessels. It is a section giving the canal company power to use the wharf as carriers. I doubt very much whether, if the widest meaning were to be given to the word "let" in sect. 82, that section would give power to enter into such an agreement as they have entered into. On the other ground, I agree with what my learned brother has said. I doubt very much whether there is any substantial difference between the agreement in this case and the agreement which was considered by the court in *Allan's* case (*ubi sup.*). There will be judgment for the plaintiffs with costs.

From that decision the defendants now appealed.

Bigham, Q.C. and the Hon. *J. Mansfield* (*Carver* with them) for the appellants.—The question is, whether in fact the canal company had that kind of exclusive occupation which has been held by the authorities to make them properly rateable to the poor; and it does not matter whether the board had power to give such occupation to them or not. The point as to whether they are liable to be rated depends on occupation and not on title. We say that the decision in the court below was wrong in treating the respondents as not being in exclusive occupation. [LOPES, L.J.—How do you distinguish the case in principle from *Allan* v. *Liverpool* (30 L. T. Rep. 93; L. Rep. 9 Q. B. 180), upon the authority of which the Divisional Court decided against you?] It was merely a revocable licence in that case for the use of the quay space and sheds, and it was not under seal. Moreover, we say that both *Allan* v. *Liverpool* (*ubi sup.*) and *The London and North-Western Railway Company* v. *Buckmaster* (31 L. T. Rep. 835; 33 L. T. Rep. 329; L. Rep. 10 Q. B. 70, 444) were wrongly decided, and should be overruled. The reservation by a landlord of a right of entry for certain purposes does not prevent the lessees from being rateable occupiers:

Reg. v. *Stephens*, 12 L. T. Rep. 491.

"A man who is both owner and occupier possesses . . . the rights which attach to the portion of land that he owns and occupies. When he lets off this land he divests himself of some of those rights, and retains others. . . . If the cases are all examined they will be found to proceed upon this principle—that, so long as a man who is both owner and occupier grants away certain limited rights only, reserving to himself all the rights except those which he so grants away, he retains the occupation, and the grantee gets merely the limited rights. Where, on the other hand, he grants away his rights generally (although, of course, only for a limited time, as must be the case in every tenancy), then, although he may reserve certain rights to himself, he ceases to be occupier, and the person to whom the general grant is made becomes the occupier in his place:" (per Cave, J. in *Mayor of Southport* v. *Ormskirk Assessment Committee* (1893) 2 Q. B. 468, 473); on appeal, 69 L. T. Rep. 852; (1894) 1 Q. B. 196.) Occupation of land by the overhead wires of a telephone company makes the company rateable:

Lancashire Telephone Company v. *Overseers of Manchester*, 52 L. T. Rep. 793; 14 Q. B. Div. 267.

They referred also to

Mersey Docks Acts Consolidation Act 1858, sects. 64, 80, 82, 88, 89, 354.

Poland, Q.C. and *C. A. Russell* for the respondents.—We submit that *Allan* v. *Liverpool* (*ubi sup.*) governs this case. It is true that the respondents enjoy a kind of occupation, but it is not such an occupation as renders them rateable to the poor, for the property is at all times subject to the control of the board. [DAVEY, L.J.—The case even more in your favour is *The London and North-Western Railway Company* v. *Buckmaster*, 31 L. T. Rep. 835; 33 L. T. Rep. 329; L. Rep. 10 Q. B. 70, 444.] The older cases on the point are collected in *Smith* v. *St. Michael, Cambridge* (3 E. & E. 383). The result of the authorities may be summed up in the following terms: "Where an exclusive occupation is conferred the grantee becomes rateable; but where merely a right to an exclusive enjoyment passes the grantee takes no interest which renders him liable to be rated": (per Baggallay, L.J. in *Smith* v. *Lambeth Assessment Committee*, 10 Q. B. Div. 327, 330.) The board are in possession and occupation of the docks just as the defendants were in possession and occupation of the cemetery in *Reg.* v. *The Inhabitants of St. Mary Abbotts, Kensington* (12 Ad. & Ell. 824). That case was subsequently approved, and a similar decision was pronounced in *Reg.* v. *Abney Park Cemetery Company* (29 L. T. Rep. 174; L. Rep. 8 Q. B. 515). [LOPES, L.J.—There is a good illustration given in *Cory* v. *Bristow* (36 L. T. Rep. 594; 2 App. Cas. 262, 276), that of a landlord of an hotel or lodging-house, and a person having the use of a bedroom or lodgings.] So also the effect of occupation of part of a house as a lodger was considered in *Bradley* v. *Baylis* (46 L. T. Rep. 253; 8 Q. B. Div. 195). It was upon the construction of a particular agreement that the tenant was held to have the right of exclusive occupation of the land, and that he was therefore liable to be rated to the relief of the poor, in respect of such occupation, in *Roads* v. *Trumpington* (23 L. T. Rep. 821; L. Rep. 6 Q. B. 56).

Bigham, Q.C. replied.

Cur. adv. vult.

July 16.—The following written judgments were delivered:—

LINDLEY, L.J.—The question raised by this appeal is whether the Rochdale Canal Company is properly rateable to the poor in respect of certain property belonging to the Mersey Docks and Harbour Board, but used and to some extent occupied by the Rochdale Canal Company under an agreement dated the 6th April 1893, and set out in paragraph 6 of the special case. Before referring to the terms of that agreement I desire to point out that the Mersey Docks and Harbour Board are not parties to the action in which the above question arises, and are not before the court; and that the court is not called upon to decide, and is not in a position to decide, whether the Rochdale Canal Company are bound as between

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themselves and the Mersey Board, to pay or to indemnify the Mersey Board against the payment of the poor rate, which is payable in respect of the property in question. The point to be decided on the present occasion is simply whether the overseers of the parish in which that property is situated are or are not entitled to rate the Rochdale Canal Company to the poor in respect of that property. That question depends on the nature of property and on whether the Rochdale Canal Company are in such occupation of it as to render them rateable in respect of it. To determine these matters it is necessary to examine the agreement under which the Rochdale Canal Company are entitled to use and occupy the property. The agreement is set out in the special case, and it was read so often in the course of the argument that I really do not think I need pause to read it again. The property described in clause 1 of the agreement is clearly land in respect of which poor rate is payable. The berth is, I apprehend, land covered with water, and not so much water only. The term "occupy," the rent to be paid, the treatment of the Mersey Board as landlords, the provision as to repair, and, above all, the provision for re-entry and quiet enjoyment, all point to a letting and taking of so much land, and not merely to the creation and enjoyment of a mere easement or licence to use. But for rating purposes it is essential to look further, and to see what kind of occupation the person sought to be rated really has. The decisions referred to in the argument of *Allan* v. *Liverpool* (30 L. T. Rep. 93; L. Rep. 9 Q. B. 180), and *The London and North-Western Railway Company* v. *Buckmaster* (31 L. T. Rep. 835; 33 L. T. Rep. 329; L. Rep. 10 Q. B. 70, 444) show that an occupation of land which is at all times subject to the control of the owner is not such an occupation as to render the occupier rateable to the poor. The appellants contended that those cases were wrongly decided, and the court was invited to overrule them. But they have stood for twenty years; and it being clear law that the occupation of a lodger does not render him rateable, it is obvious that the above decisions cannot be held to be wrong in principle. These cases, in my opinion, govern the present. The seventh clause of the agreement is all important. I will read that. [His Lordship read it and continued:] It was no doubt inserted in order to preserve to the Mersey Board the right to exercise the powers conferred upon them by sect. 80 of their Act of 1858. Sect. 80 runs thus: [His Lordship read it and continued:] Even if the Mersey Board had power under sect. 82 to let any part of their quays, free from their jurisdiction and management, they have carefully abstained from doing so in this instance. In the face of clause 7 of the agreement, and of sect. 80 of the Act, it is impossible to hold the Rochdale Canal Company to have that exclusive occupation which is essential to render them rateable. The decision appealed from was correct, and the appeal must be dismissed with costs.

LOPES, L.J.—The point in this case is, whether such exclusive possession has been parted with by the board as is necessary to make the respondents liable to pay rates. In determining this question it is the intention of the parties which has to be looked at. It is not the words only that are to be regarded. The whole of the circumstances must be taken into consideration. It is the substance of the transaction rather than the form that determines the question whether such an exclusive occupation exists as will make the property rateable. In this case I have come to the conclusion that there is such a predominating right of control reserved to the board as to prevent the occupation from being so exclusive as to be rateable. In my judgment, what passed to the respondents was a licence to use the accommodation of the cranes, quays, land and water berths, subordinated to the superintending control of the board—a mere incorporeal right. They could not exclude the board. This is manifest from clause 7 of the agreement, which I proposed to read, but I have been anticipated, and also from sect. 80 of 21 & 22 Vict. c. xcii., which I proposed likewise to read, but I have been anticipated in that also. To my mind the case is not unlike the case of *Reg.* v. *The Inhabitants of St. Mary Abbotts, Kensington* (12 Ad. & Ell. 824). That was a case of the rating of a cemetery incorporated under an Act of Parliament. It appeared that the company sold in perpetuity the exclusive right of burial therein, subject to the rules and regulations of the company, and to payment of burial fees to them. The board were rated in respect of the profits arising from the sale of these rights. It was contended that the company having parted with the exclusive right of burial, which was the only right that could be exercised over the land, had conveyed away the land itself, and were therefore no longer occupiers of the land. The court decided that the company were in occupation of the cemetery as a whole. I refer to the case on account of what was said by Lord Denman, C.J. He said this (at p. 830): "The company are occupiers of the whole premises. The cemetery is under their control and superintendence;" the same as it appears to be in this case. Then Littledale, J. says this: "The purchasers have nothing but a right to a certain mode of enjoying portions of the land, from which the company derive a profit." Williams, J. says: "No doubt the company are in the occupation of the whole cemetery. They have the regulation and the repair of it, and the general superintendence over it." Then again there are the two cases of *Allan* v. *Liverpool* and *Inman* v. *Kirkdale* (30 L. T. Rep. 93; L. Rep. 9 Q. B. 180), and they are important because they are, as I understand, upon the same Act of Parliament as the present turns. In those cases I find that the question was whether certain persons were rateable, the Mersey Docks Board, under the powers of their Act, having appropriated, as here, certain accommodation in the docks for their particular use; in one case certain berths for the use of steamers and in the other case a space as a coal depôt. The Court held that, under all the circumstances of the case, looking at the powers given by the Act, to appropriate certain parts of the land for the use of particular persons, that did not take the occupation out of the Mersey Docks Board and confer it on the defendants; but that the possession and control remained in the board, subject to the rights conferred; and that no exclusive occupation passed. It seems to me that both those cases are strongly in point here. There is only one other case to which I will call attention, and that is, *The London and North-Western Railway Company* v. *Buckmaster* (31 L. T. Rep. 835; 33

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L. T. Rep. 329; L. Rep. 10 Q. B. 70, 444). That is a very important case. It appeared in that case that the railway company had been rated for the whole of their station, including a stable, which was the stable in question. They appealed against the rate, and so on, and it was contended that, if the agreement was looked at, and the situation of the stable in question was looked at, there was only a licence to use the stable accommodation, and the Court so decided. But the importance of that case, to my mind, is owing to what was said by Quain, J., who gave the judgment in the Queen's Bench. He says (at p. 78 of L. Rep. 10 Q. B.) this: "I have looked at the whole substance of what appears to be the arrangement between the parties. It is clear that, before this arrangement, these stables were a part of the railway station premises at that particular place at Clapham Junction; and these stables are within the curtilage, which curtilage is undoubtedly, taking it as a whole, practically in the possession and occupation of the railway company. The stables can only be approached by the roads over which the railway company undoubtedly have exclusive control, and they are entered by gates at the end of these approaches, which, I think we may fairly infer, are under the control of the railway company. And therefore the railway company seem to be in possession and occupation of the whole of these premises; very much in the way the cemeteries were held, in the two cases that have been cited, to be under the control and in the possession of the cemetery companies: (*Reg.* v. *St. Mary Abbots*, 12 Ad. & Ell. 824; *Reg.* v. *Abney Park Cemetery Company*, 29 L. T. Rep. 174; L. Rep. 8 Q. B. 515.) When we come to look at the agreement, no doubt it contains ambiguous expressions"—such as letting and re-entering, as in the present case—"which may be construed either way; but if we look at the convenience of the thing and the situation of the premises, and the general control evidently exercised and intended to be exercised over these stables of the railway company by the provision with regard to the bye-laws, I come to the conclusion that, on the whole, these stables are not in the occupation in the strict sense of the word of the Clay Cross Company or the other coal-owners, but remain in the occupation of the railway company." Now it appears to me that that judgment is much in point in the present case. The case, I am aware, afterwards went to the Exchequer Chamber; and in the Exchequer Chamber three judges held one way and three judges held the other. That being so, the judgment of the court below prevailed. Upon reading all those judgments, it seems to me that there is no judgment to which I can attach so much importance as to the judgment of Quain, J., which seems to me to be very closely associated with the circumstances of the case which we have now to decide. I think, therefore, that this appeal must be dismissed, and the decision of the court below affirmed.

Davey, L.J.—I am of the same opinion, and I do not think it necessary to repeat the reasons which have been given. In my opinion, the case is governed by the case of *The London and North-Western Railway Company* v. *Buckmaster* (*ubi sup.*), which I am unable to distinguish from the case before us upon principle. The appeal will be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants, *Sharpe, Parker, Pritchards*, and *Barham*, agents for *Cleaver, Holden, Garnett*, and *Cleaver*, Liverpool.

Solicitors for the respondents, *Norris, Allens*, and *Chapman*, agents for *George Jackson*, Rochdale.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Tuesday, May 29.

(Before Cave and Collins, JJ.)

Keeble v. Bennett and another. (a)

County Courts—Costs—Action for sum exceeding 100*l. commenced in High Court—Judgment under Order XIV. as to part of claim—Action as to balance under* 20*l. remitted to County Court—Sum recovered in the action—County Court scale of costs—Higher scale, column C.—County Courts Act* 1888 (51 & 52 *Vict. c.* 43), *s.* 65.

In an action founded on contract to recover the sum of 104*l., and which was commenced in the High Court, the plaintiff obtained judgment under Order XIV. for* 90*l. The action as to the balance, which did not exceed* 20*l., was remitted under sect.* 65 *of the County Courts Act* 1888, *to be tried in the County Court. This the defendants paid into court, and the plaintiff obtained judgment for the same. The registrar taxed the costs incurred in the proceedings in the County Court under column C. of the County Court scale of costs, being of opinion that the sum recovered in the action exceeded* 50*l.*

Held, on appeal, that the registrar was right in so taxing. By the order of the master the whole action had been remitted and the registrar was right in taking into consideration the sum recovered under Order XIV. in the High Court, and that the sum therefore recovered in the action exceeded 50*l.*

This was an appeal by the defendants from an order made by the County Court judge sitting at Southwark, who dismissed the defendants' application to review the taxation of the plaintiff's costs in the action.

The action was one founded on contract, and was commenced in the High Court, the claim being for 104*l.* 19*s.* 9*d.* for the price of goods sold and delivered. The plaintiff applied for judgment under Order XIV., on which the master made an order for payment to the plaintiff's solicitors of 90*l.* 7*s.* within five days, and in default judgment, and remitted the action to the Southwark County Court of Surrey, under sect. 65 of the County Courts Act 1888. The 90*l.* 7*s.* was duly paid. Three days prior to the day appointed for the trial of the action in the County Court the defendants paid the balance, namely, 14*l.* 12*s.* 9*d.*, into the County Court, and on the 5th March 1894, the day appointed for the trial, the judge, on the application of counsel for the plaintiff, ordered the costs to be taxed and paid on the 19th March 1894, and gave no special directions as to the taxation thereof.

The registrar taxed the costs incurred in the County Court under column C., being of opinion that the sum recovered in the action exceeded 50*l.*

(a) Reported by G. H. Grant, Esq., Barrister-at-Law.

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Application was then made by the defendants to the judge to review the taxation. No question arose as to the costs incurred in the High Court, which were taxed according to the High Court scale, but the question raised on behalf of the defendants was, whether the costs incurred in the County Court should be taxed under column A. or column C. of the County Court scale of costs. The learned County Court judge was of opinion that under the master's order the whole action and all the proceedings therein were transferred to the County Court (relying upon the authority of *Harris* v. *Judge*, 67 L. T. Rep. 19; (1892) 2 Q. B. 565), and not only the question of the liability of the defendants to pay the plaintiff the sum of 14*l.* 12*s.* 9*d.*, and that the plaintiff had therefore recovered a larger sum than 50*l.*, and would, if the action had been commenced in the County Court by consent, have been entitled to have his costs taxed on the 50*l.* scale, but that, as the action was commenced in the High Court and was afterwards sent to the County Court, he was entitled under sect. 65 of the County Courts Act 1888 to costs on the High Court scale up to the date of the master's order, and to costs on the County Court scale in respect of all proceedings after the date of the order. As the plaintiff had recovered in the action a sum exceeding 50*l.*, the learned judge thought the registrar was right in taxing the costs of the proceedings in the County Court on the scale of costs in use in the County Courts where the plaintiff recovers a sum above 50*l.* He therefore dismissed the application with costs, but, as it was admitted by counsel on both sides that the question then raised had not as yet been brought before the High Court, he gave the defendants leave to appeal.

Sect. 65 of the County Courts Act 1888 (51 & 52 Vict. c. 43) provides that:

> Where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed one hundred pounds, or where such claim, though it originally exceeded one hundred pounds, is reduced by payment, an admitted set-off or otherwise, to a sum not exceeding one hundred pounds, it shall be lawful for either party to the action at any time, if the whole or part of the demand of the plaintiff be contested, to apply to a judge of the High Court at chambers, to order such action to be tried in any court in which the action might have been commenced, or in any court convenient thereto; and on the hearing of the application the judge shall, unless there is good cause to the contrary, order such action to be tried accordingly; and thereupon the plaintiff shall lodge the original writ and the order with the registrar of the court mentioned in the order, who shall appoint a day for the trial of the action, notice whereof shall be sent by post or otherwise by the registrar to both parties or their solicitors, and the action and all proceedings therein shall be tried and taken in such court as if the action had been originally commenced therein; and the costs of the parties in respect of proceedings subsequent to the order of the judge of the High Court shall be allowed according to the scale of costs for the time being in use in the County Courts, and the costs of the order and all proceedings previously thereto shall be allowed according to the scale of costs for the time being in use in the Supreme Court.

Cababé for the appellant.—This is a novel point. The question is, on what scale in the County Court is the plaintiff entitled to have the costs taxed. It is submitted that there was a final adjudication on the merits of the case in the High Court, and judgment was given for 90*l.* 7*s.*, which was paid, and that there have therefore been two judgments, one in the High Court and one in the County Court, as to the balance. The action when remitted was converted into an action for 14*l.* 12*s.* 9*d.*, and no question as to the 90*l.* 7*s.* arose in the County Court, and the only amount for which the judge could enter judgment was the smaller one. The sum dealt with is under 20*l.*, and it cannot be that the sum recovered is to carry costs as if it were over 20*l.* *Harris* v. *Judge* (67 L. T. Rep. 19; (1892) 2 Q. B. 565) is to be distinguished from this case. Order LA., r. 1, of the County Court Rules of 1889 provides that in every action or matter in any court all costs shall be taxed by the registrar of such court according to the scale of costs in the appendix. In the appendix the costs where the sum recovered exceeds 10*l.* are divided into three classes: (A.) where the sum exceeds 10*l.* and does not exceed 20*l.*; (B.) where the sum exceeds 20*l.* and does not exceed 50*l.*; and (C.) where the sum exceeds 50*l.* It is submitted that the costs here should be taxed under scale A. and not under scale C., for the plaintiff has only recovered in the County Court the sum of 14*l.* 12*s.* 9*d.* One of the chief reasons for remitting actions to the County Court is to render litigation less expensive, and this object is defeated if scale C. is to be held to apply where the amount in dispute in the County Court is under 20*l.*:

> *White* v. *Cohen*, 68 L. T. Rep. 305; (1893) 1 Q. B. 580.

Paget, for the respondent, was not called upon.

CAVE, J.—I am of opinion that the learned judge in the County Court was right. In this case we have an action which was commenced in the High Court and subsequently remitted to the County Court. The claim was for a sum exceeding 100*l.* for goods sold and delivered. The plaintiff took out a summons under Order XIV. for judgment, upon which the master ordered the defendants to pay the plaintiff the sum of 90*l.*, or in default to have judgment signed against them for that amount, and gave the defendants leave to defend the action as to the residue of the plaintiff's claim, and ordered the action as to such residue to be transferred to the Southwark County Court. This order, however, I think, is not quite in the form it should be. On a case being remitted from the High Court to the County Court, all subsequent proceedings in the action are to be taken in the County Court, and I doubt whether the plaintiff could have entered judgment in the High Court, the case having been remitted, against the defendants in the event of the latter not paying the sum of 90*l.* within the five days, in compliance with the order made by the master. Such a defect, however, in the form of the order could no doubt have been met by ordering the action to be remitted only after payment of that sum, or after judgment had been entered for the same. Now, although the plaintiff only recovered 14*l.* in the County Court, I am clearly of opinion that the learned judge, when deciding what was the amount recovered in the action, was bound to take into consideration the fact that the defendants had already paid the plaintiff part of his claim,

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while the action was in the High Court. The only question, therefore, that remains for us to decide is, whether the plaintiff recovered more than 50*l.* in the action. I must say that I am clearly of opinion that he did, and therefore the costs were rightly taxed under column C. The appeal must therefore be dismissed.

COLLINS, J.—I am entirely of the same opinion.

Appeal dismissed, with leave to appeal.

Solicitors for the appellant, *Swepstone* and *Stone.*

Solicitors for the respondent, *Meggy* and *Stunt.*

Friday, July 13.

(Before WILLS and WILLIAMS, JJ.)

ROBINSON, KING, AND CO. *v.* LYNES. (*a*)

Married woman—Contract entered into by wife before marriage—Personal judgment against wife—Married Women's Property Act 1882 (45 & 46 *Vict. c.* 75), *ss.* 1, *sub-sect.* (2), 13, *and* 14.

The liability of a married woman at common law in respect of a contract entered into by her before marriage is not affected by the Married Women's Property Act 1882, *and therefore a plaintiff who has succeeded in an action upon such a contract is not confined to a judgment against the married woman's separate property in the form settled in* Scott *v.* Morley (57 *L. T. Rep.* 919; 20 *Q. B. Div.* 120), *but is entitled to personal judgment against the married woman.*

APPEAL from chambers.

The defendant, a married woman, was sued by the plaintiffs on a bill of exchange for 21*l.*, accepted by her prior to her marriage. On application by the plaintiffs for judgment under Order XIV., r. 1, the master gave the defendant unconditional leave to defend, and on appeal the judge, Charles, J., referred the matter to the court for its determination of the question whether the plaintiffs were entitled to a judgment against the wife's separate property only according to the form settled by the Court of Appeal in *Scott* v. *Morley* (57 L. T. Rep. 919; 20 Q. B. Div. 120), or to a personal judgment against the wife herself.

Turrell for the plaintiffs.—The form of judgment settled by the Court of Appeal in *Scott* v. *Morley* (*ubi sup.*), which is a judgment only against the wife's separate property, is not applicable to the case where the contract sued upon was made by the wife before her marriage. The judgment in such a case is properly against the wife herself. Prior to the Married Women's Property Act 1882 the judgment would have been against the husband and wife jointly, and the wife could have been taken under a *capias ad satisfaciendum*: (see per Lord Esher in *Scott* v. *Morley* (*ubi sup.*) The Act has made no difference in the legal liability of a married woman (*Scott* v. *Morley*), and therefore the same personal judgment which at common law could be had against both husband and wife can now be given against the wife alone.

WILLS, J.—The result of the discussion in this case is to make it clear that the plaintiff has a right to the personal judgment against the wife which he claims. At common law prior to the Judicature Act, the wife would have been entitled as of right to plead in abatement, or since that Act, to have her husband joined as a co-defendant. That absolute right no longer exists, and an application under Order XVI., r. 11, to have her husband joined would not now be successful unless the court were satisfied that there was some ground for it. If it were shown, for example, that the husband acquired separate property with his wife, then sect. 14 of the Married Women's Property Act would make it the duty of the court to allow the husband to be joined. But that is not the case here. The wife does not suggest in her affidavit that her husband has taken any property of hers through the marriage, and therefore there can be no ground for saying that any wrong would be done to her by not bringing in her husband as a co-defendant. At common law, if the wife took no steps to join her husband, the judgment would properly be against her alone. Therefore, unless the common law in this respect has been altered by the Married Women's Property Act 1882, the plaintiff would be still entitled to such a judgment. Now, has that Act altered the common law? If the plaintiff were obliged to resort to sub-sect (2) of sect. 1 for his remedy, then he would be only entitled to judgment against the wife's separate property in the form settled in *Scott* v. *Morley*. But he is not confined to that remedy. The wider language of sect. 13 shows that the wife's common law liability remains as before in respect of contracts entered into by her before her marriage, and that section enables the wife's property, if she has any, to be taken in execution under a judgment against her. The section enacts that, "all sums recovered against her in respect of such contracts shall be payable out of her separate property." I am satisfied, therefore, that the plaintiff is entitled to personal judgment against the wife as asked for.

WILLIAMS, J. concurred.

Solicitors: *Kisch* and *Wake.*

May 7, 8, 31, *and June* 16.

(Before CHARLES, J.)

NICHOLS AND ANOTHER *v.* THE REGENT'S CANAL COMPANY. (*a*)

Company—Promoting and obtaining Act—Solicitors' costs—Agreement for payment of costs on condition of "the capital being raised"—Issue of part capital—Right of solicitors to payment—Statute of Limitations—Acknowledgment—Right to payment under Act.

The promoters of a scheme for making a railway, and for the purchase in connection therewith of a certain canal, in 1880 *appointed the plaintiffs to act as their solicitors upon the terms that they (the plaintiffs) "would give their services gratis in the event of the application to Parliament failing, or the capital not being raised," and the plaintiffs agreed on the condition that, if an Act were obtained and "the capital raised," they should be paid their professional charges. The plaintiffs took the necessary steps for the obtaining of an Act, and in* 1882 *an Act was passed incorporating the company. By the Act the company were authorised to make the canal undertaking and capital separate, and to create a separate "canal capital," which they did. In*

(*a*) Reported by G. H. GRANT, Esq., Barrister-at-Law.

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

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1883 *the "canal capital" was wholly issued, but the residue of the capital, the "railway capital," has not yet been issued. After incorporation, the plaintiffs, by arrangement, acted for the company on the same terms as they had done previously for the promoters. A dispute arose as to whether the plaintiffs were entitled to their professional charges before the issuing of the "railway capital," and within six years before action brought the company wrote to the plaintiffs that "no application for further payment can be entertained until your outstanding bills of costs have been delivered to the company for their examination and consideration;" and again that "the board cannot entertain your application for a further payment until the taxation of your several bills of costs has been completed." The bills had been delivered and taxed, and in an action for the recovery of the same:*

Held, that the plaintiffs were entitled to recover, upon the ground that, upon the issue of the "canal capital," there had been a substantial issue of the capital sufficient to satisfy the agreement, although the whole capital had not been issued.

Held also, in answer to a defence of the Statute of Limitations, that, if the six years limitation applied, the letters amounted to a conditional promise to pay the bills when taxed, and as the condition had been performed, there was a sufficient acknowledgment to take the case out of the statute, aud that. moreover, as the plaintiffs were not employed for reward by the promoters, they could maintain an action for these costs against the company under sect. 204 of the Act; that "all costs, &c., of and incident to the preparing for, obtaining, and passing of the Act should be paid by the company," and that the period of limitation would in that case be twenty years.

Action tried by Charles, J., without a jury.

The facts as stated by the learned judge in his written judgment were as follows:—

In this case the plaintiffs seek to recover from the defendants a sum of 22,191*l.* 17*s.* 10*d.*, being the balance of money alleged to be due for costs to the firm of Messrs. Higginson and Vigers, who, until the close of the year 1884, carried on business in partnership as solicitors.

The plaintiff Nichols is trustee of the estate of Mr. Higginson, who became bankrupt in the year 1888, but in this case the term "plaintiffs" is used for convenience, as denoting the firm of Messrs. Higginson and Vigers, with whom all the business in respect of which the costs are now sued for was done.

The main question in the case is, whether the defendants are liable for costs incurred prior to the date of their incorporation, and in particular for costs incurred in obtaining the Act under which they were incorporated, and which received the Royal assent on the 18th Aug. 1882, under the title of "The Regent's Canal, City, and Docks Railway Act 1882 (45 & 46 Vict. c. cclxii).

Two defences were chiefly relied on up to the time of the trial. First, it was alleged that the plaintiffs' work was done upon the terms that they should only receive out-of-pocket expenditure—which they had duly received—unless the then pending application to Parliament in reference to the proposed undertaking of the defendant company should be successful and the capital raised, and that the capital had not been raised. Secondly, they pleaded the Statute of Limitations. A subsidiary defence pleaded that no signed bill of costs had been delivered, but this defence was not insisted on upon the hearing.

The plaintiffs, in answer to the statute, contended, first, that their claim was by sect. 204 of the Act of 1882 constituted a statutory debt, when the period of limitation would be twenty years; and secondly, that, if not, there had been within six years acknowledgments in writing sufficient to prevent the statute from running.

The defendants moreover at the trial also contended that they were under no contract at all with the plaintiffs as to these costs, and that, if there was any liability, it rested on the promoters, but throughout the voluminous correspondence and numerous minutes relating to the matter no trace is to be found of this contention. On the contrary, the defendants have never asserted until now, that they were not bound to pay because the liability rested upon others, but merely because the conditions and time of payment had not yet arrived. But this point—as the learned judge thought—was certainly open to them, and indeed in logical order constituted and was treated by the defendants in argument, as their first line of defence.

The facts proved at the trial may be summarised as follows: In the autumn of 1880 a scheme was contemplated by Mr. J. Forbes and others for constituting a railway from the Albert Docks to Paddington, and for the purchase, in connection with this undertaking, of the Regent's Canal. A meeting of those interested in the scheme was held on the 16th Nov. 1880, when it was determined that Messrs. Vigers should be surveyors, Messrs. Barlow and Thomas engineers, and the plaintiffs solicitors, and it was then resolved that it was "distinctly understood that the professional gentlemen concerned will unite with the promoters by giving their services gratis in the event of the application to Parliament failing or the capital not being raised, and only receive actual out-of-pocket expenditure incurred with the sanction of the committee."

On the 30th Dec. the plaintiffs wrote:

We agree to the terms of the resolution of Nov. 16 upon the condition that in the event of an Act of Parliament being obtained and the capital raised we shall be paid the customary professional charges for work done, and be secured in the business properly appertaining thereto as solicitors to the company.

On the 30th March 1881 the secretary of the promoters wrote:

I am desired to request that you will now proceed with the work necessary to ensure a Bill being brought before Parliament next session. . . . These instructions are given subject of course to the agreement existing between the promoters and yourselves, namely, that you unite with the promoters by giving your services gratis in the event of the application to Parliament failing, and will only receive actual out-of-pocket expenditure.

This letter was, on the 5th April 1881, approved by the promoters, and payments for disbursements were from time to time made until the 18th Aug. 1882, when the Act was passed incorporating the defendant company. This Act was expressed to be for incorporating the Regent's Canal, City, and Docks Railway Company, for the transfer to

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them of the Regent's Canal, and for authorising the construction of railways from the Great Western Railway at Paddington to the City and to the Royal Albert Dock of the London and St. Katherine's Docks Company.

The capital was, by sect. 48, fixed at eight millions one hundred thousand pounds, and by sect. 67 the company were authorised to resolve that the canal undertaking and capital necessary for it should be a separate undertaking and capital, and in the event of their so resolving were authorised to create a separate capital, called "the Canal Capital." This course was adopted by resolution passed on the 26th Feb. 1883, when the canal capital was fixed at 1,275,000*l.* This capital was afterwards raised, and is a part of the capital authorised by the Act of 1882. The residue of the capital, or "Railway Capital," has not yet been raised. Sect. 204 provided that all costs, charges, and expenses of and incident to the preparing for, obtaining, and passing of this Act, or otherwise in relation thereto, shall be paid by the company.

On the 17th Nov. 1882, at a meeting of the directors, the question of payment to the professional gentlemen with respect to expenses incurred during the passage of the Bill through Parliament was raised, and "bearing in mind the understanding recorded in the minutes of the meeting of 16th Nov. 1880," it was decided that at a further meeting some arrangement should be made as to the basis and mode of payment for professional service. Accordingly, on the 29th Jan. 1883, the subject was further considered at a board meeting, and the plaintiffs were requested to present their proposals. This they did in a letter of Feb. 8, in which they wrote as follows:

> We beg to intimate that we shall only look to the promoters for payment of actual liabilities and moneys out of pocket, looking to the capital of the company for our professional remuneration.

At a board meeting on the 12th Feb. this letter was read and approved.

In the spring of 1883, the canal capital having been to some extent then raised, the plaintiffs wrote, on the 10th April, to the chairman:

> We feel that, as the work has now been going on for more than two years, and a portion of the capital has been raised, we are fairly entitled to a payment on account of our professional services.

On the 12th a reply was received from the Finance Committee declining to entertain any claims "until the capital for the railway shall have been raised." The plaintiffs did not acquiesce in this view. They wrote on the 13th April that they were not aware they had "in any way undertaken or agreed not to consider the canal capital as a portion of the general undertaking."

On the 2nd Aug. 1883 the canal capital had been wholly issued, and on that day an Act received the Royal assent constituting the canal undertaking and capital a separate undertaking and capital. In Oct. 1883 several bills of costs, including work done in reference to the Act of 1883 and other matters, were sent in, but they did not include matters connected with obtaining the Act of 1882. At a board meeting held on the 15th Nov. these bills were referred back to the plaintiffs for reconsideration, the board considering that they were excessive. The plaintiffs offered to make a small reduction, but the board were not satisfied, and on the 20th Dec. 1883 resolved "that the several bills be submitted to taxation."

In Jan. 1884 further bills were delivered, and on the 18th April a cheque for 1000*l.* was given, but it was given and accepted without prejudice to the view entertained by the board of their liability. In May 1884 further bills were delivered, and also on the 1st July. In this last set was contained the bill for 28,104*l.* 12*s.* 10*d.*, "*re* Regent's Canal, City, and Docks Railway Act 1882." On the 12th July a payment on account was asked for, and on the 15th a general statement of all the bills then delivered was forwarded, and on the 17th a further bill completing the firm's charges up to June 30.

On the same day the board held a meeting, at which the following resolution was passed:

> The bills of costs of Messrs. Higginson and Vigers in reference to the promoting and passing of the Company's Act of 1882, and the Various Powers and Canal Capital Act of 1883, having at length been delivered, and the charges appearing to the board to be greatly in excess of any amount reasonably and fairly due, it was resolved that the bills be referred to taxation to the taxing master of the House of Lords.

This resolution was at once communicated to the plaintiffs, and the taxation was soon afterwards commenced. In Dec. 1884 some further bills were delivered, and at the same time Messrs. Higginson and Vigers dissolved partnership. Mr. Higginson continued the company's business, and in Feb. 1885 two full cash statements were sent to the defendants, which include all the items sued for in the present action.

The taxation was meanwhile proceeding, but not much was done during the first half of 1885. On the 12th June a joint application from the plaintiffs for a further payment on account of their charges was read at a board meeting, and it was resolved "that the consideration for the same be deferred pending the completion of the taxation of the several bills delivered," and on the 13th the secretary wrote:

> The board cannot entertain your application for a further payment on account until the taxation of your several bills of costs has been completed.

In the autumn of this year (1885) a compromise was suggested, but was not effected. A long time then elapsed, during which no step on either side appears to have been taken, but in June 1887 Mr. Higginson wrote, but without effect, urging a settlement. Then again ensued a long delay, and on Sept. 3, 1888, Mr. Higginson again wrote to the board that he had exhausted all his means, and on the 1st Nov. 1888, he wrote:

> I think the time has arrived when something might be paid on account of the costs of 1882 . . . without a payment at once I cannot go on, and that is the unpleasant truth.

He did not, however, succeed in inducing the company to pay him any substantial sum, and bankruptcy ensued, and the plaintiff, Nichols, having been appointed trustee, on 5th Nov. 1889 made a formal demand for settlement of the account. On the 11th the company's solicitors replied that it appeared to have been expressly stipulated that Messrs. Higginson and Vigers should not make any claim beyond actual disbursements unless and until the capital of the railway undertaking was raised. On the 12th the

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trustee's solicitor denied that any such arrangement had been made, and on the 21st the writ in this action was issued.

Finlay, Q.C., *G. E. Lyon*, and *Layman* for the plaintiffs.—The plaintiffs are entitled to recover these costs from the company, who are the defendants in this action. It is true that the first transactions of the plaintiffs were with the promoters, and not with the company, but the company either took over the liability of the promoters for the costs incurred before the incorporation, or they are, at all events, liable for such costs under the 204th section of the Act. So that in either case the company are liable to the plaintiffs for these costs. By the terms of the arrangement made, in the first instance, with the promoters, and afterwards with the company, the plaintiffs were to receive their costs for their professional services if the capital were raised. This condition has been performed, and the capital, or at any rate a substantial part of the capital, has been raised, for the "canal" capital has been wholly raised. It is not necessary for the plaintiffs to wait until the whole capital has been raised, and the "canal" capital is "capital" of the company within the meaning of the arrangement. The company could go on for many years as an existing company without raising the "railway" capital. With regard to the question of the Statute of Limitations, if the six years' limitation is applicable to the case, then there is a sufficient acknowledgment in writing within the six years to take the case out of the statute. The time runs from the time the solicitors are entitled to payment, and not from the delivery of a bill of costs, and the letter of the 13th June 1885 is an acknowledgment of the debt. That letter admits liability, and is an implied promise to pay when the taxation is completed, and that will take the case out of the statute:

Quincey v. *Sharpe*, 34 L. T. Rep. 495; 1 Ex. Div. 72.

So a request to be furnished with an account, accompanied by a statement that a cheque would be sent for the amount due, has been held to be a sufficient acknowledgment of the debt:

Skeet v. *Lindsay*, 36 L. T. Rep. 98; 2 Ex. Div. 314.

In such cases it is not necessary to have an acknowledgment that a debt is actually due, but it is sufficient that there should be an acknowledgment that an account is pending, and a promise to pay the balance if it be found against the accounting party:

Prance v. *Sympson*, Kay, 678.

In the present case there is, in the letter of 13th June 1885, an implied promise to pay the amount of the bills when taxed, and as the bills have been taxed, and this condition performed, this is sufficient to bring the case within the third of the three things laid down by Mellish, L.J., in *Re River Steamer Company; Mitchell's Claim* (25 L. T. Rep., at p. 321; L. Rep. 6 Ch., at p. 328), as necessary to take the case out of the statute, namely, a conditional promise to pay the debt and evidence that the condition has been performed. The same principle is laid down in the cases of *Curwen* v. *Milburn* (62 L. T. Rep. 278; 42 Ch. Div. 424); *Firth* v. *Slingsby* (58 L. T. Rep. 481); *Re Gedye* (20 L. J. 410, Ch.). But the plaintiffs have another answer to the defence of the Statute of Limitations. We say that the claim in the present action can be recovered from the company under sect. 204 of the Act of 1882, and that the period of limitation is therefore twenty years, as for a debt due under a statute, which period has not yet run out. It is only for professional charges we are now seeking to recover, and as regards these the plaintiffs had no other paymasters than the company, and the plaintiffs are entitled to sue the company for these charges under sect. 204:

Re Skegness and St. Leonards Tramway Company, 60 L. T. Rep. 406; 41 Ch. Div. 215.

They also referred to two unreported decisions in the Court of Appeal against the same defendants, namely, the cases of *Allan* v. *Regent's Canal and Docks Railway Company*, decided on the 16th Nov. 1885, and *The Vestry of St. Luke's* against the same defendants, decided on the 22nd Feb. 1886.

Sir *Henry James*, Q.C., *Lawson Walton*, Q.C., and *F. W. Hollams* for the defendants.—The plaintiffs had no contract at all with the company. Whatever the contract of the plaintiffs was, it was a contract with the promoters, and the promoters were the persons to whom all the professional men engaged in the business were to look to for payment for their services. The plaintiffs were employed by the promoters, and the only contract they had was with the promoters, and if it had been necessary for any persons to sue the plaintiffs for any breach of duty in respect of the business, the promoters, and not the company, would have been the proper persons to bring such action. Our first defence, therefore, is that, whatever rights the plaintiffs may have against the promoters, they have none against the company in respect of these costs. Our next defence is that, even assuming that the liability of the promoters has been transferred to the company, and that the company are ultimately liable, the event upon which the liability was to arise has not yet happened. The rights of the plaintiffs are determined by the resolution of the promoters of the 16th Nov. 1880, and by that resolution the plaintiffs were to unite with the promoters by giving their services gratis "in the event of the application to Parliament failing, or the capital not being raised," and they were only to receive out-of-pocket expenses, which they have duly received, and as to which there is now no question. The plaintiffs accepted these terms upon the condition that in the event of an Act of Parliament being obtained, and the capital raised, they should be paid the customary professional charges for work done. The plaintiffs then were to be paid their professional charges only in the event of the capital being raised. The capital has never been raised within the meaning of the contract. It is true the "canal" capital has been raised, but the capital, that is, the "railway" capital, has not been raised. It is necessary that there should be a substantial issue of capital before the plaintiffs' rights accrue. The object of the scheme was a railway and not a canal, and the canal was merely a means to an end. Therefore it is not sufficient that the "canal" capital has been raised for the purchase of the canal; there must be a raising of the capital for the making of the railway, but the "railway" capital

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has not been raised, and the contract of the solicitors was not with reference to the making of a canal, but was with reference to the making of the railway. The event, therefore, has not yet happened which entitles the plaintiffs to payment of their professional charges. Our next defence is the Statute of Limitations. We say that the plaintiffs' right to these costs, if any, arose more than six years before action brought, and that therefore the statute would apply unless there has been something within the six years to take the case out of the statute. It is said there is an acknowledgment importing a promise to pay, and reliance has been placed on the letter of the 13th June 1885, but the meaning of that letter is not a promise to pay the bills when taxed, and the company do not say so. All that the company mean by that letter, and a similar letter which was relied on, is that they wanted to have the bills taxed in order to know how much capital they ought to raise, and to ascertain definitely the amount of liability which might ultimately fall on the railway capital when raised. These letters do not contain an acknowledgment of an existing debt, much less an acknowledgment from which a promise to pay would be implied. That being so, the six years' limitation applies, and the remedy is barred. But it is contended that the plaintiffs can maintain this action against the company under sect. 204 of the Act, and that therefore the period of limitation is twenty years. The plaintiffs cannot recover under that section; only promoters can recover under that section, but not solicitors employed by the promoters for reward:

Wyatt v. *The Metropolitan Board of Works*, 11 C. B. N. S. 744;

Re Skegness and St. Leonards Tramways Company, (*ubi sup.*);

Re Manchester, Middleton, and District Tramways Company, 68 L. T. Rep. 820; (1893) 2 Ch. 638.

Moreover, the contract is one contract, and the costs cannot be divided, and part claimed from the promoters and part from the company under sect. 204.

Finlay, Q.C., in reply.—The company have adopted the contract made with the promoters, and although they now contend that the promoters only are liable, in all their correspondence their only contention was that the event had not happened which entitled the plaintiffs to payment. The terms of the employment excluded the promoters from liability, except for out-of-pocket expenses, and we could not have sued the promoters:

Kelner v. *Barter*, 15 L. T. Rep. 213; L. Rep. 2 C. P. 174.

Cur. adv. vult.

June 16.—The following judgment was read by

CHARLES, J.—[After stating the facts as above set out his Lordship proceeded:] With reference to the first defence raised at the trial, it seems to me that these minutes and letters amount to much more than a mere adoption or ratification by the company of the terms which had been agreed upon between the promoters and the plaintiffs. Ratification there could not be, because the company was not in existence when the contract was made, and "ratification must be by an existing person, on whose behalf the contract might have been made at the time:" (see per Wills, J., and Byles, J., in *Kelner* v. *Baxter*, L. Rep. 2 C. P. 174, 185; 15 L. T. Rep. 213, 214.) But the letters and minutes constitute, in my opinion, a new contract made with the defendants upon the same terms as the former contract, the plaintiffs on the one hand relinquishing their claims on the promoters for their professional charges, if they ever had one, and accepting in lieu thereof the liability of the company; the company on the other hand agreeing to the arrangement. That this was the true position of the parties is, I think, beyond question, and the subsequent conduct of the plaintiffs and of the company confirms me in my opinion. The whole dispute, thenceforth, is confined entirely to the consideration of what was the proper time for payment. Were the plaintiffs to be paid when the canal capital was raised, or were they to wait until the railway capital was raised? It is suggested that the new contract was an improvident one—indeed, that it was beyond the powers of the company to make it. But I do not see any force in this argument. Suppose the promoters still remained liable to the plaintiffs for charges in relation to the passing of the Act, any payments made by them could be by them recovered from the company under sect. 204 of the Act, so that in the end the company would have to provide for payment of these charges. The contract, therefore, was one which did not really impose any liability on the shareholders beyond that which they must in any case have been called upon to bear. I will assume, therefore, that the promoters in the first instance were liable to pay the plaintiffs their charges in the events which happened, and that the company had made a new contract with the plaintiffs to the same effect. With regard to the position taken up by the plaintiffs that they had never agreed "not to consider the canal capital as a portion of the general undertaking," I may here say that I attach no importance to the evidence given that Mr. Higginson, as solicitor for the company, and acting on their instructions, took up a different position from this with reference to claims made by other persons against the company. His conduct, or rather the conduct of the firm, in asserting, as solicitors of the company and on the company's instructions, that the canal capital was not to be taken into account as a part of the capital raised, does not seem to me in any way to affect the rights of the firm. Their contention has throughout differed from the contention of the company upon this matter, and the fact that they represented the company's view, when dealing in their capacity of the company's solicitors with third parties, does not preclude them from asserting their own view in a contest between the company and themselves. Having dealt with the first head of defence raised, I now proceed to consider the other points relied upon. First, it is contended that the raising of the railway capital is a condition precedent to paying the plaintiffs their professional charges. Now, the terms of the contract which in my opinion have become binding on the company are to be found in the minute of the 16th Nov. 1880, and the plaintiffs' letter of 30th Dec. They were to receive the customary professional charges "in the event of an Act of Parliament being obtained and the capital raised." Apart from authority, I should have thought these words

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satisfied by the raising of the canal capital, which is undoubtedly a part of the capital authorised by the Act of 1882. I do not think the words can mean the whole capital. It is, in my opinion, enough if a substantial issue of capital has taken place. The point, however, is, I think, really settled by the two cases in the Court of Appeal, to which my attention has been called. In the first case, which was decided on the 16th Nov. 1885, the plaintiff, Mr. Allan, brought an action against the company and their solicitors to enforce an undertaking given by the solicitors to pay him the costs he had incurred in opposing the Bill of 1882. The words used were: "We undertake to pay the costs of the petitioner, Mr. Allan, in relation to his petition, out of the first capital raised." Mr. Allan had petitioned generally against the Bill, but the matters he really objected to were in connection with the proposed railway works, and the defendants contended that, under these circumstances, the words "first capital" did not include the separate canal capital. The Court, however, decided that, although the canal undertaking and capital were separate from the railway undertaking and capital, still both capitals were "capitals of the company," and that the canal capital was "capital raised" which could be applied for any purposes not inconsistent with the Act, and was money in hand out of which Mr. Allan was entitled to be paid. They accordingly gave judgment against the solicitors on their undertaking, holding that the fund out of which they had promised to pay had been created. Nothing turned upon the use of the word "first" in conjunction with the word "capital," and the decision seems decisive of the point now again raised by the company. The second case, which was decided on the 22nd Feb. 1886, was one in which the Vestry of St. Luke's were plaintiffs, and it is to the same effect. There the company had undertaken to buy some lands from the plaintiffs "in the event of the capital authorised to be issued by the Bill being wholly or in part issued," and to pay interest upon the purchase money until payment. The action was brought to recover 6000*l.* interest alleged to be due, and it was necessary to put an interpretation on the words "capital wholly or in part issued." The same attempt was made by the company as they made in Allan's case, and are making now; an attempt to show that the canal capital was a separate and distinct capital, and that the plaintiffs could not recover unless the railway capital had also been wholly or in part raised. But the Master of the Rolls, in giving judgment against the company, points out that neither the company, nor the capital authorised to be issued, is divided. The canal capital, it is true, is separated from the railway capital, but both remain parts of the same total capital of 8,100,000*l.* The other Lords Justices concurred in this view. It may indeed be said that in the present case the words "wholly or in part" are wanting, and Lindley, L.J., no doubt does rely in his judgment on the use of the words "in part." But the principle of the decision nevertheless is, in my judgment, entirely applicable. Upon authority then, as well as apart from it, I decide that the event has happened which entitles the plaintiffs to be paid. Now it is alleged that the plaintiffs' claim is barred by the Statute of Limitations, and, if it be a simple contract debt, it is so barred, unless there has been within six years an acknowledgment in writing in such terms as to justify me in holding that a new promise to pay was made. "There must," said Mellish, L.J., in *Re Mitchell's Claim* (25 L. T. Rep. at p. 321; L. Rep. 6 Ch. at p. 828), "be one of three things to take the case out of the statute. Either there must be an acknowledgment of the debt from which a promise to pay is to be implied; or, secondly, there must be an unconditional promise to pay the debt; or, thirdly, there must be a conditional promise to pay the debt, and evidence that the condition has been performed." Mr. Finlay, for the plaintiffs, insisted that the letters of the 4th Jan. 1884 and the 13th June 1885, from the secretary of the company to the plaintiffs, were sufficient acknowledgments. In the former letter, while sending a cheque on account in response to the plaintiffs' request "without prejudice," he says: "My directors wish it to be distinctly understood by you that no application for any further payment can be entertained until your outstanding bills of costs have been delivered to the company for their examination and consideration." This condition was afterwards performed, and thus, it was said I think rightly, the case was brought within the third rule laid down by Mellish, L.J. Again, on the 13th June 1885, in answer to another request for a payment on account, the secretary writes: "I am instructed to say that the board cannot entertain your application for a further payment on account until the taxation of your several bills of costs has been completed." I think, from the language of this letter, written when the bills were in course of taxation, I ought to infer a promise to pay the bills of costs when taxed. It was urged that at that time there was a divergence of view as to whether the capital had been raised in such a sense as to entitle the plaintiffs to be paid, and the chairman of the company stated that the reference of the bills to taxation was merely to ascertain what liability might some day fall on the railway capital. But even granting that this was the motive for taxation, and further assuming, as no doubt the fact was, that a dispute was existing as to the time for payment of the debt, the letter still appears to me sufficiently to acknowledge its existence to take the case out of the operation of the statute. There is another mode in which the plaintiffs sought to meet this defence. They contended that the debt they were suing for was due to them under sect. 204 of the statute, and that the period of limitation was twenty years. And if they really are entitled to sue by virtue of that section, they would, I think, be clearly right. Their claim, then, would be for "debt on statute." But it has been held that such a section applies only to the promoters of the Act, and not to solicitors employed for reward by them: (*Wyatt* v. *The Metropolitan Board of Works*, 11 C. B. N. S. 744.) This was admitted by the plaintiffs, but they said that they were not employed for reward by the promoters, and that for their professional charges they had no paymaster other than the company. If this be the true view of the contract with the promoters, they could, I think, maintain an action on sect. 204: (see *Re Skegness and St. Leonards Tramways Company*, 60 L. T. Rep. 406; 41 Ch. Div. 215, and especially the observations of Bowen, L.J.

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at p. 241, 41 Ch. Div.) In whichever way, therefore, the matter is regarded, the defence of the Statute of Limitations fails. If the promoters were responsible for these charges in case the Act passed, then the statute would apply; but it is met by the acknowledgments in writing to which I have referred. If, on the other hand, they were only responsible for costs out of pocket, then reliance can be placed on sect. 204, and the period of limitation has not yet run out. For the reasons given I think all the defences raised fail, and I give my judgment accordingly for the plaintiffs with costs. The amount must be ascertained by taxation, and, when ascertained, I order by consent that it be paid to the joint account of the plaintiffs and defendants.

Judgment for the plaintiffs.

Solicitor for the plaintiffs, *E. Rushworth Keele.*

Solicitors for the defendants, *Hollams, Sons, Coward,* and *Hawksley.*

Thursday, July 19.

(Before Mathew and Day, JJ.)

De Peyrecave *v.* Nicholson. (*a*)

Practice—Equitable execution — Appointment of receiver at instance of judgment creditor—Personal estate of debtor—Jurisdiction of court to order sale of same.

When at the instance of a judgment creditor a receiver has been appointed by way of equitable execution of the goods and chattels of the debtor, the Court has no jurisdiction to order a sale of such goods and chattels to satisfy the debt.

The decision of Stirling, J., in Flagg *v.* Prentice (ubi inf.) *followed.*

Appeal by the plaintiff from an order made by Bruce, J., at chambers, refusing to order a sale of certain furniture on the application of the plaintiff, a judgment creditor, who had been appointed receiver by way of equitable execution.

The plaintiff had recovered a judgment against the defendant for a sum of about 24*l.* and costs in respect of rent. The defendant had gone to America after this judgment was obtained, leaving within the jurisdiction some furniture which she had warehoused.

The plaintiff, having obtained his judgment, applied *ex parte* at chambers for, and obtained from Grantham, J., an order appointing him receiver of the furniture, with liberty to apply. The order appointing the plaintiff receiver was served upon the warehouseman, who had a lien upon the furniture for his warehouse charges.

The plaintiff afterwards took out a summons for leave to sell the furniture, but Bruce, J. made no order upon this summons, on the ground that a receiver ought not to have been appointed, there being no impediment to legal execution.

The plaintiff appealed.

Pyke, Q.C. (*E. J. Davis* with him) for the plaintiff.—We discovered that this furniture was warehoused in the defendant's name, and, as the warehouseman had a lien upon it for his charges, our only course was to go and ask for a receiver, and an order for a receiver was made. We were then obliged to go before the judge at chambers and ask for a sale of the furniture, but Bruce, J. took the view that a receiver ought not to have been appointed at all, but that the sheriff ought to have gone in. We submit this view was wrong, and that the order appointing a receiver was rightly made. [He was stopped.]

H. A. Forman for the defendant.—The first order for the appointment of the plaintiff as receiver was wrong and was improperly made, as there was no real obstacle to the sheriff going in and seizing. Under the statutes there is no power given to order a sale of goods and chattels, even though a receiver has been appointed by way of equitable execution. By the practice prevailing in the Court of Chancery there was power to appoint a receiver, but before the 1 & 2 Vict. c. 110, there was no power in the court to order a sale, whether of lands or goods, when a receiver had been appointed. But by sect. 13 of 1 & 2 Vict. c. 110, a judgment when entered up was made to operate as a charge upon the debtor's lands, and by that Act, combined with sects. 1 and 4 of the 27 & 28 Vict. c. 112, a judgment creditor to whom land was actually delivered in execution—as by the appointment of a receiver—was entitled to obtain from the Court of Chancery a summary order for the sale of such lands, and the court was given power to order such sale. These statutes had reference solely to lands, and did not give any power to declare a charge or order a sale of goods and chattels, and there is no corresponding enactment applicable to the debtor's interests in personal estate. Moreover, the decision of Stirling, J., in the recent case of *Flegg* v. *Prentice* (67 L. T. Rep. 107; (1892) 2 Ch. 428) is precisely conclusive of the present point, as showing that the court has no jurisdiction to order a sale of goods and chattels in such a case as this. The head-note in that case is, that "the court has no jurisdiction to make a declaration of charge upon a judgment debtor's reversionary personalty in favour of a judgment creditor who has got himself appointed receiver of the property." As there was no power and no remedy before the 1 & 2 Vict. c. 110, with regard to lands, so there is no power and no remedy now with regard to goods and chattels. Even with regard to the power to appoint a receiver by way of equitable execution, the court has no more power now under the Judicature Act than it had before that Act, and this is shown by the two recent cases in the Court of Appeal, the cases of *Holmes* v. *Millage* (68 L.T. Rep. 205; (1893) 1 Q.B. 551); and *Harris* v. *Beauchamp Brothers* (70 L. T. Rep. 636; (1894) 1 Q.B. 801). If the judgment creditor applies for the appointment of a receiver, then he has chosen his remedy, and he has no power to apply further for a sale. Here he was not even entitled to apply for a receiver:

The Manchester and Liverpool District Banking Company Limited v. *Parkinson,* 22 Q. B. Div. 173.

Under the circumstances this appeal cannot succeed, as there is no power in the court to make an order for sale.

R. G. Glenn for the warehouseman.

Pyke, Q.C. in reply.—The reason why the sheriff did not go in and seize was because the cases show that the sheriff cannot go in and seize when there is a lien on the goods. Assuming, then, that the sheriff cannot go in, is the only remedy of the judgment creditor to get a receiver-

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

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ship order without an order for sale? If there be no power of sale, the receivership order would in most cases be useless. [DAY, J.—It seems that under the decision of Stirling, J., in *Flegg* v. *Prentice* (*ubi sup.*), you cannot sell personal property under an order for a receiver.] I rely on some dicta of Lord Esher, M.R. in *Levasseur* v. *Mason and Barry* (64 L. T. Rep. 761; (1891) 2 Q. B. 73), as showing that there may be a sale.

The COURT (Mathew and Day, JJ.) held, on the authority of *Flegg* v. *Prentice* (*ubi sup.*), that there was no jurisdiction to order a sale of goods and chattels, notwithstanding that a receiver had been appointed by way of equitable execution, and they dismissed the appeal.

Appeal dismissed.

Solicitors for the plaintiff, *Easton* and *Cargill*.
Solicitors for the defendant, *Collyer* and *Collyer*.
Solicitor for the warehouseman, *G. Tilling*.

Aug. 8, 9, *and* 10.

(Before HAWKINS and LAWRANCE, JJ.)

GUILFORD *v.* LAMBETH. (*a*)

Practice—County Court—Action of contract in High Court — Counter-claim for unliquidated damages — Jurisdiction to remit action and counter-claim to County Court—County Courts Act 1888 (51 & 52 *Vict. c.* 43), *s.* 65.

Where, in an action of contract which may be remitted to a County Court under sect. 65 *of the County Courts Act* 1888, *a counter-claim for unliquidated damages is put in, the court has no power under the section to remit to the County Court the action, including such counter-claim, where the counter-claim is within the jurisdiction of the County Court.*

Upon an appeal to the court from an order of a judge at chambers affirming an order of a master remitting an action to the County Court, an objection was taken that, after the master had made the order, but before the judge had affirmed the order, a counter-claim for unliquidated damages had been put in, and that therefore there was no jurisdiction to remit the action by reason of such counter-claim, although such counter-claim had not been put in when the master's order was made, and the objection was not called to the attention of the judge.

Held, that it was sufficient that the master had jurisdiction to make the order, and that it was now too late to take the objection, as it had not been taken before either the master or the judge; but that, even if the counter-claim for unliquidated damages had been before the master, he would have had jurisdiction to remit the action with such counter-claim, the latter being within the jurisdiction of the County Court.

Mackay *v.* Bannister (*ubi inf.*) *distinguished.*

APPEAL by the defendant from an order made by Mathew, J., at chambers, affirming an order of a master, who had ordered the action to be remitted for trial to the County Court of Northampton.

The action was brought in the High Court to recover the sum of 32*l.*, being the price of a horse sold by the plaintiff to the defendant. A summons was taken out by the plaintiff for judgment under Order XIV., but the defendant got leave to defend, and the plaintiff then applied for an order to have the action remitted for trial to a County Court.

On the 29th June 1894 an order was made by the master to remit the action to the County Court. On the 2nd July notice of appeal to the judge was given by the defendant. On the 3rd July the defendant put in a defence and counter-claim. The defence alleged that the horse was sold with a warranty that it was quiet, and that there was a breach of that warranty, and the counter-claim set up that the horse kicked the defendant's van and harness and caused damage thereto, and gave considerable annoyance. Particulars of damage were given by the defendant at 22*l.* 11*s.*, and he counter-claimed for 35*l.*

On the 4th July the appeal was heard by the judge at chambers and dismissed.

When the application was brought before the master on the 29th June, no defence or counter-claim had been delivered, and although the defendant opposed the application he raised no objection as to the want of jurisdiction to make the order. When the appeal was before the judge, although a counter-claim had then been delivered, the attention of the judge was not called to the fact that there was a counter-claim, and no objection was taken to the jurisdiction.

The defendant now appealed, on the ground that, by reason of there being a counter-claim for unliquidated damages, there was no jurisdiction to remit the action.

Sect. 65 of the County Courts Act 1888 (51 & 52 Vict. c. 43) provides:

> Where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed one hundred pounds, or where such claim, though it originally exceeded one hundred pounds, is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding one hundred pounds, it shall be lawful for either party to the action at any time, if the whole or part of the demand of the plaintiff be contested, to apply to a judge of the High Court at chambers, to order such action to be tried in any court in which the action might have been commenced, or in any court convenient thereto; and on the hearing of the application the judge shall, unless there is good cause to the contrary, order such action to be tried accordingly . . . and the action and all proceedings therein shall be tried and taken in such court as if the action had been originally commenced therein.

Hume Williams for the defendant.—The question is whether or not the judge had jurisdiction to make the order. I submit he had no jurisdiction to make the order, on the ground that in his defence the defendant had put in a counter-claim for unliquidated damages. There is a case exactly in point showing that where there is a counter-claim for unliquidated damages there is no jurisdiction to send the action down to the County Court. This was the case of *Mackay* v. *Bannister* (53 L. T. Rep. 567; 16 Q. B. Div. 174), decided in the year 1885, on the 26th section of the Act 19 & 20 Vict. c. 108, a section which is almost identical in terms with sect. 65 of the County Courts Act 1888, under which the present action was remitted. The facts there are almost identical with the present case, and the judgment of Pollock, B. is strongly in my favour, as showing

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

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that a counter-claim for unliquidated damages cannot be remitted to the County Court. So, in the recent case of *Bassett* v. *Tong* (71 L. T. Rep. 16; (1894) 2 Q. B. 332), it was held, upon the construction of the 65th section of the Act of 1888, that there is no power to remit an action for unliquidated damages to a County Court, even though the writ be indorsed with a specified sum. That case referred to the claim in the action; whereas this refers to the counter-claim, and if there be no power to refer a claim for unliquidated damages, much less is there a power to refer a counter-claim for unliquidated damages. On looking carefully at sect. 26 of the Act of 1856, on which *Mackay* v. *Bannister* (*ubi sup.*) was decided, and sect. 65 of the present Act, I can find no distinction whatever so far as the present question is concerned. In the later Act the jurisdiction is merely enlarged to 100*l*. The present case, therefore, is practically on the same section as that on which *Mackay* v. *Bannister* was decided, and ought therefore to follow the same rule.

Morton Smith for the plaintiff.—This point as to the jurisdiction was not taken before either the master or judge, and cannot be taken now. It could not have been taken before the master, as no counter-claim had then been put in. *Mackay* v. *Bannister* (*ubi sup.*) does not apply here, for this reason: There the action could only be sent down after issue joined, and what was sent down for trial under sect. 26 of the Act of 1856 was the issue only; whereas under the Act of 1867 and sect. 65 of the Act of 1888, what is sent down is the action, that is, the action as shown indorsed on the writ. The master had jurisdiction, and you cannot deprive him of jurisdiction by anything which took place afterwards. [HAWKINS, J.—Suppose this counter-claim had been delivered before the application came before the master, would he have had jurisdiction to send the action down?] Yes, for all the master has to regard is the writ. The action, from the time the master made the order, became a County Court action, and that is the distinction between the two Acts, the 19 & 20 Vict. c. 108, s. 26, under which the issues only are sent down, and sect. 65 of the present Act, under which the action is sent down. It is true that, in the case of *Reg.* v. *The Judge of the City of London Court* (64 L. T. Rep. 869; (1891) 2 Q. B. 71) it was held that, where an action had been discontinued, a counter-claim in the action could not be sent down under sect. 65. That case does not apply here, as there the action itself had been discontinued, and there was nothing left to try but the counter-claim. The distinction between sect. 26 of the 19 & 20 Vict. c. 108, and sect. 65 of the Act of 1888 is this, that when sect. 26 of the former Act was passed there was no power to counter-claim, whereas when sect. 65 of the present Act was passed there was power to counter-claim, and that is the reason why *Mackay* v. *Bannister* (*ubi sup.*) was so decided. The ground upon which the decision was based in that case was, that no counter-claims were in existence when the Act of 1856 was passed, and that therefore it could not be contemplated that counter-claims, when they came into existence, should be remitted under that section. Whatever the plaintiff puts on his writ is the deciding point as to the power to send down to the County Court:

Percival v. *Pedley*, 18 Q. B. Div. 635.

What the master has to regard is the writ only, and the indorsement on the writ, and he has or has not jurisdiction to remit the action according to the indorsement on the writ. If, according to the indorsement on the writ, he has jurisdiction to remit, then this jurisdiction cannot be taken away by anything that takes place afterwards, such as the delivery of a counter-claim. When this case came before the master there was the writ only and no counter-claim, and when the case came before the judge the action was then really a County Court action; it was in fact a County Court action on the 3rd July, when the counter-claim was delivered, as sect. 65 makes the action a County Court action from the time the order to remit is made. Sect. 65 in this respect follows the practice under the Act of 1867, and not sect. 26 of the Act of 1856. I submit the master and judge were both right, and the case is a proper one to be sent down to the County Court.

Hume Williams in reply.—[HAWKINS, J.—It is obvious the master was right.] That is so, but I submit the question is not whether the master was right, but whether the judge was right, and whether his jurisdiction was not taken away by the delivery of the counter-claim before the case came before the judge. When the judge made the order he had no jurisdiction to make it, because there was then a counter-claim for unliquidated damages, and whether this counter-claim was or was not brought to his attention makes no difference.

Cur. adv. vult.

Aug. 10.—The judgment of the Court (Hawkins and Lawrance, JJ.) was delivered by

HAWKINS, J.—[His Lordship stated the facts and proceeded:] This application is now made to us under somewhat peculiar circumstances. When the order was made by the master no pleading at all had been delivered by the defendant; no defence or counter-claim put in; and there can be no doubt that when the master made the order he had jurisdiction to make it. The application was opposed before the master, but not on the ground that there was a counter-claim, and, no objection of that kind being made, the master made the order. When the case went before Mathew, J. on the 4th July, his attention was never called to any such objection, and the result was that he dismissed the appeal. Now here, upon this application, we are told that we ought to reverse the master's order and the judge's order, on the ground that, after the master's order was made and before the judge's order was made, a defence had been delivered containing a counter-claim for damages, as a result of the breach of warranty. It was said that, upon the authority of *Mackay* v. *Bannister* (*ubi sup.*), there was no power to send down to the County Court a case of this kind containing a counter-claim for damages, and no jurisdiction in the County Court to entertain such an action with such pleadings. I thought during the argument, and I still think, that we have no right to entertain an appeal upon an objection that was not before either the master or the judge. I am very much of the opinion that this is not in the nature of a rehearing; if it be a rehearing, I should have thought it a rehearing only of the matter that was before the master and the judge; but to let them make

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an order in absolute ignorance that any objection as to their want of jurisdiction existed, and then take the objection before us, would seem to me to be irregular, as I think we ought not to treat this as a new or fresh application. Before Mathew, J. the point was never raised, but the point now raised before us is altogether different from the objection before the master and the judge. The master, therefore, having on the 29th June made his order at a time when as a matter of fact no counter-claim existed, made an order which he was entitled to make. On the 29th June, therefore, there was a good order made; against that good order there was an appeal, and no objection of the kind was made before the judge at chambers, and upon this simple ground I think the appeal ought to be dismissed. It was said, however, that the case of *Mackay* v. *Bannister* (*ubi sup.*) was exactly in point. That case was decided in 1885, and the question was whether a counter-claim for unliquidated damages could be sent down for trial under sect. 26 of the 19 & 20 Vict. c. 108, and it was held that it could not. When that statute was passed there was no power to set up counter-claims, and therefore that section could not have contemplated the sending down of counter-claims to the County Court for trial, as such counter-claims were not known to the law. When we read the judgment of Pollock, B. in that case, we see that the *ratio decidendi* was that the order remitting the case to the County Court was originally made under the 19 & 20 Vict. c. 108, sect. 26, which was passed long before counter-claims were admissible at all, and Pollock, B. said there that it could not be supposed that it was intended to extend sect. 26 of that Act to counter-claims which were unknown when the Act was passed. But since that time counter-claims have from time to time often been tried in County Courts, and by sects. 89 and 90 of the Judicature Act 1873 counter-claims in County Courts are distinctly recognised. [His Lordship then read those sections.] The latter of those sections is a provision which very much affects the matter we have to determine. Then there is the 18th section of the Judicature Act 1884: and finally we have sect. 65 of the County Courts Act 1888. [His Lordship then read those sections and proceeded:] In this case undoubtedly the counter-claim itself, which actually was delivered on the 3rd July, was within the jurisdiction of the County Court, because it was a counter-claim for 35*l.* damages resulting from the breach of warranty. There was, therefore, a claim over which the County Court had jurisdiction, and a counter-claim over which the County Court had jurisdiction, and if the action had been brought in a County Court it could have been tried there. What is there, then, to prevent such a case as this, both claim and counter-claim, from being sent down for trial in a County Court, notwithstanding the case of *Mackay* v. *Bannister* (*ubi sup.*)? When the Legislature passed this Act of 1888, providing that actions might be sent down under sect. 65 to the County Court, they evidently contemplated that such actions should be sent down with such pleadings as are allowed in the High Court. I cannot myself see the objection to it, and the case of *Mackay* v. *Bannister* does not militate against this view of the matter, for that case was, as I have said, decided under very special circumstances under sect. 26 of the County Courts Act 1856, at a time when no counter-claims at all were allowed, as Pollock, B. says in his judgment; and that was the ground upon which that case was decided. Looking at the reason and sense of the matter, even supposing that both the master and the judge had had this objection raised before them, they would have come to the same determination, and as the claim was within the jurisdiction of the County Court, and the counter-claim also within the jurisdiction of the County Court, I think they would have done what I think they ought to have done, namely, they would have sent the counter-claim as well as the claim down to the County Court. But even supposing I am wrong on this point, the proper course was to move to have the order set aside, or to have the cause sent back on the ground that there was a counter-claim. The order was a good one until the counter-claim was delivered. When it comes before us a new ground of objection altogether is taken, but I think it is now too late to set up an objection to the order made by the master, which was made by him with full jurisdiction. For these reasons I think this appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors for the plaintiff, *Pitman* and *Sons*, for *C. W. Lane*, Kettering.

Solicitor for the defendant, *H. R. Newson.*

Monday, April 23.

(Before Lord COLERIDGE, C.J., WRIGHT and KENNEDY, JJ.)

UNITED ALKALI COMPANY (apps.) v. SIMPSON (resp.). (*a*)

Harbours, ports, and navigable rivers—Depositing rubbish on shore within sect. 11 *of* 54 *Geo.* 3, *c.* 159.

By sect. 11 *of* 54 *Geo.* 3, *c.* 159, *it is enacted that, if the owner or master of a ship or vessel, &c., or any person working any quarry, mine, or pit near to the sea or any harbour or navigable river, "or any person or persons whatsoever" shall cast, throw, &c., rubbish or filth, &c., into such harbour or navigable river so as to tend to the injury or obstruction thereof, "or in any place or situation on shore where the same shall be liable to be washed into" such harbour or river, he shall forfeit the sum of* 10*l.*

The appellant company, in the course of their business as alkali manufacturers, caused a quantity of waste matter, in the form of a very finely divided powder, which was held in suspension by water, to be conveyed by means of a drain into a brook, whence it was carried into a navigable river.

Held, that they were rightly convicted under the above Act; that they came within the meaning of the words "or any other person or persons whatsoever"; that the matter deposited was "rubbish or filth" within sect. 11 *of the above-mentioned Act; that what they had done was a "casting, throwing, or emptying" on shore within the said section, and that it was not necessary in the last case for the prosecution to show that the act complained of "tended to the injury or obstruction of the navigation."*

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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THIS case, owing to its being one of considerable importance, was ordered to be argued before a court consisting of the above three judges. It was an appeal on a case stated by the justices sitting in petty sessions at Widnes in the county of Lancaster. The facts of the case will fully appear from the following stated case:—

1. At a petty session, holden at Widnes (in and for the division of Prescot), in the county of Lancaster, on the 28th Sept. 1893 and the following day, an information, preferred by Francis Odell Simpson (hereinafter called the respondent) against the United Alkali Company Limited (hereinafter called the appellant company), under sect. 11 of the statute 54 Geo. 3, c. 159, charging that the appellant company, the said United Alkali Company Limited, on the 16th May 1893, at West Bank, Widnes, in the county aforesaid, did cast, throw, and empty, or cause to be cast, thrown, and emptied, certain rubbish, to wit, alkali waste, in a place or situation on shore at or near the chemical manufacturing works belonging to them, and known as Golding and Davies' works, where the same was liable to be washed into the river Mersey by tides or floods, contrary to the statute in such case made and provided, was heard and determined by us (counsel for the said parties respectively being then present), and upon such hearing the appellant company was duly convicted before us of the said offence, and we adjudged that the appellant company for their said offence should forfeit and pay the sum of 10*l.*

[Two other informations were also preferred against the appellant company under the same section, which were identical with the above information, except as to date and name of the works. The justices also convicted on these further informations, and at the request of the appellant company stated and signed the following case.]

5. The following facts were proved and found: That the said informations were laid by the respondent on behalf of the acting conservator of the Commissioners for the Conservancy of the River Mersey.

6. That the said Golding and Davies' and Hall and Shaw's works belong to and are the property of the appellant company, who there carry on the business of alkali manufacturers. In the course of such manufacture, a refuse or waste is produced known as alkali waste. This waste product, to the extent of many thousand tons in the year, was formerly placed in heaps or mounds in the nearest available space.

7. That partly to prevent the necessity of depositing the alkali waste, and partly in order to utilise it by extracting the sulphur from it, the appellant company have lately put in use at the said works, in the course of their manufacture there, a certain chemical process known to the trade as the "chance process." Also they have there treated by the same process quantities of alkali waste procured from other works of the company, and brought to the works aforesaid for that purpose.

8. That the said "chance process" is a method of treating alkali waste (after it has been mixed with water) with carbonic acid gas, whereby sulphuretted hydrogen gas is evolved in closed tanks and utilised for the production of sulphur, and the residue is left in the said tanks in the form of a liquid, containing in suspension solid matters in a finely divided state, which, when deposited, form a mud, which is known in the trade as "chance mud."

9. That the said solid matters in the said residue consist of about 87 per cent. of carbonate of lime in a very finely divided condition, and about 13 per cent. of other substances also in a finely divided condition. These solid matters were kept in suspension in the water while in the tanks by means of agitators revolved slowly inside the tanks for that purpose.

10. That the appellant company did, on the said 16th May 1893, and did for some time past, discharge the said residue from the tanks in their said works through 4-inch pipes, which carried it in each case into a sewer belonging to the works, where it would mix with any other drainage of the works, and that by means of these sewers it was discharged into a natural brook known as the Marsh brook, at a point of 500 yards or thereabouts, above where the said brook flows into the river Mersey.

11. It was admitted by the appellants that the solid matter of the "chance mud" thus discharged from the tanks of the said works in each week would, if dried, have weighed 567 tons.

12. That the said Marsh brook is not the property of the appellant company. The said brook is timbered from the point where it enters the said river Mersey up to a point above the said works. The said brook serves as a drain to a number of works and manufactories other than the said works, and to carry away surface water from a considerable district. The said brook is tidal up to and beyond the point where the said sewers from the said works discharge into the brook.

13. It was proved, and we find as a fact, that part of the solid matter in suspension thus discharged by the appellants from the said works into the said brook became deposited in the brook from the point of the outfall of the sewers into the brook downwards. Also that the remainder of that solid matter was carried down the brook and into the river Mersey by the tide or by other water flowing down the brook.

14. It was also proved that part of the said solid matter, carried in suspension as aforesaid, was deposited on the shore of the Mersey near the outfall of the Marsh brook, between high and low water marks.

15. The 11th section of the statute 54 Geo. 3, c. 159, is as follows:

And be it further enacted that, if the owner, master, or other person having the charge or command of any private ship of war, transport, or other private or merchant ship or vessel, lighter, barge, boat, or other craft whatsoever, or any person working any quarry, mine, or pit near to the sea or to any such harbour, haven, or navigable river as aforesaid, or any other person or persons whatsoever, shall cast, throw, empty, or unlade, or cause or procure to be cast, thrown, emptied, or unladen either from or out of any such ship or vessel, lighter, barge, boat, or other craft, or from the shore, any ballast, stone, slate, gravel, earth, rubbish, wreck, or filth, into any of such ports, roads, roadsteads, harbours, havens, or navigable rivers of this kingdom as aforesaid, so as to tend to the injury or obstruction of the navigation thereof, or in any place or situation on shore where the same shall be liable to be washed into the sea or into any such ports, roads, roadsteads, harbours, havens, or navigable rivers, either by ordinary

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or high tides, or by storms or land floods, all and every such person and persons so offending shall for every such offence forfeit and pay the sum of 10*l.* over and besides all expenses which may be incurred in removing to a proper place the said matter which may have been deposited contrary to the provisions of this Act, such expenses to be recoverable in such manner and with such power of commitment on nonpayment thereof, as in cases of penalties or forfeitures under this Act. Provided that nothing herein contained shall extend or be construed to extend to the casting out, unloading, or throwing out of any ship or vessel, lighter, barge, boat, or other craft, any stones, rocks, bricks, lime, or other materials used or to be used in or towards the building, repairing, or keeping in repair any quay, pier, wharf, wear, bridge, or other building, or the banks or sides of any port, harbour, haven, channel, or navigable river, or any materials for repairing any highway, anything herein contained to the contrary thereof in anywise notwithstanding.

16. The conviction of the said appellant company upon the said three first above-mentioned informations was opposed on the following grounds:—

(*a*) That the appellant company are not persons within the meaning of the said 11th section of said statute 54 Geo. 3, c. 159, because the words in the said section, "or any other person or persons whatsoever," are only to be taken as applying to persons *ejusdem generis* with the classes named in the said section immediately before the words "or any other person or persons whatsoever," and that we ought not to have convicted the appellant company, who are alkali manufacturers, and do not fall within any of the the classes named in the said section.

(*b*) That the said residue discharged as aforesaid was not "ballast, stone, gravel, earth, rubbish, wreck, or filth" within the meaning of the said 11th section of the said statute of 54 Geo. 3, c. 159, and that we ought not to have convicted the appellant company thereunder.

(*c*) That the evidence produced before us as aforesaid did not disclose any case of "casting, throwing, or emptying on shore where the same was liable to be washed into the sea or into any ports, roads, roadsteads, havens, or navigable rivers," inasmuch as it was proved that the point at which the said residue was discharged into the Marsh brook was 500 yards or thereabouts above where the said brook flows into the river Mersey.

(*d*) That the acts complained of do not constitute an offence under the 11th section of 54 Geo. 3, c. 159, unless and until it be shown that such acts were committed "so as to tend to the injury or obstruction of the navigation" of the river, and that, inasmuch as the respondent had not alleged in the said informations, and had not proved that there was any injury or obstruction to the navigation of the said river Mersey, caused by the acts aforesaid of the appellant company, we ought not to have convicted the appellant company, and that they had committed no offence under the said sect. 11.

17. We, the said justices, however, being of the opinion that the objections raised in the matter were not good in law, gave our determinations against the appellant company in manner before stated.

18. The questions of law arising on the above statement for the opinion of this court therefore are:—

(1.) Whether the appellant company are included within the meaning of the words "or any other person or persons whatsoever" contained in the said 11th section of the statute 54 Geo. 3, c. 159.

(2.) Whether the said residue or the said solid matters contained in the said residue discharged as aforesaid from the said works, could properly be found by us to be "earth, rubbish, or filth" within the meaning of the said 11th section of the said statute.

(3.) Whether the acts of the appellant company above described, in getting rid of the said residue and the said solid matters contained therein, could properly be found by us to amount to a "casting, throwing, or emptying on shore" within the meaning of the said 11th section of the said statute 54 Geo. 3, c. 159.

(4.) Whether, inasmuch as the respondent failed to allege and show that the discharge of the said residue as aforesaid by the appellant company was such as to "tend to the injury or obstruction of the navigation" of the said river Mersey, the appellant company were rightly convicted by us on the said informations as aforesaid.

19. If the court shall be of opinion that the said convictions were legally and properly made, and the appellant company liable as aforesaid, then the said convictions are to stand; but if the court should be of opinion to the contrary, then the said convictions are to be reversed.

J. Walton, Q.C. (*Deacon* with him) appeared on behalf of the appellant company, and argued as follows:—The statute 54 Geo. 3, c. 159, is an Act for the preservation and protection of rivers in navigable parts, and also for the protection of Her Majesty's moorings. Sect. 11 applies to three classes of persons: (1) the owners, masters, or persons in charge of a vessel, (2) persons working quarries or mines near a navigable river, and (3) "any other person or persons whatsoever." It is submitted that the appellant company cannot be taken to be included in the last class, and clearly they are not in the first or second. The well-known rule of *ejusdem generis* must be applied here, that general words following an enumeration of particulars are to have their generality limited by reference to the preceding particular enumeration. In the case of *Reg.* v. *Cleworth* (9 L. T. Rep. N. S. 682; 4 B. & S. 927), which was an action brought under the Sunday Act (29 Car. 2, c. 7), it was decided that a farmer could not be brought within the Act, though a farm labourer would have been. If the words "any other person or persons whatsoever" were to be held to extend to everybody in the world, then there would be no need to make use of such particular words as we find in sect. 11. The expression "any other person," &c., can only refer to persons such as masters of ships or persons working quarries, and it is confined to such persons. Chemical workers who produce in their works deposit that floats away in water, such as we find in this case, cannot be included in the section. [Lord Coleridge, C.J.—Do they not cast, or cause or procure to be cast, rubbish within the meaning of the section?] It is submitted that they do not. The powder in suspension cannot be called "rubbish" within the section. [Lord Coleridge, C.J.—Is it not filth?] No; it is a very finely divided chalky matter suspended in the water, consisting very nearly entirely of

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carbonate of lime. It is not dirty, nor is there any offensive smell attached to it. There is no depositing of this residue on the banks. No doubt there is a considerable amount conveyed into the river, but this is carried away by the tide. If we look at the Rivers Pollution Act 1876 (39 & 40 Vict. c. 75) we find it defined in sect. 20 that "solid matter," which is provided against, as "rubbish" is in this Act, "shall not include particles of matter in suspension in water." The justices do not find that this "tends to the injury or obstruction of the navigation" of the river. It is submitted that it is necessary to show such a tendency to injure or obstruct, for the whole gist of the section is to prevent injury to the navigation of the river. The natural construction of the words "so as to tend to the injury or obstruction of the navigation thereof" requires that they should be read as affecting the whole of the section, and are equally applicable to the latter part beginning with the words "or in any place or situation on shore."

Sir *Henry James*, Q.C. (*Carver* with him) appeared *contrà* on behalf of the respondents.—The original statute dealing with this matter was 19 Geo. 2, c. 22. In the preamble to the statute 54 Geo. 3, c. 159, it is recited that, whereas the former Act was not adequate for the purposes for which it was made, it should be extended so as to give conservators of rivers and harbours further powers. The latter part of sect. 11 in the Act of Geo. 3 is intended to remedy the limitations of power of the Act of Geo. 2, provided for in sect. 7 of that Act. As to the words "other person or persons whatsoever," it is submitted that alkali workers are included in these words. [Lord Coleridge, C.J.—We all think you are right as regards that.] Then as to whether what the appellants have done can be described as coming within the provisions of the Act, it is admitted that every week some 567 tons of the residue that is left after treating the alkali is deposited in the drains and brooks, and this, either as a solid or in solution, is carried down into the river. This amounts to an offence under the Act. This residue is certainly "rubbish and filth," and it was the intention of the Legislature to include such matter as this within the Act. [Lord Coleridge, C.J.—We agree with you on this point.] There has also been a casting, emptying, or throwing "on a place or situation or shore." It is not less a casting because the rubbish is deposited in such a place that the water of the river carries it into the harbour. It makes no difference if it is carried there in solid matter by cart, or, firstly mixed with water, is carried in a pipe and deposited there. [Wright, J.—If they conveyed it there by means of pumping no one could deny that they thereby cast it there.] The important point is as to the words "so as to tend to the injury or obstruction of the navigation." It is submitted that the offence is complete under the second part of sect. 11, before the rubbish deposited reaches the water. The mere placing it on shore where it is liable to be washed into the sea, &c., constitutes the offence; therefore it is not necessary to show that such placing tends to the injury or obstruction of the navigation. In both the 73rd section of the Harbours, Docks, and Piers Clauses Act 1847 (10 Vict. c. 27) and sect. 101 of the Mersey Dock Acts Consolidation Act 1858 (21 & 22 Vict. c. xcii.), which sections deal with throwing rubbish into the harbour or dock, we find that the offence is committed by the mere depositing. The words in sect. 11 of the Act of Geo. 3 are limited, whereas in sect. 7 of the Act of Geo. 2 they are extended to the whole clause. The proper construction of sect. 11 is to take the words as they are found, and it is submitted that, if the rubbish deposited is liable to be washed into the sea, then an offence within the section has been committed.

Lord Coleridge, C.J.—In this case a very important question has been raised before us upon an information which was laid before the justices of Widnes, as to whether a particular act done, or a particular state of things produced, by the United Alkali Company, is or is not within the scope of the Act of Geo. 3, and whether the magistrates were right in convicting the appellants. It is necessary to mention the fact that the statute of Geo. 3 is an expansion of the Act of Geo. 2, but they both deal with the same kind of offence. The kind of offence pointed at in the earlier Act, and in the first part of sect. 11 of the Act of Geo. 3, is with regard to persons who are mentioned there, practically speaking, owners of ships, or masters of ships, and persons who are the owners or workers of mines, throwing the deposit or refuse that they get from their ships, the ballast of their ships, or the refuse of their mines, so as to impede or obstruct the navigation of any navigable river. It is said that what has been done here is within the second statute. Now, the statute of Geo. 3, it is to be observed, goes far beyond the statute of Geo. 2, and it recites in its preamble that the former Act had been found insufficient for its purpose, and that it was desirable, therefore, to increase the strength of the legislation, and to include other things within it. By the 11th section of the Act of Geo. 3 I find that it was enacted that, "if the owner, master, or other person having charge or command of any private ship of war, transport, or other private or merchant ship or vessel, lighter, barge, boat, or other craft whatsoever, or any person working any quarry, mine, or pit near to the sea or to any such harbour, haven, or navigable river as aforesaid, or any other person or persons whatsoever, shall cast, throw, empty, or unload, or cause to be cast, thrown, emptied, or unladen, either from or out of any such ship, vessel, lighter, barge, boat, or other craft, or from the shore, any ballast, stone, slate, gravel, earth, rubbish, wreck, or filth, into any of such ports, roads, roadsteads, harbours, havens, or navigable rivers of this kingdom as aforesaid, so as to tend to the injury or obstruction of the navigation thereof," certain penalties shall be incurred. That is the first part of the section, and there, in terms, it is said that what is done must be done so as to tend to the injury or obstruction of the navigation of the different forms of water mentioned therein. Then comes the second portion of the section, under which this conviction, if it is to be supported at all, must be supported: "Or in any place or situation on shore where the same shall be liable to be washed into the sea, or into any such ports, roads, roadsteads, harbours, havens, or navigable rivers, either by ordinary or high tides, or by storms or land floods, all and every such person and persons so offending shall for every such offence forfeit and pay a sum not exceeding the

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sum of 10*l*." Now, it is to be observed that in the second part of the section the words "tend to the injury or obstruction of the navigation" of the water do not re-occur. That was probably done intentionally, for it would have been perfectly easy to put the two portions of the section together, or to put the purpose for which the act was done, viz., so as to tend to the injury or obstruction of the navigation, at the end of both portions of the section. Therefore, I think the right presumption is, that it was intended to be confined to the first portion of the section, and intended not to be included in the second part of the section. We have to consider what is the true effect of the second part. Now, I am of opinion that the conviction can be supported, and that it is not necessary that an offence under the second part of the section must be committed with the intent to obstruct and injure the navigation. I should say that that is the reasonable conclusion to be gathered from the words of the Act itself, and I am unwilling to alter the words of the Act, or to alter the situation of the words so as to make the Act different from what it would be according to its most ordinary construction. In the first portion of the section it is to be observed that what is pointed at and made the subject-matter of conviction is something done by the party offending. The actual result of the act of the party offending is pointed at in that part of the section. The second part of the section points to what is done by a person said to be the person offending, but which, if done by itself, and nothing else happened, could not by any possibility come within the words of the section, and could not tend to injure or obstruct the navigation. Take the case of a man discharging ten tons of gravel within 500 yards of the shore of the sea or the banks of the navigable river, and who does no more, but leaves the gravel there. It is obvious that his act does not in itself, and may never, cause any obstruction to the navigation. But if the party accused places the gravel in a position in which the ordinary forces of nature may sweep it into the sea, or into the river, and thereby make it tend to obstruct the navigation of the sea or the river, it is obvious that he has done a thing which has made obstruction much easier, and much more likely to happen than is in accordance with the general interests of the navigation of the sea and the ports. The Legislature says, first of all, you shall not do anything that by your act tends to obstruct; and next it says, you shall not do that which, although by your act it does not tend to obstruct, makes the obstruction much more easy and much more likely to happen, and which ought, therefore, in the interests of the general public, to be prevented. That, it seems to me, gives a very good reason for the distinction between the application of the words to which I have referred to the first part of the section, and the non-application of them to the second. Therefore, it would be contrary to the very intention and meaning of the statute if you were to insist upon an intent being attached to the act in the second part of the section, which intent, in ninety-nine cases out of a hundred, cannot exist when the act is done. Another point has been raised upon which I think it better to say a word. It has been suggested that the Alkali Company are not "persons" within the Act. I think they are. We had a long discussion upon that subject, but I think they are well within the meaning of the words "any other person or persons whatsoever," even limiting those words, as I agree they ought to be limited, to persons of the same sort as the persons mentioned specifically in the Act. Other points have been raised with regard to which we intimated in the course of the arguments that we were satisfied, and upon which we stopped Sir Henry James, but which I refer to to show that I have not forgotten them. Those points I decided at the time in favour of Sir Henry James, and upon those points there is no difference between us at all. We all think that way. These convictions must therefore be affirmed.

Wright, J.—I will only add that I entirely agree upon all except the fourth point. It does seem to me that in any view sect. 11 applies to rubbish of such a kind, in such a place, and possibly in such a quantity, that it could be washed down in sufficient quantities so as to tend to do damage either to the navigation or to the port. I think that there must be some kind of limitation to the section, but that does not interfere at all with the question in the present case.

Kennedy, J.—I am of the same opinion, and for the same reasons that have already been given by the Lord Chief Justice. It seems to me that you have here got the natural English enactment which could naturally only be construed in one way. You have got nothing which would make it necessary for the purpose of what we might call workability or reasonableness to construe it in any other way. In the second half of the section you have got an offence described as "depositing," and there are provisions that what is deposited, if deposited so as to cause a danger, may have to be removed from that place to a proper place at the expense of the wrongdoer. Now, therefore, in order to test the fair meaning of the second half of this section, you must take, as it seems to me, a case in which there has been no carrying away or washing away of the deposit. In such a case how would it be possible to prove in one way or the other whether a deposit tended or not to the injury or obstruction of the navigation? It seems to me that, taking a case on sub-sect. (*d*) of paragraph 16 of the stated case, in which the stuff had been deposited merely, and the actual washing away has not taken place, it would be impossible to show that there has been a tending to the injury or obstruction of the navigation. Therefore it seems to me that the true meaning is that the section has been violated in the second part if there has been a placing of the stuff in a situation in which, on the finding of the court, it is liable to be washed into the sea or the other places described in the section.

Lord Coleridge, C.J.—I should like to add that I do not in the least differ from the qualification made by my brother Wright, J. I think that some limitation must be put upon the general words. But that does not affect this case. I do not think this is a case for costs.

Appeal dismissed.

Solicitors for the appellant company, *Wynne, Holme*, and *Wynne*, agents for *H. Forshaw* and *Hawkins*, Liverpool.

Solicitors for the respondent, *Rowcliffes, Rawle*, and *Co.*, agents for *A. T. Squarey*, Liverpool.

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PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PROBATE BUSINESS.

June 11 *and* 25.

(Before the PRESIDENT (Sir F. H. Jeune.)

In the Goods of KINCHELLA (deceased). (a)

Administration—Representative of next of Kin—Person entitled in distribution—Clearing off—Practice.

A representative of the next of kin of a deceased person must clear off persons entitled in distribution before he can obtain a grant as of right; and, where a person entitled in distribution has not been cleared off, administration to a representative of the next of kin will only be made, if at all, under sect. 73 *of the Probate Act* 1857.

MOTION for administration by the representative of a next of kin of the deceased.

Ann Kinchella died intestate, leaving an estate of 45*l.* in the Chancery Division.

At the time of her death she left, as her sole next of kin her surviving, a married daughter. She also left her surviving, a grandson, the child of a deceased child.

At the time of the application for administration, the daughter of Ann Kinchella had died, leaving a will by which she appointed a daughter to be her executrix. In this capacity the latter now applied for administration to the estate of her grandmother, Ann Kinchella. Objection was taken in the Probate Registry that, inasmuch as the grandson was personally entitled in distribution to share in the estate of Ann Kinchella, and, as the applicant claimed administration as executrix of her mother, the applicant's title being only a derivative one, she was bound to cite the grandson before she could claim a grant to Ann Kinchella's estate as of right.

Priestley for the applicant.—The registrar was wrong in refusing the grant. The applicant does not claim merely as the executrix of her mother. As a granddaughter of Ann Kinchella the applicant is in exactly the same degree of relationship as the grandson. [The PRESIDENT.—At the time of Ann Kinchella's death you had no right at all.] The applicant's mother, who was the next of kin of the deceased, was no doubt alive at the time of the deceased's death. There is, however, authority for this application:

In the Goods of Mary Carr (deceased), 16 L. T. Rep. 181; L. Rep. 1 Prob. Div. 291.

If the grandson had applied he would have obtained the grant; but it was not necessary for the applicant to cite him: (Williams on Executors, 9th ed. 375, note.) [The PRESIDENT.—My difficulty is whether the grant should not be made under sect. 73.] Although it would not be very material in this particular case, it is hoped that the court will not make the grant under sect. 73. It is important to establish the practice in such cases as this.

Cur. adv. vult.

June 25.—The PRESIDENT.—The question in this case is whether, as a matter of practice, the grant of administration should be made under sect. 73 or not, the point being whether a person entitled in distribution must be cleared off before a grant is made to the representative of the next of kin. I have inquired as to the practice at the registry, and I am informed that it has been the invariable practice to require a person entitled in distribution to be cleared off in such a case, or for a special order of the court to be obtained. The case of *In the Goods of Ann Middleton* (2 Hagg. Eccl. Rep. 60), decided in 1828, appears to me to show that a citation to the person entitled in distribution may in a particular instance be dispensed with by the court; but it shows, also, that the general practice then was to require a person directly entitled in distribution to be cited before making the grant to the representative of the next of kin. The word "preferred" was probably employed in that case to draw a distinction between the prior right to the grant, according to the practice of the court in the exercise of its discretion, and the prior right of a next of kin derived from statute. I think that, following that case, the grant might perhaps be made by the court independently of the 73rd section; but, as no question can arise as to the powers of the court under that section, it will be better to have recourse to it. I therefore grant administration to the applicant under sect. 73.

Solicitor, *W. J. Homewood.*

(a) Reported by H. DURLEY GRAZEBROOK, Esq., Barrister-at-Law.

June 11 *and* 25.

(Before the PRESIDENT (Sir F. H. Jeune.)

In the Goods of FRANZ BRIESEMANN (deceased). (a)

Will in German form—German domicile—Two Englishmen named in will to deal with property in England—Refusal of probate—Limited administration.

A domiciled German subject died in Germany, leaving a will in German form by which he requested the court of the district to appoint two persons to be his executors, and who were to have the rights and position of an unlimited general attorney of the heirs, and were to hold their powers irrevocable by the heirs. These executors, when appointed, were to get in the estate, pay debts, invest the balance, and perform other functions of trustees.

In a subsequent paragraph of his will, the testator declared that his estate in England was to be wound-up by two English gentlemen, whose addresses in this country were given, and who were to realise all the property owned by the testator in this country, and to hand over the proceeds to the trustees or testamentary executors to be nominated by the German court. To enable this to be done the two Englishmen were to have power to sell all movable and immovable property belonging to the testator in England, to collect claims, pay debts, give receipts, and, in general, to undertake for the heirs all necessary legal matters, with power to bind the heirs.

Held, upon construction of the will, according to the law of the testator's domicile, that these persons were not executors according to the tenor; and that they were only entitled to a limited grant of administration for the use and benefit of the testamentary executors nominated by the German court.

THIS was a motion that probate of the will of a German subject should be granted to two English-

(a) Reported by H. DURLEY GRAZEBROOK, Esq., Barrister-at-Law.

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men named in the will in respect of the testator's property in England.

Franz Briesemann, deceased, late of Brockhusen in the Duchy of Mecklenburg Schwerin, a naturalised German subject domiciled in Germany, duly made and executed his will in German form, and by clause 9 thereof directed that two business persons should be appointed as executors, and requested the Provincial Court at Gustrow to appoint these testamentary executors, who were to have the rights and position of an unlimited general attorney of the heirs and were to hold a power irrevocable by the latter. The testator directed them (*inter alia*) to get in the estate, to pay debts and legacies, and to invest the balance in such a way as was required in regard to the moneys of wards; and to perform other functions of trustees; and, as to the security to be given by the executors or trustees and the fee to be paid to them, the Provincial Court at Gustrow was freely to decide.

Paragraph 10 of the will was as follows:

My estate in England has to be wound-up by Herbert Rolles, Bathurst Lodge, Kidbrook Park-road, Blackheath, in the county of Kent, and James Hawes, 35, Old Jewry, London, solicitor. These two persons have to sell and to realise all the property which I possess in England, and to hand over the proceeds to the trustees or testamentary executors (referred to in paragraph 9). I give to both the power to sell all my movable and immovable property existing in England, to call in capitals, to collect the same, to acknowledge the receipt and payment thereof, to collect claims, to pay debts, and in general to undertake for the heirs all necessary legal matters with binding power to the heirs. As an honorarium, each of the two shall receive 100 guineas in case they shall have acted. If for the winding-up of my legal matters in England legal assistance be required, James Hawes shall be appointed to that office. In order to carry out the English legal matters, I lay particular stress on the necessity that the power of representation be given only to James Hawes personally—not his heirs or rightful successors.

The affidavit of a German doctor of law, practising in London as a solicitor, stated that, by the laws of Mecklenburg Schwerin, such an appointment as was contained in paragraph 10 of the will would constitute the persons so appointed executors, and the competent German court of the district within which the deceased resided would appoint them as such for the purpose of realising property in Germany and transmitting the same to another country under the provisions of the will.

The will of the deceased was dated the 16th April 1891. The testator died on the 28th Feb. 1894.

On the 15th March 1894, the Mecklenburg Schwerin Grand Ducal Provincial Court of Justice, being the competent court, according to German law, as the court of the district in which the deceased resided, appointed, in accordance with clause 9 of the will, the Counsellor of the Provincial Court of Justice, Von Kühlwein of Rostock, and the attorney-at-law, Kiesow, of the same place, testamentary executors of the deceased, and confirmed them formally in the said appointment, with the observation that the rights and duties of the appointed testamentary executors, as well as the manner in which the estate of the deceased situate in England was to be realised, were obvious by the certified copy of the annexed provisions of the will, which was handed over to the magistrate of Schwaan on the 16th April 1891, for the purpose of registration. The estate of the deceased in England amounted to about 20,000*l.*, and consisted entirely of personal property.

Upon Herbert Rolles and James Hawes applying for probate in the registry, objections were raised that it was impossible to have executors according to the tenor along with executors nominative, and, further, that the powers of the latter did not extend to England.

Herbert Rolles and James Hawes thereupon applied to the court upon motion.

R. H. Pritchard for the applicants.—This will being the will of a domiciled German, the rights of succession to his estate must be determined by the law of Germany. It is shown by affidavit that clause 10 of the will would be held by the German courts to be equivalent to the appointment of executors. The principles by which this court is to be guided were laid down *In the Goods of Earl* (16 L. T. Rep. 799; L. Rep. 1 Prob. & Div. 540). According to the terms of the will the applicants are executors according to the tenor in this country. By clause 9 the testator intended that the German court should appoint two persons to have control of his property in Germany, and that they should also have control of his property in England, when it has been realised and handed over to them by the applicants. By clause 10 two other persons (the present applicants) are appointed to wind-up the testator's estate in this country. [The PRESIDENT.—Can a foreign will made by a testator domiciled abroad, ever do more than place a person named in the position of administrator? The executor is the creature of English law.] The contention is, that the testator in this case has appointed two sets of executors. Whether by English or by German law, two sets of executors are appointed. The motion ought therefore to be granted. He also referred to

Powles & Oakley on Probate, 116:
Williams on Executors, 9th edit., p. 194:
Velho v. *Light*, 3 Sw. & Tr. 456; and
In the Goods of Baroness von Buseck, 6 P. Div. 211.

Cur. adv. vult.

June 25.—The PRESIDENT.—In this case, the deceased was domiciled in Germany. By paragraph 9 of his will he directed that two business persons should be appointed as executors and requested the German court of the district in which he lived to appoint these testamentary executors, who, he also directed, were to have the rights and position of an unlimited general attorney of the heirs, and whose power was not to be revocable by the heirs. The testator requested that these executors, when appointed by the German court, were (*inter alia*) to get in the estate, pay debts and legacies, and invest the money in such a way as was required in regard to the moneys of wards; and to perform other functions of trustees. As to the security to be given by the executors and trustees, and as to the fees to be paid to them for the performance of their duties, the said provincial German court was freely to decide. The translation of paragraph 10 of the will is as follows: "My estate in England has to be wound-up by Herbert Rolles, Bathurst Lodge, Kidbrook Park-road, Blackheath, in the county of Kent, and James Hawes, of 35, Old Jewry, London, solicitor. These two persons

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have to sell and to realise all the property which I possess in England, and to hand over the proceeds to the trustees or testamentary executors (referred to in paragraph 9). I give to both the power to sell all my movable and immovable property existing in England, to call in capitals, to collect the same, to acknowledge the receipt and payment thereof, to collect claims, to pay debts, and in general to undertake for the heirs all necessary legal matters, with binding power ot the heirs. As an honorarium, each of the two shall receive 100 guineas, in case they shall have acted. If, for the winding-up of my legal matters in England, legal assistance be required, James Hawes shall be appointed to that office. In order to carry out the English legal matters, I lay particular stress on the necessity that the power of representation be given only to James Hawes personally—not to his heirs or rightful successors." It will be observed that the persons named in paragraph 10 have no power of distribution, and the devolution of authority from one of the persons named to his successor is expressly excluded. The question is, should the persons named in paragraph 10 be appointed executors according to the tenor, or, in what other form should a grant be made to them? The principle on which grants should be made by the courts of this country in respect of persons domiciled in foreign countries appears to be settled by the case of *In the Goods of Earl* (16 L. T. Rep. 799; L. Rep. 1 Prob. & Div. 450). That principle I take to be, that regard should be had to the law of the domicile in order to determine what power or authority has been vested in anyone with regard to dealing with the estate, and then to give such a grant to such person as will enable him duly to perform in this country the duties imposed on him. In this case, Mr. Creusemann, an expert in the law of the domicile, that is to say, the law of Mecklenburg Schwerin, states: "Such an appointment as is contained in paragraph 10 of the will would constitute the persons so appointed executors; and the competent German court of the district within which the deceased resided would appoint them as such for the purpose of realising property in Germany and transmitting the same to another country under the provisions of the will." Although the word "executors" is employed by this German lawyer, it is clear that the powers which he attributes to the persons to whom he so refers fall short of the powers of an executor according to English law. It appears to me, therefore, that such a grant should be made to the persons in question as will enable them to perform such duties as, we gather from what is stated by a competent German lawyer, the court of the domicile would expect from them, and that this will be a grant to the persons entitled to administer the estate in England, according to the law of the domicile, of administration for the use and benefit of the testamentary executors nominated by the German court. To appoint them executors according to the tenor would, I think, be to give them powers in excess of that which the will, as construed by the court of the domicile, intended that they should have.

Solicitors: *Kearsey, Hawes,* and *Walsh.*

Friday, July 6.

(Before the PRESIDENT (Sir F. H. Jeune.)

WAINEWRIGHT v. WAINEWRIGHT. (a)

Will and codicils—Additional or substitutional bequests—Surrounding circumstances—Extrinsic evidence.

The testator executed a will of 1885, *and two codicils of* 1890 *and* 1892 *respectively. These documents were found, each in a separate envelope, at his bankers after his death. The codicil of* 1892 *contained no revocation clause. After the death of the testator, there was found at his residence an altered copy of the codicil of* 1890, *which had served as a draft of the later codicil. Between the dates of the codicils the testator's property had largely increased in value. The benefits conferred by the later codicil were larger in amounts than those mentioned in the earlier codicil; but the same class of persons were benefited in both documents, the terms of which were almost identical, and contained almost identically the same powers, provisions, and limitations. On the draft the testator had written an indorsement which made it quite clear that he thought and intended the second codicil to be in substitution for the first.*

Held, that evidence of surrounding circumstances was admissible; and that, upon that evidence, taken in connection with the documents themselves, the later codicils must be taken to be in substitution for the former.

THE plaintiffs, Anne Hannah Jemima Wainewright, John Hertslet Wainewright, and Robert Spencer Wainewright, were the executors appointed under the will, with one codicil thereto, of John Wainewright, late of Belmont-hill, Lee, in the county of Kent, who died on the 27th Sept. 1893, the said will bearing date the 27th Aug. 1885, and the said codicil thereto bearing date the 8th Aug. 1892.

The testator also made a codicil bearing date the 22nd Feb. 1890, bnt the plaintiffs alleged that the later codicil was made by him in substitution for the earlier, which was thereby revoked.

The plaintiffs claimed that the court should pronounce for the will, and for the codicil of 1892; or, in the event of the earlier codicil being also included in the probate, the plaintiffs claimed a declaration that the testator intended to substitute the bequests and devises contained in the codicil of 1892 for the bequests and devises contained in the codicil of 1890, and a direction that the estate should be administered as if the codicil of 1890 had been revoked.

The defendants, in their statement of defence, submitted whether both the codicils should be included in the probate or not.

The draft of the second codicil was framed by making an exact copy of the first codicil, and then altering, in red and black ink, certain portions of the copy so made. The copy of the first codicil, thus altered, became the draft of the second codicil.

One important point of absolute similarity in the two codicils was that the testator revoked the appointment in the will of two persons who had been originally named executors and trustees along with the plaintiffs. One of those persons had died between the date of the will and first

(a) Reported by H. DURLEY GRAZEBROOK, Esq., Barrister-at-Law.

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codicil. The powers already given to the trustees under the first codicil were copied *verbatim* into the second codicil. The word "debts" was extended so as to cover payments to fulfil contracts entered into by the testator for the purchase of improved ground rents. There was an extension of a recital having reference to the settled fund of John Hertslet Wainewright, one of the plaintiffs, and the payment thereout of an annuity of 200*l.* to the said plaintiff's wife. The recitals directing the trustees to set apart a fund for securing annuities of 50*l.* each to two ladies named Turrell were struck out in the draft and omitted from the second codicil. A recital was struck through that the testator estimated that the rents and profits arising from certain manor freeholds would, within a few years, amount to the annual sum of , and that he was desirous of making certain provisions, thereinafter specified, during the period which might elapse before the said net rents and profits should amount to that sum. In place of the said recital was inserted a recital of a recent contract to purchase from a Mr. Wm. Pearce Jones, of Holloway, at the price of 12,000*l.*, certain freehold hereditaments which the said Jones had agreed to purchase from another person, and, that the testator had agreed to let the said premises to the said Jones for a long term of years at a yearly rent of 480*l.*, and, that the testator wished to increase the annuity to the wife of the plaintiff John Hertslet Wainewright from 200*l.* to 300*l.*, but so, nevertheless, that an annuity of 200*l.*, which John Hertslet Wainewright was empowered to charge in a certain event, should not be increased in favour of any future wife.

A clause was then added, as follows:

> I do hereby direct that the yearly sum which, at my death, may be required to be paid in order to complete the purchase of the said hereditaments at Holloway which I have contracted to purchase from the said Wm. Pearce Jones as aforesaid, shall be raised and paid by my executors out of my residuary personal estate in exoneration of the same hereditaments.

An addition was made, whereby the testator revoked the declaration that the plaintiff John Hertslet Wainewright was to bring 7500*l.* into hotchpot. An addition was also made whereby the trustees were to be seised (in addition to the manor freeholds) of the property purchased from Jones, charged as to the latter property (after the death or remarriage of testator's widow) with the payment of 3000*l.* to Mr. J. H. Wainewright absolutely, and also with a similar sum as an addition to the share of the testator's daughter. Certain provisions, in the event of the said manor freeholds not reaching the estimated value of 4000*l.* a year, were struck out (the testator having in fact lived beyond the time when the said increase came into effect). Provisions as to marshalling the personal estate and the real and leasehold estates were struck out.

In the testator's house, after his death, was found a copy of the first codicil which had been altered into a draft of the second codicil.

On the outside of the draft, the date "22nd Feb." had been struck out in red ink, which however did not extend through the 1890, and 8th Aug. 1892 was written under the original date. The words "copy codicil to the will of John Wainewright" remained under the date; and, underneath, in the testator's handwriting, the following indorsements:

> 24th Feb. 1890.—"This is a correct copy of the codicil which I have signed and declared.—J. W."
>
> 8th Aug. 1892.—"I have signed and declared the within altered codicil and have posted it to Lloyd's Bank, 189, Fleet-street, London, E.C., to be kept for me. The unaltered codicil of 1890 in my Japan box at Lloyd's Bank is, therefore, superseded and cancelled.—J. W."

Inderwick, Q.C. (*Searle* and *R. F. Norton* with him) for the plaintiffs.—The question is, whether the second codicil is in substitution for, or in addition, to the first codicil. There are two ways of dealing with the matter: either by asking the court to grant probate of the will and one codicil only; or, to grant probate of all three documents, leaving them to be construed by the Chancery Division. The practice is to consider, taking the papers as a whole, whether the two papers should be admitted to probate, or only one. The Court of Chancery would, in the former event, have to determine whether the legacies in the later codicil are in substitution for those in the earlier codicil, or whether the legacies are cumulative. The court is asked to say, supposing it should hold that both codicils are to be admitted to probate, that the legacies in the second codicil are in substitution for those in the first. But the court is invited to say that the second codicil is to be taken as altogether in substitution for the first. [The PRESIDENT.—Ought I to decide the question of construction if it arises?] If it is claimed in the statement of claim, and fairly arises out of the litigation, this court is bound to deal with it. [The PRESIDENT.—What power have I to piece documents together and to say, taking them together, what the intention of the testator was?] *Dempsey* v. *Lawson* (36 L. T. Rep. 515; 2 P. Div. 98) deals entirely with internal evidence. [The PRESIDENT.—How far are you entitled to go beyond internal evidence?] Revocation by implication is sufficient, and parol evidence is sometimes admitted:

> *Jenner* v. *Fynch*, 42 L. T. Rep. 327; 5 P. Div. 107;
>
> *Campbell* v. *The Earl of Radnor*, 1 Brown, 271.

For the purpose of determining whether there are one or two papers entitled to probate, the court is entitled to go into the circumstances under which the papers were made:

> *Hubbard* v. *Alexander*, 35 L. T. Rep. 52; 3 Ch. Div. 738.

Nearly all the authorities were referred to in *Hooley* v. *Hatton* (2 Wh. & Tu. Leading Cas., 6th edit., 349). These two codicils are almost identical, not merely in substance, but in detail; with identically the same provisions, the same powers, and the same limitations; the difference being an increase in the amount of the benefits conferred on the children under the later codicil, the testator having acquired increased funds after the execution of the earlier codicil. Moreover, it is the same class of persons who are benefited under both codicils, and, accordingly, there would be the same motive for benefiting them. The appointment of executors is identical in both codicils, and so are the powers given to the trustees to deal with the real estate and to invest. Upon all these grounds, the court is asked to hold that the testator, when he executed the second codicil,

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intended it to be in substitution for the first. They also referred to

Roxburgh v. *Fuller*, 11 L. T. Rep. 587; 13 W. R. 39.

Roscoe, for the defendants, said that all the children, with the exception of one, were *sui juris*, and they consented to probate being granted of the will and second codicil only.

The PRESIDENT.—I think there can be no real doubt about this case. When one comes to consider the two codicils, I am satisfied, by merely comparing them and seeing how one works with the other, that it is not to be supposed that the testator intended the gifts in the one to be in addition to the gifts in the other. The whole framing of the document and the reasons for the alterations make it quite clear that it was in substitution for the earlier codicil. At any rate, there is sufficient to raise a doubt; and the cases, especially that of *Jenner* v. *Ffinch* (*ubi sup.*) as well as the case in the Chancery Court, appear to me conclusive to show that, where there is a doubt upon the words of the two documents, as to whether one is in substitution for the other, or whether the one revokes the other, the court is entitled to look not only at evidence of surrounding circumstances, but also at evidence furnished by the testator himself. The evidence of surrounding circumstances is, in this case, sufficiently clear, and the testator knew exactly what he was doing. Of course, when one looks at the testator's indorsement on the draft of the second codicil, his intentions are put beyond doubt. I have no hesitation in holding that the later codicil supersedes the earlier one, and I therefore grant probate of the will and second codicil only. I allow the costs of all parties out of the estate.

Solicitors: *Pennington* and *Son*; *Field, Roscoe*, and *Co.*

July, 16 *and* 18.

(Before the PRESIDENT (Sir F. H. Jeune.)

In the Goods of WIELAND (deceased).

BIRD v. WIELAND AND ANOTHER. (a)

Probate practice—Administration pendente lite—*Duration—Time when administrator's duties terminate.*

The duties of an administrator pendente lite *cease at the termination of the* lis; *that is to say, at the date of the judgment admitting the will to proof, and do not continue until the probate is actually issued.*

SUMMONS in chambers to determine the practice as to the period when the functions of an administrator *pendente lite* cease.

John Fredk. Wieland died on the 6th July 1893, leaving a will of the 4th March 1893 appointing his widow Rosetta Wieland and Samuel Thos. Hewlett executors.

A caveat was entered by Mrs. Maud Evelyn Bird, a daughter of the testator by a former marriage. This was warned, and Mrs. Bird commenced an action against the said executors by which she claimed probate of the draft of a lost or destroyed will of her late mother, who, it was alleged, had, by her will, purported to dispose of certain leaseholds which formed the bulk of the property passing under John Fredk. Wieland's will. The executors then propounded the last will, and it was pronounced for, on the 25th June 1894, upon terms signed by all parties and sanctioned by the court.

The bulk of the property consisted of a large block of leasehold premises in the City, subject to a mortgage; and, in the course of the proceedings, two persons were appointed joint administrators *pendente lite*, and, under an order for sale which was made by the court in the course of the proceedings, the administrators *pendente lite* caused the said leasehold property to be advertised for sale by auction, and the date of sale was fixed for the 17th July.

After the will had been pronounced for, a difference of opinion arose as to whether the administrators *pendente lite*, who were liable for the ground rents due at Midsummer, were entitled to receive the rents payable by the tenant up till the time when the executors could obtain the actual probate; or whether, on the other hand, the appointment and office of the administrators *pendente lite* was automatically extinguished on the 25th June, when the decree, granting probate to the executors, was pronounced.

In order that the point might be definitely settled, an application was made on the 16th July to the judge in chambers.

Deane for the plaintiff, Mrs. Bird, and for one of the administrators *pendente lite*.

Barnard for the executors.—The office of executor dates from the death. The judgment of the court granting probate of the will only confirms the executors in their office.

The PRESIDENT intimated that, as counsel desired that the practice should be definitely settled, he would put his judgment into writing.

Cur. adv. vult.

July 18.—The PRESIDENT.—The question is whether the functions of an administrator *pendente lite* terminate with a decree pronouncing in favour of a will with executors, or continue till the executors obtain a grant of probate. After considering the matter and inquiring into the practice as to such matters in the registry, I think that the *lis* terminated with the decree. After that, the position of things is the same as if there never had been a *lis*, and as if the testator had died leaving an undisputed will with executors. To this state of things the ordinary law applies. I do not think that the case is altered if there be no executors. It is true that, in that case, the estate vests in the court. But, if a dispute arises and an administrator *pendente lite* is appointed, I think his functions terminate when the dispute ends, though, after that, the estate may still vest in the court, subject to the right of the person entitled to administration to apply for it. I do not think that the case of *Taylor* v. *Taylor* (6 P. Div. 29) affects this question. The point in that case was not whether the *lis* terminated with the decree of the court, but whether the powers of the administrator continued during the appeal. It may be added that, although the functions of the administrator end with the termination of the *lis*, he may, in some cases, be right in retaining moneys received by him as administrator until his accounts are brought in and passed.

Solicitors: *Walter B. Styer*; *Treadwell.*

(a) Reported by H. DURLEY GRAZEBROOK, Esq., Barrister-at-Law.

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DIVORCE BUSINESS.

Monday, May 28.

(Before BARNES, J.)

RUSSELL v. RUSSELL. (a)

Divorce practice—Restitution of conjugal rights—Answer—Pleading.

In answer to a petition by the wife for restitution of conjugal rights, the husband pleaded that the petition was not presented in good faith with the object of obtaining the relief sought for, inasmuch as the petitioner had alleged in a former suit for judicial separation, in which she had failed, and inasmuch as she still alleged, that her husband had been guilty of an abominable crime.

The respondent further pleaded that this amounted to cruelty on the petitioner's part, and he prayed for a judicial separation on this ground.

Upon a summons to strike out the answer on the ground that it contained no allegation of a matrimonial offence and disclosed no bar to the prayer of the petition:

Held, that the case ought to be left to be dealt with on the merits, it being the practice of the court not to strike out a pleading where a reasonable doubt existed as to the legal effect of the allegation therein contained, and, where such legal effect could properly be discussed after all the facts had been elicited in evidence at the trial.

THIS was an appeal from chambers to strike out an answer in a suit for restitution of conjugal rights.

The wife, who had previously failed in a suit for judicial separation, which she had presented against her husband on the ground of cruelty, subsequently filed the present petition, claiming restitution of conjugal rights.

The husband's answer was as follows:

(1.) That this petition has not been presented *bonâ fide* and for the purpose of relief, inasmuch as the petitioner has alleged, and still alleges, that the respondent has been guilty of the crime of sodomy.

(2.) That the petitioner has been guilty of cruelty in falsely alleging and filing a petition and stating on oath that the respondent had been guilty of physical cruelty towards her, and also in stating on oath that she believed the respondent had been guilty of the crime of sodomy.

(3.) That, since the date of the matters mentioned in the preceding paragraph, the petitioner has falsely and maliciously stated and published in writing that the respondent has been guilty of the crime of sodomy, and, when called upon to retract and apologise for the said allegation, has refused to retract and apologise and persisted in her allegations.

The respondent prayed the court to decree that he be judicially separated from his wife, and to grant him such further and other relief as might be just.

The petitioner took out a summons before the registrar to strike out the answer, but the registrar refused to strike it out.

The petitioner appealed to the judge in chambers, who referred the summons into court for further argument.

Murphy, Q.C. and *Barnard* (*C. F. Gill* with them) for the petitioner.—This may be treated as a demurrer. There is nothing in the answer that can possibly afford a ground of defence to the petition. The only valid answer would be that the petitioner had been guilty of a matrimonial offence, which, if it were established, would entitle the respondent to relief against the petitioner. There is, in this answer, no allegation of a matrimonial offence. The most convenient definition of cruelty is to be found in *Birch* v. *Birch* (judgment of Sir James Hannen, 28 L. T. Rep. 540; 42 L. J. 23, P. & M.): "something that would cause injury to life, limb, or health." The earliest reported case on the point was decided in 1755: *Holmes* v. *Holmes* (2 Lee, 116). We also rely on *Barlee* v. *Barlee* (1 Addams Eccl. 301). Although *Gale* v. *Gale* (2 Robert. Eccl. 421) is reported on only one point, it must not be said against the petitioner that such a defence as this answer contains can be properly pleaded by the respondent. The only public statement that the respondent had been guilty of crime was made by the petitioner on oath in the witness-box in answer to a question put to her by the respondent's counsel, which she was bound to answer. The plea alleges that she published the statement, but it does not allege that she published it to a third party. The words "alleged and still alleges" probably embrace only one allegation. In *Forth* v. *Forth* (16 L. T. Rep. 574; 36 L. J. 122, P. & M.) specific acts of violence were charged. [BARNES, J.—A woman may be guilty of conduct which renders it unsafe for her to live with her husband because he might retaliate. His health and safety might not be in danger. The whole point involved seems to be the safety of the parties. As a matter of common sense, if the wife's conduct should turn out to be of so provocative a character that the husband might not be able to restrain himself from hitting her, the court would not make a decree for restitution of conjugal rights, because her safety might be endangered.] There is no authority for such a proposition; it would not be a matrimonial offence by the person invoking the aid of the court. *Forth* v. *Forth* (*ubi sup.*) seems to have been founded on *Prichard* v. *Prichard* (10 L. T. Rep. 789; 3 Sw. & Tr. 523). In *Prichard's* case, there was an allegation that the health of the husband had suffered, and that there had, moreover, been a lifting of hands against him amounting to an assault. The principle suggested by the court would seem to be only applicable in cases where the wife has actually raised her hand against her husband, in addition to using her bad tongue against him. This point is now raised for the first time, and it is submitted that the husband cannot avail himself of the allegation in his answer as a bar to his wife's suit for restitution. [BARNES, J.—Might not words be a matrimonial offence if they amount to menace?] Words would not amount to menace, unless accompanied with the present power to inflict an injury. There is no case in which the matrimonial offence of cruelty has been held to be established, unless there has been injury, or probable injury, in the sense indicated in the authorities cited. They also referred to

The Divorce Act 1857 (20 & 21 Vict. c. 85), s. 22:
Curtis v. *Curtis*, 1 Sw. & Tr. 192;
Cousen v. *Cousen*, 12 L. T. Rep. 712; 11 Jur. N. S. 656; 34 L. J. 139, P. & M.;
Birch v. *Birch*, 28 L. T. Rep. 540; 42 L. J. 23, P. & M.;
Stace v. *Stace*, 18 L. T. Rep. 740; 37 L. J. 51, P. & M.

(a) Reported by H. DURLEY GRAZEBROOK, Esq., Barrister-at-Law.

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Robson, Q.C. and *Deane* (*A. L. Davies* with them) for the respondent.—The mere making of a charge such as this would not be sufficient for our purpose upon this application, the question being whether a charge of this character may not, under certain circumstances, be such as to amount to cruelty. The respondent must, of course, show that such circumstances are sufficiently indicated by his plea. In other words, the answer must take the charge out of the category of mere abuse or reproach, and must show that it is essentially cruel, that it is intended to injure, and that it is calculated to make the married life an impossibility. Those allegations were sufficiently made in the answer. The charges are persisted in, and the maintenance of a home, a social establishment for this husband and wife, is an impossibility under such circumstances. In *Gale* v. *Gale* (*ubi sup.*) the charge of incest, which was there in question, was treated merely as a charge calculated to wound the feelings, and it might have been simply levelled by the one party against the other in the privacy of their own home. But the charge in the present case is made publicly, and under circumstances which show deliberate cruelty. The charge was disproved at the former trial. Nevertheless the petitioner repeats and persists in it. Is she not to be held guilty of cruelty in deliberately wrecking her husband's reputation? [BARNES, J.—Is there any case of that kind? This is a case which is unique. I doubt whether I ought to strike out this plea, practically on demurrer, and I think that the matter ought to be tried by a jury.] That is very much what the judge said in *Stace* v. *Stace* (*ubi sup.*). If the respondent were ordered to receive his wife into his house again, and she were to persist in making these charges against him, the provocation might be so great as to cause him to lose his self-control, and he might do her some actual bodily harm. The danger would arise on a resumption of cohabitation.

C. F. Gill in reply.—The wife is not asking for protection. The husband is, on the other hand, seeking to bar her petition, and is counter-claiming in his answer for a judicial separation, upon a ground which he could not seriously put before the court upon a petition for a judicial separation. At the most, the wife's charges amount to slander.

BARNES, J.—I think the case ought to be left to be disposed of on the merits. I am strongly of opinion that the plea of the respondent ought not to be struck out, nor be disposed of practically upon demurrer, but that its subject-matter ought to be tried by a jury. The petitioner's counsel says that the answer ought to be struck out; the respondent's counsel, on the other hand, says that it ought to remain. The most that I could say now would be, that it is doubtful which contention is right, and, under these circumstances, I think the practice has been not to strike out a plea, in a case where the whole matter can be dealt with at the trial, after all the facts are out. I believe it to be a matter within my discretion as to whether the pleadings should be struck out or not, and I think this is a case in which it is far preferable that the facts should be first proved, and that then the question of law, as to whether this answer is a good or a bad defence to the petitioner's suit, should be decided by the judge at the trial, upon the facts then ascertained. Unless it were made perfectly clear to my mind that I ought to strike out the answer at this stage of the proceedings, I do not think it should be now struck out; and it is, in my view, far more convenient that the whole matter should be disposed of on the merits at the trial, when evidence in proof or disproof of the answer can be given, and when the court will be in a position to pronounce an opinion upon the legal effect of the answer when the facts regarding it have been proved. The registrar has refused to strike out the answer, and I shall uphold his decision. I dismiss this appeal, without, however, deciding at the present time whether the answer does or does not disclose a legal answer to the prayer of the petition.

Solicitors: for the petitioner, *Valpy, Chaplin, and Peckham*; for the respondent, *Vandercom, and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Thursday, July 12.

(Before the LORD CHANCELLOR (Herschell), LINDLEY and DAVEY, L.JJ.)

Re HARDING; HARDING *v.* HARDING. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Power—Joint appointment—Power of revocation—Revocation and new appointment by survivor.

A marriage settlement gave the husband and wife a power of appointment among the children of the marriage during their joint lives by deed with or without power of revocation and new appointment, and in default of and subject to such joint appointment, then as the survivor should, after the decease of the other, by deed or will appoint. The power was exercised by the husband and wife jointly by a deed, which provided that "the appointments made by these presents are made subject to the power of revocation and new appointment mentioned in the hereinbefore recited indenture," i.e., the settlement.

Held, that, after the death of the wife, the husband could effectually revoke the joint appointment and make a fresh appointment.

Decision of North, J. affirmed.

BY a settlement made on the marriage of the Rev. J. W. Harding with Elizabeth A. R. Barker, and dated the 8th Dec. 1846, a sum of about 12,000*l.* was settled upon trust for the husband and wife and the survivor for life, with a power of appointment among the children of the marriage and their issue as the husband and wife

During their joint lives by any deed or deeds by both of them legally executed, and either with or without power of revocation and new appointment, shall from time to time appoint, and, in default of and subject to such joint appointment, then as the survivor of them, the said J. W. Harding and Elizabeth A. R. Barker, shall, after the decease of the other of them, by any deed or deeds by him or her legally executed, with or without power of revocation and new appointment, or

(*a*) Reported by W. C. BISS, Esq., Barrister-at-Law.

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by his or her last will and testament or any codicil or codicils thereto in writing, from time to time appoint.

In 1878 the husband and wife jointly appointed to each of two daughters the sum of 2000*l.*

By a deed-poll, dated the 30th Jan. 1881, which recited the settlement of the 8th Dec. 1846, but only the joint power of appointment, the husband and wife, in exercise of the power contained in the settlement, jointly appointed that the unappointed part of the trust funds should be held upon certain trusts therein mentioned, and it was provided that (clause 7) "The appointments made by these presents are made subject to the power of revocation and new appointment mentioned in the hereinbefore recited indenture."

Mrs. Harding died on the 10th Feb. 1881.

By a deed-poll, dated 10th March 1886, the Rev. J. W. Harding, "in exercise of the power reserved to him by the said deed-poll of the 30th Jan. 1881," wholly revoked the appointments expressed to be made by the same deed-poll, and appointed that the trust funds should be held on certain other trusts, and reserved a power of revocation.

The Rev. J. W. Harding died on the 6th June 1893.

A question then arose whether the Rev. J. W. Harding after the death of his wife had power to revoke, and did by the deed-poll of the 10th March 1886 effectually revoke the trusts declared by the deed-poll, dated the 30th Jan. 1881, executed by himself and his wife, or any of such trusts; and on the 11th Dec. 1893 an originating summons was taken out by the trustees of the settlement to have the matter decided.

The summons was heard by North, J. on the 24th April 1894, who held that the Rev. J. W. Harding had effectually revoked the joint appointment of the 30th Jan. 1881.

From this decision the persons interested under the joint appointment appealed.

Cozens-Hardy, Q.C. and *J. G. Butcher* for the appellants.—Mr. Harding had no power to revoke the joint appointment of himself and his wife; but if he had he did not do so. The power to revoke the joint appointment could only be reserved to both. In the deed of joint appointment the joint power, and the power of revocation which follows it, only are recited, and there is no reference to the power of the survivor, therefore the power of revocation reserved is to the appointors jointly. Assuming that a power of revocation and new appointment could have been given to the survivor by the deed of 1881, there is nothing to show any intention to reserve such a power; on the contrary, it points to a future revocation and appointment by both. In *Dixon* v. *Pyner* (54 L. T. Rep. 748) such power was specially reserved to the survivor by the joint deed of appointment. *Brudenell* v. *Elwes* (1 East, 442) is distinguishable, as there the power of appointment and revocation was a single power, while here the joint power and the power to the survivor are two separate powers. The deed of appointment must contain the power of revocation: (Sugden on Powers, 8th ed. p. 387.)

Swinfen Eady, Q.C. and *G. P. C. Lawrence*; *Bickley Rogers* and *Methold* for the respondents.

The LORD CHANCELLOR.—This is an appeal from a declaration that the appointments made by the deed-poll of the 30th Jan. 1881 were revocable appointments, and were revoked by J. W. Harding after the death of his wife by a deed of the 10th March 1886. The power of appointment exercised by the deed of 1881 was conferred by the marriage settlement between John W. Harding and his wife of the 18th Dec. 1846. By that settlement, a power of appointment was reserved to the husband and wife, "during their joint lives, by any deed or deeds by both of them legally executed, and either with or without power of revocation and new appointment," the appointment to be among the children of the marriage, "and in default, and subject to such joint appointment, then as the survivor of them" should after the decease of the other by deed, with or without power of revocation and new appointment, or by will, from time to time appoint. On the 30th Jan. 1881 the husband and wife, in pursuance of the power conferred upon them by the deed, made an appointment, the nature of which it is not necessary to state. By that deed (clause 7) it was declared "the appointments made by these presents are made subject to the power of revocation and new appointment mentioned in the hereinbefore recited indenture," the indenture being the marriage settlement of 1846. After the death of the wife, the husband by a deed duly executed did revoke that appointment. It is contended that he had no power to do so on two grounds: first, that the power to revoke could only be reserved to the husband and wife jointly in respect of the joint appointment made; and secondly, that, even if it could have been reserved to the survivor of them, it had not been effectually so reserved. In the case of *Brudenell* v. *Elwes* (*ubi sup.*), under marriage articles power was reserved to appoint the estates as the husband and wife or the survivor of them should from time to time, either with or without power of revocation, direct, limit, or appoint. A joint appointment was made by the two, and the question was whether that could be revoked by the survivor. It was contended that the joint appointment could only be revoked by the two. Lord Kenyon said: "I see no reason to doubt but that the appointment by the wife alone, by the deed of 1773, was a good appointment as far as it is warranted by the power, and that it is a good revocation of the prior appointment of 1768. The marriage articles meant to give a joint power of appointment to the husband and wife during their lives, and after the death of either, that the survivor should have equal power to revoke and make a new appointment. It seems clear that an equal degree of confidence was reposed in both husband and wife, and, as it could not be foreseen what alterations the exigency of the family might from time to time require, it was thought more prudent to leave the survivor of them, whichever it might be, the same power to mould the appointment that had been committed to both while living." That seems to me to indicate the principles which should guide the court if there be any ambiguity in the construction of a marriage settlement of this description. But it is said in the present case the power of appointment and revocation is not, as in the case of *Brudenell* v. *Elwes*, a single power, but that there are two separate powers, the one the joint power and the other the power to the survivor, with a power of revocation attached to each. I think that there is a fallacy involved in that. No doubt, in the present case, the powers of appointment given are

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efined in what may be termed two separate lauses, whereas in *Brudenell* v. *Elwes* they were omprised in a single clause. But where power is iven to two persons and a power is given to the urvivor, that is two powers, whether you insert he two powers in a single clause or separately in wo separate clauses; it is not the mode of draftng which makes them two powers. In substance hey are two powers in the one case as they are in he other. I therefore do not see really any subtantial distinction between this case and *Brudeell* v. *Elwes*. Now, I turn to the words of the ettlement. The power is given to make the ppointment with or without power of revocation. t does not say revocation by them, and the quesion is, on the true construction of the provisions f the deed, was it intended the power of revocaion should be confined to a power of revocation y the two jointly, or that there should be a power f revocation by the survivor, supposing the ower to the survivor be duly reserved? I annot, myself, doubt that it was the intention of he framers of this settlement that there should e in the case of the exercise of the joint power power of revocation by the survivor, if, as I say, hat was duly reserved. Then the question emains whether such a power of revocation was eserved by the deed of 1881. The deed of 1881, fter making the appointment, provides, as I have aid, that the appointments are "subject to the ower of revocation and new appointment menioned in the hereinbefore recited indenture." For he purpose of seeing what is reserved you are hrown back on the provisions of the indenture, nd it seems to me, upon the true construction of lause 7, whatever power could be reserved in ursuance of and in conformity with the trusts f the settlement is reserved by clause 7. The nly suggestion which was urged to the contrary as founded upon the fact that in the recital in he deed of 1881 reference was only made to the ower of joint appointment and to the words of evocation which follow it, and there was no eference to the power by the survivor. It seems o me it would be impossible to give such effect as s contended for to the recitals, and by reason of hem to cut down what appears to me to be lainly the proper construction of the provisions ontained in clause 7. For these reasons I think he judgment appealed from is right, and ought o be affirmed.

Lindley, L.J.—I am of the same opinion. The utmost extent to which I could go with the ounsel who have argued the case for the appellants is, that it is just possible to read this power as two powers instead of one, and if you do read it as two and give them the construction put on hem by the counsel for the appellant, the result would be to defeat what ninety-nine men out of a hundred would say was the real object of the parties. What is the object which everybody has in framing a settlement of this kind? It is to give the husband and wife a joint power, and after the death of either to give the survivor the power of revoking the old appointment and making a new appointment according to the exigencies of the family. It is impossible to see what may happen twenty or thirty years after the parties marry, and the object of the husband and wife is, that while they are living they shall have the power to modify the settlement. Mr. Hardy's construction defeats that object, whereas the construction put on this clause by the learned judge carries it out. Which view are we to take? Are we to say that, because a clause is framed so that it may be possibly read two ways, we must read it so as to defeat the object? The argument is far too subtle and paradoxical. I am satisfied it is wrong. The reasons for that opinion I need not repeat. The truth is, the moment you grasp the principle affirmed in *Brudenell* v. *Elwes*, and carried out, I will not say extended, in *Dixon* v. *Pyner*, this case is clear.

Davey, L.J.—I cannot bring my mind to feel any serious doubt about this case. Mr. Hardy's first point was, that there were two powers and not one power. That is true, but wherever you have a joint power for two persons to appoint, followed in default of such joint appointment by a power to one to appoint, they are two powers; and I observe that, even in *Brudenell* v. *Elwes*, Lord Kenyon accurately, as I think, treated it as two powers. He says: "The marriage articles meant to give a joint power of appointment to the husband and wife during their lives, and after the death of either that the survivor should have equal power to revoke and make a new appointment." It is always two persons, in whatever language you couch the power, whether in the succinct and short form used in *Brudenell* v. *Elwes*, or in the more elaborate form in use by conveyancers in the present day. It appears to me, when you once grasp the principle of *Brudenell* v. *Elwes*, this case is at an end, because that case decided that a power of revocation under a provision of this kind could be reserved in a case of a joint appointment either to the husband and wife jointly during their lives, or on the death of either to the survivor. That being so, what is the meaning of these words, "subject to the power of revocation or new appointment mentioned in the hereinbefore recited indenture"? They refer to whatever power of revocation or new appointment could be reserved consistently with the settlement. Mr. Butcher says there is nothing to show the intention to reserve a power of revocation. I should rather reply, that it is on those who wish to restrict the meaning of those words to show why they should receive a narrower construction than that which is the natural construction and meaning of the words. Mr. Butcher relied on the recital. I do not attach any importance to that. When conveyancers are drawing an appointment, it is usual to recite so much of the settlement as shows the power they mean to exercise, and that is what is done in the present case. We should be defeating the object of this settlement, which was to reserve to the husband and wife and the survivor, power to mould the trusts of this trust fund to suit the exigencies of the family from time to time as they arose, and we should be defeating the object of the appointors in 1881 if we acceded to the argument of the appellants.

Solicitors: *Wade* and *Lyall*; *Meredith*, *Roberts*, and *Mills*, agents for *Baker* and *Co.*, Weston-super-Mare; *Hulberts* and *Hussey*; *Walters*, *Deverell*, and *Co.*

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Wednesday, July 11.

(Before the LORD CHANCELLOR (Herschell), LINDLEY and DAVEY, L.JJ.)

Re LORD GERARD AND BEECHAM'S CONTRACT. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Vendor and purchaser — Title — "Rentcharge"— Land and easement purchased from limited owner —Perpetual rent payable by a corporation— Charge on rates leviable by corporation—Lands Clauses Consolidation Act 1845, *ss.* 10, 11— 4 *Geo.* 2, *c.* 28, *s.* 5.

Whenever a rent is reserved upon the sale of land to promoters, under sect. 10 *of the Lands Clauses Consolidation Act* 1845, *that rent becomes* ipso facto *charged upon the rates and tolls by sect.* 11.

When land is sold reserving a rent, that rent may properly be called a rentcharge, even if it is in law a rent-seck, as, by virtue of 4 *Geo.* 2, *c.* 28, *s.* 5, *a right of distress has become incident to it.*

By a special Waterworks Act of 1855, *which incorporated the Lands Clauses Consolidation Act* 1845, *the corporation of L. was empowered* (*sect.* 2) "*to purchase, at an annual or other rent,*" *certain land,* "*or any easement over the same,*" *and it was provided that* (*sect.* 3) "*the persons empowered by the Lands Clauses Consolidation Act* 1845 *to convey lands, shall have full power to convey or grant in perpetuity, at an annual or other rent, any lands for the purposes of this Act or the Acts incorporated therewith, or any easement over such lands.*"

In 1856 *an absolute owner and a limited owner respectively conveyed certain land and easements to the corporation of L. for the purposes of the waterworks, in consideration of certain rents which the corporation covenanted to pay in perpetuity.*

Held, that the special Act extended the provisions of sect. 10 *of the Lands Clauses Consolidation Act* 1845, *and gave a limited owner the power, which an absolute owner already had, of conveying land in consideration of a rent, and also gave both limited and absolute owners power to convey easements in consideration of a rent, and that such rent was by sect.* 11 *of the Lands Clauses Consolidation Act* 1845 *charged on the rates payable under the special Act; and, therefore, it was properly described in particulars of sale as a* "*rentcharge.*"

Decision of Chitty, J. affirmed.

ON the 20th June 1893 Lord Gerard caused certain property to be offered for sale by auction.

The particulars of sale contained at the top the following words, "Rare investment in an absolutely secured rentcharge of 215*l.* 9*s.* per annum."

Further on the property was described as:

All that aggregate yearly rentcharge or sum of 215*l.* 9*s.*, payable in perpetuity by the Corporation of the City of Liverpool in respect of a water pipe rent on that portion of the Rivington pipe line extending 2 miles and 1580 yards, or thereabouts, through the Garswood estate in the township of Ashton-in-Makerfield, and extending from Stubshaw Cross to near Hollin Hey House in the said township, and created by virtue and under the authority of the Liverpool Corporation Waterworks Act 1855 and subsequent Acts, and secured by covenants of the Corporation of the Borough of Liverpool, and by a statutory charge on the rates leviable by the corporation under the provisions of some of those Acts. The above offers an exceptionable secure investment, the security of the city of Liverpool being unequalled, the present price of 3½ per cent. 100*l.* stock being about 117*l.*

The conditions of sale stated that "the property offered for sale is composed of the whole of a perpetual yearly rent of 1*l.* 5*s.*, created by a deed dated the 31st March 1856, and of part (214*l.* 4*s.*) of a perpetual yearly rent of 250*l.*, created by a deed dated the 5th April 1856."

The preamble of the Liverpool Corporation Waterworks Act 1855 (18 Vict. c. lxvi.) recited the Liverpool Corporation Act 1847, the Liverpool Corporation Waterworks (Amendment) Act 1850, and the Liverpool Corporation Waterworks (Deviations) Act 1852. By sect. 2, it, among other things, enacts that: "Subject to the provisions of this Act, and with and subject to such of the powers and provisions of the said recited Acts, and of the Acts incorporaed therewith, as are not hereby altered or repealed, it shall be lawful for the mayor, aldermen, and burgesses to make and maintain" certain works thereby authorised, "and for that purpose to purchase either absolutely for a sum in gross or at an annual or other rent, and to enter upon and take and use such of the lands" delineated on the deposited plans, and referred to in the deposited book of reference, "as shall be necessary for that purpose, or any easement, privilege, power, or authority in or over the same; and the new works respectively by this Act authorised shall, for all intents and purposes, become and be part of the undertaking of the Liverpool Corporation Waterworks. And by sect. 3, it provided that "the persons empowered by the Lands Clauses Consolidation Act 1845 to convey lands shall have full power to convey or grant in perpetuity, at an annual or other rent, any lands for the purposes of this Act, or the Acts incorporated therewith, or any easement, power, or authority in or over such lands."

At the sale the appellant Thomas Beecham bought the property for 7000*l.*

On the 9th Aug. 1893 an abstract of the title to the property sold was delivered to the purchaser's solicitors, commencing, in conformity with the conditions of sale, with the deeds of the 31st March 1856 and the 5th April 1856. Those deeds were, so far as is material to the present proceedings and *mutatis mutandis* similar in form, except that the vendor and grantor in the deed of the 31st March 1856 was the absolute owner of the land over which easements were thereby granted, while the vendor and grantor in the deed of the 5th April 1856 was only tenant for life in possession of the land granted by and mentioned in that indenture.

The deed of the 5th April 1856 was made between Sir Robert Tolver Gerard, Bart., of the one part, and the Liverpool Corporation of the other part. It recited local and personal Acts of Parliament, including the Liverpool Corporation Waterworks Acts 1847 (10 & 11 Vict. c. xxvi.), with which were incorporated the Lands Clauses Consolidation Act 1845, and the Waterworks Clauses Act 1847, so far as the same were respectively applicable, and were not modified by, or inconsistent with, the provisions of the Liverpool Corporation Waterworks Act 1847, and also sects. 2 and 3 of the Liverpool Corporation Waterworks Act 1855.

(*a*) Reported by W. C. BISS, Esq., Barrister-at-Law.

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It then recited that, under the will of Sir William Gerard, Bart., deceased, the said Sir Robert Tolver Gerard was tenant for life in possession of certain settled estates, including the lands and hereditaments thereinafter mentioned and described. And also that the Liverpool Corporation, by virtue and under the authority of the powers and provisions of the Liverpool Corporation Waterworks Act 1855, and of the several Acts therein recited and therewith incorporated, and for the purposes of the Liverpool Corporation Waterworks Acts 1847, had contracted and agreed with the said Sir Robert Tolver Gerard for an absolute grant and conveyance in fee simple of the lands thereinafter particularly described, and also for a grant in perpetuity of the easements, privileges, powers, and authorities thereinafter mentioned and described and expressed to be granted, at or for the perpetual yearly rent or sum of 250*l.* And it was witnessed that, in consideration of the yearly rent or payment thereinafter reserved and covenanted to be paid, and of the covenants and agreements by and on the part of the Liverpool Corporation thereinafter contained, the said Sir Robert Tolver Gerard, under and by virtue and in pursuance and execution of the "powers, authorities, and provisions created by, and expressly and by reference contained in the Liverpool Corporation Waterworks Act 1855," granted unto the Liverpool Corporation, their successors and assigns, certain parcels of land and certain easements over those and other lands respectively situate in Ashton, to hold the same unto the Liverpool Corporation, their successors and assigns, "yielding and paying therefor yearly and every year for ever unto the said Sir Robert Tolver Gerard during his life," and after his decease to the person or persons who, under the limitations contained in the will of Sir William Gerard, was or might become entitled to the lands and hereditaments which, after the execution of the deed, would remain subject to the uses of such will, "the yearly rent or sum of 250*l.* by equal half-yearly payments on the 1st Jan. and the 1st July in every year." And the deed contained (together with other covenants by the Liverpool Corporation) a covenant by them to pay the said yearly rent on the days and in manner previously mentioned for payment thereof.

The deed of the 31st March 1856 was made between James Clough of the one part, and the Liverpool Corporation of the other part. It recited sects. 1 and 2 of the Liverpool Corporation Waterworks Act 1855 and the other Acts above mentioned, and by virtue of the powers therein contained the said James Clough granted easements over certain land in Ashton to the corporation in perpetuity, the corporation, their successors and assigns, "yielding and paying therefor yearly and every year unto the said James Clough, his heirs and assigns, the yearly rent or sum of 1*l.* 5*s.*"; and the corporation covenanted to pay that rent to the said James Clough, his heirs and assigns.

The purchaser took the objection that there was nothing to show that the so-called rent-charges were charged on the rates. The vendor contended that, by the Liverpool Corporation Waterworks Act 1855 and the other Acts mentioned, sect. 11 of the Lands Clauses Consolidation Act 1845 was made applicable to conveyances by limited owners, and to conveyances of easements, for the purposes of the Liverpool Corporation Waterworks Act.

The purchaser contended that the deeds of the 31st March and 5th April 1856 reserved rents only, and did not purport to create rentcharges, and that sect. 11 of the Lands Clauses Consolidation Act 1845 had not the operation contended for by the vendor, and that there were not in 1856 any rates or tolls within the meaning of that section upon which the rents could be charged. He also contended that, having regard to the misdescription of the property, he was entitled to rescind the contract, and on the 10th Nov. 1893 his solicitor sent the vendor's solicitors a letter purporting to rescind the contract accordingly.

The vendor then took out a summons under the Vendor and Purchaser Act 1874, asking for a declaration that a good title had been shown to the property comprised in the contract for sale.

The summons came before Chitty, J. on the 11th July.

Levett, Q.C. and *T. C. Wright* for the vendor.

Byrne, Q.C. and *Theobald* for the purchaser.

CHITTY, J.—In this case the first point raised at the Bar on behalf of the purchaser is, that the description of this rent is misleading. It is suggested that the description is such that an ordinary prudent man would have been led to understand that it was secured upon all the rates leviable by the Corporation of Liverpool. It is an extravagant statement in itself, seeing how many rates there are leviable by such a corporation; but when the words are read it is clear that the plain meaning is that the rent is charged upon the water rates, and on the water rates only. On the outside of the particulars the subject-matter of the sale is described as an aggregate yearly rent of 215*l.* 9*s.*, payable by the Corporation of Liverpool in respect of part of their waterworks, and on the first page it is described more fully. [His Lordship then referred to the description set out above.] Putting these things together, it appears to me that a reasonable prudent man would interpret this to mean a rent or sum of money charged upon the water rates leviable by the corporation. There is a covenant by the Corporation of the Borough of Liverpool, and that explains, if explanation is required, the statement with regard to the unequalled position of the security for the investment. The former part of the description which I have read shows that the rent, or some of it, was secured by the covenants of the corporation, and the statement, which is of a commendatory kind in regard to the security of the city of Liverpool, is merely made for the purpose of showing that the covenant of the great city of Liverpool is a valuable covenant. I hold, then, that the description is not misleading. The other two points are these: First, that there were not in 1856, when the rent was created, any rates or tolls within the meaning of the Lands Clauses Consolidation Act upon which the rents could be charged; in other words, there was no water rate leviable by the Corporation of Liverpool. That appears to be an unfounded contention. There is, and was at the time, a rate leviable by the corporation. It is not necessary to travel through the Act of Parliament to arrive at that conclusion, and, in fact, very little was said by the respondent's counsel on that point. The main argument was on the question whether the rent was charged

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on the water rates. That requires some examination, particularly of the Liverpool Corporation Waterworks Act of 1855 and the Lands Clauses Consolidation Act 1845. The conveyance of the easement and the reservation of the rent was made by the deed of April 1856 as to the greater part of the aggregate rent which was sold. There is another deed relating to a rent of 1*l.* 5*s.* which was sold, but it is not necessary to consider that in particular. It is sufficient to deal with the second deed, because, if the conclusion at which I have arrived is the correct one, it necessarily follows that the case, with regard to the earlier deed relating to the 25*s.*, is covered by that decision. The deed refers to certain Acts of Parliament, including the Lands Clauses Consolidation Act 1845 and the Liverpool Corporation Waterworks Act of 1855. The grantor was a limited owner; that is to say, a person entitled for life, and, in consideration of the yearly rent or payment reserved by virtue of the powers created expressly by reference to what is contained in the Liverpool Corporation Waterworks Act 1855, an easement is granted for the purpose of carrying water by a pipe, and the deed contains a reservation in the usual form of "yielding and paying therefor the yearly rent or sum of 250*l.* by equal half-yearly payments." Sometimes the language is "yearly rent," and sometimes it is "yearly rent or sum"; but nothing turns, in my opinion, upon that. It is declared that the yearly rent is to be accepted in full compensation for certain lands which are conveyed, and for all damage done, and then there is a covenant on the part of the corporation to pay the yearly rent of 250*l.* The deed contains no charge in express terms of the rent of 250*l.* upon the water rates. Now the argument for the purchaser is that, the deed being silent, there is no charge, and much argument has been addressed to the court on sects. 10 and 11 of the Lands Clauses Consolidation Act. The 10th section runs thus: "It shall be lawful for any person seised in fee of, or entitled to dispose of, absolutely for his own benefit, any lands authorised to be purchased for the purposes of the special Act, to sell and convey such lands, or any part thereof, unto the promoters of the undertaking in consideration of an annual rentcharge payable by the promoters of the undertaking." Whether that power to grant land in consideration of an annual rentcharge payable by the promoters of the undertaking was actually required in the case of an owner in fee simple I need not stay to consider; but it is put into the Act for the purpose of the 11th section, and in connection with the end of the 10th section, which provides: "But except as aforesaid the consideration to be paid for the purchase of any such lands, or for any damage done thereto, shall be in a gross sum." Under that section, therefore, a limited owner could not sell or convey for a rentcharge. I observe that the words in the 10th section are "an annual rentcharge." Now "rentcharge," commonly understood, means a rent issuing out of land, charged thereon with a power of distress. That is not the meaning of the term "rentcharge" in the section, as is shown by the following section. It does not mean that the rentcharge is charged necessarily on the land which is conveyed, because that would enable the person conveying the land to break up the undertaking, and any strict meaning that it might be considered right to attribute to the words "annual rentcharge" in a general Act of Parliament is not applicable by reason of the 11th section. I do not say, and it is not necessary to say, that the promoters cannot create such a rentcharge, but that is not the rentcharge which is created by the Act of Parliament itself. Now the 11th section of the Lands Clauses Consolidation Act 1845 is in these terms: "The yearly rents reserved by any such conveyance shall be charged on the tolls or rates, if any, payable under the special Act, and shall be otherwise secured in such manner as shall be agreed between the parties, and shall be paid by the promoters of the undertaking as such rents become payable." It is left to the parties to agree to some other charge or other security than the charge on the tolls or rates which are here mentioned; but, in the absence of any agreement, and with a mere conveyance by the owner in fee simple under these two sections, the 11th section applies to the conveyance, and creates the charge on the tolls or rates, if any, payable under the special Act. It is not necessary that the conveyance should in terms create the charge. Now, sect. 81, which refers to forms of conveyances, refers to the form in schedule B. to the Act of what is termed a "conveyance on chief rent." Chief rent is not an appropriate term. Probably it was taken from the marginal note, which forms no part of the Act, to the 10th section, where "chief rent" happens to be mentioned. In this form of conveyance there is no mention whatever of the charge. If any corroboration is required, that corroborates the conclusion at which I have arrived on the reading of the two sections. Then there is the Act of 1855, which is a special Act, and for the purposes of the 11th section (I am assuming for the moment that it applies) the term "special Act" means, by the definition contained in the Lands Clauses Consolidation Act 1845, the series of Acts which, looked upon as a whole, amount to the special Act, and the undertaking in this case would mean the undertaking which was authorised by the various special Acts of Parliament, and all of them would be included for the purpose of interpreting the term "special Act" in the 11th section. Now, it is said that the landowner cannot grant an easement to the promoters of an undertaking by virtue of the provisions of the Lands Clauses Consolidation Act 1845; that there is a power simply to convey (this applies, of course, particularly to the case of a limited owner) the lands themselves, that is, the corporeal hereditament. Lord Watson was not of that opinion, as appears from his judgment in *The Great Western Railway Company* v. *The Swindon and Cheltenham Extension Railway Company* (51 L. T. Rep. 798, 802; 9 App. Cas. 787, 801). But I will assume in favour of the respondents that they are right, and that, notwithstanding the wide terms of the interpretation clause of the Act of 1845, corporeal hereditaments to be created *de novo* are not included. In making this assumption I am not to be understood to be expressing any opinion that the assumption is well founded. Then I have to consider the 2nd and 3rd sections of the special Act of 1855. That is an Act for amending the general Acts relating to the Liverpool Waterworks, and for authorising deviations, and for the construction of works, and other purposes. The 2nd section

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provides as follows: [His Lordship then read the section referred to above.] This enactment empowers the corporation, which represents the promoters of the undertaking, to buy first an easement, and secondly, to buy it for an annual or other rent. This section, of course, on the very face of it, has reference to the Lands Clauses Consolidation Act 1845, and assuming what I have considered to be the construction of the Act as to an easement, the result is that within the scope of the Lands Clauses Consolidation Act 1845, as modified by this enactment, the corporation can purchase an easement, and they can purchase an easement for an annual or other rent. Then the 3rd section refers to the persons who can convey. This, again, is an empowering section, and the Lands Clauses Consolidation Act 1845 is again referred to. [His Lordship then read the section set out above.] "The persons empowered by the Lands Clauses Consolidation Act 1845 to convey lands" includes the owner in fee simple, who has an absolute power of disposition over the lands, and all the persons who are generally described as limited owners. The result of that section is to confer upon the persons empowered by the general Act to convey lands the power of conveying an easement, and in consideration of an annual or other rent. The result, therefore, appears to me to be that, taking these two sections and reading them in connection with the general Act relating to the same matters, the two sections are a modification of the terms of the general Act. Therefore I must read the general Act and the special Act together. Then there was some argument on the terms "annual or other rent," which terms do not coincide with the term "annual rentcharge" in the 10th section. The special Act of 1855 speaks of an "annual or other rent." It does not say "rentcharge." Now a rent is not a mere sum of money without some security behind it. No lawyer would think of describing a sum of money payable for the use of a flock of sheep or the like (referring to an old case on the subject) as a rent. At the same time, as already pointed out, the term "annual rentcharge" is not used in any strict technical sense in the general Act, and it appears to me that it is not used in any strict sense in this Act; but still that which is spoken of is a rent. As I have already shown, on the construction of the 10th and 11th sections taken together, that is considered to be a yearly rent which is secured upon rates. I do not adopt the construction that was put on the two sections of the Act of 1855 by the purchaser, that "other rent" means a mere personal annuity. It must be a rent, and some "other rent" than an annual rent. I need not speak of an owner in fee, because he can deal with his own land as he likes; but, in my opinion, a limited owner cannot, by virtue of these two sections, grant an easement by virtue of a mere covenant to pay a sum of money. That being so, the argument for the purchaser is of a highly technical nature in regard to the 11th section. It is that the 11th section is not in any way referred to expressly by the special Act of 1855, and that the language of the 10th and 11th sections, taken together and compared with the language of the 2nd and 3rd sections of the special Act of 1855, produces such a result that the 11th section is dropped out. As I said before, in my opinion that is not the meaning of this special enactment. I think it is a modification of the general Act, and that I must read the two together. It appears to me it would be producing a result which I am satisfied was not contemplated by Parliament if the respondents are right, namely, that a limited owner could convey for a mere covenant to pay a sum of money. I find no difficulty in making the necessary alterations or modifications in the 11th section, and holding that the 11th section is intended to apply, and does apply, to the rent which is mentioned in the 2nd and 3rd sections of the special Act of 1855. The language of Lord Watson in *The Great Western Railway Company* v. *The Swindon and Cheltenham Extension Railway Company* (*ubi sup.*) appears to me to be again applicable. He says, speaking of the general Act, "When that Act is incorporated with enactments which expressly confer upon the promoters power to purchase and take incorporeal hereditaments by compulsion, I think its clauses ought, by virtue of their new context, to be construed so as to include and apply to hereditaments which are not corporeal . . . It was, according to my apprehension, the purpose of the Legislature that the clauses of the general Act should be capable of expansion, so as to apply not only to the cases contemplated by that Act, but to all cases of purchasing and taking sanctioned by the provisions of any of the special Acts with which they were in future to be incorporated, subject, it may be, to the proviso that the words and expressions occurring in these clauses were not to be extended beyond the meanings severally assigned to them in sect. 3 of the Act." He is there dealing with the case of an easement, but the observation he makes is of a general nature, and I think it is a statement of the principle on which the court should act in construing special Acts which modify the terms of the general Act. The result appears to me to be that, if under the general Act the owner in fee simple conveyed without taking any special charge on the tolls or rates payable under the special Act, yet the 11th section, by its own inherent force, would apply to the transaction, and I think the Legislature did not intend to put the limited owner on whom it was conferring this new power—a power to sell an easement, which I will assume to be a new power, and to sell for an annual or other rent which certainly was a new power—in any worse position than the Lands Clauses Consolidation Act 1845 placed the owner in fee simple The result therefore is, that in this case I think, notwithstanding the silence of the deed conveying the easement and reserving the rent, the 11th section with the modification I have mentioned does apply of its own force to the instrument, and consequently that the rent is secured by a charge upon the water rates leviable by the corporation under their special Act in relation to their waterworks undertaking.

From this decision the purchaser appealed.

Byrne, Q.C. and *Theobald* for the appellant.

Levett, Q.C. and *T. C. Wright* for the respondent.

The Lord Chancellor.—In this case objection is taken to the title to a certain rentcharge purchased by the appellant from the respondent, on the ground that a title cannot be made to a rentcharge, and therefore the subject-matter purporting to be sold is not that to which the respondent

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has shown a title. The sale was of an "aggregate yearly rentcharge or sum of 215*l.* 9*s.*, payable in perpetuity by the Corporation of the City of Liverpool, in respect of a water pipe rent" on a certain portion of pipe line belonging to them, "created by virtue and under the authority of the Liverpool Corporation Waterworks Act 1855 and subsequent Acts, and secured by covenants of the Corporation of the Borough of Liverpool, and by a statutory charge on the rates leviable by the corporation under the provisions of some of those Acts." The rent, except as to the sum of 1*l.* 5*s.*, was created by a deed dated 5th April 1856. I will deal with the part of it other than the 1*l.* 5*s.* first. By that deed certain land was conveyed to the Corporation of Liverpool for the purposes of their waterworks, and there was reserved by the conveyance a yearly rent of 250*l.* There was a covenant by the corporation to pay that rent, and therefore the 10th section of the Lands Clauses Consolidation Act 1845, which was incorporated with the Waterworks Act of the Liverpool Corporation, did not in terms apply to such a case. But, in order to consider what was the effect of that reservation of rent, and what rights it gave and how far it was charged upon the rates, it is necessary first to examine the provisions of the section of the Lands Clauses Consolidation Act to which I have alluded, although it applies only, as I have said, to the case of an absolute owner. Under that section it is provided that "It shall be lawful for any person seised in fee of or entitled to dispose of absolutely for his own benefit, any lands authorised to be purchased for the purposes of the special Act, to sell and convey such lands, or any part thereof, unto the promoters of the undertaking in consideration of an annual rentcharge payable by the promoters of the undertaking; but, except as aforesaid, the consideration to be paid for the purchase of any such lands or for any damage done thereto shall be in a gross sum." Now, much stress has been laid by the learned counsel for the appellant upon the use in that section of the word "rentcharge" as distinguished from a reservation of rent which is not a rentcharge. I do not think that any stress was intended to be laid by the Legislature upon the term "rentcharge." I think that the contrast was between a sale of the land reserving rent as its price, and a sale of the land for a sum in gross. That being the provision of sect. 10, sect. 11 provides that: "The yearly rents reserved by any such conveyance"—and such conveyance, I understand, to be a conveyance in consideration of an annual rentcharge payable by the promoters and not in gross—"shall be charged on the tolls or rates, if any, payable under the special Act," and there is a provision enabling an action of debt to be brought if it is not paid, and also authorising a distress of the goods and chattels of the promoters of the undertaking. Now it appears to me that, whenever a rent is reserved upon the sale of land to promoters as distinguished from an agreement for a sum in gross, thereupon that rent becomes *ipso facto* charged upon the rates and tolls under sect. 11. Wherever land is sold reserving a rent, it appears to me that since the statute of 4 Geo. 2, that rent may properly be called a rentcharge, for there has become incident to it the right of distress, and it was the conveying of land reserving rent and the right of distress which made that rent a rentcharge. Therefore, in the case of a sale of the land reserving rent, it appears to me that no difficulty arises that that is a rentcharge, and that, consequently, the 11th section would in terms be applicable to any such case. So far I have dealt with the case of an absolute owner, and but for the special Act under which this land was sold it seems clear that there was no power in a limited owner to convey in consideration of rent; but by the 2nd section of the Liverpool Corporation Waterworks Act 1855 (18 Vict. c. lxvi.), it is expressly provided that, subject to the powers and provisions of the previous Waterworks Act, and of the Acts incorporated therewith, that is the Land Clauses Consolidation Act 1845 amongst others, so far as they "are not hereby altered or repealed, it shall be lawful for the mayor, aldermen, and burgesses . . . . to purchase either absolutely for a sum in gross, or at an annual or other rent," any of the lands mentioned or any easement. Then the 3rd section provides that "The persons empowered by the Lands Clauses Consolidation Act 1845 to convey lands shall have full power to convey or grant in perpetuity, at an annual or other rent, any lands for the purposes of this Act or the Acts incorporated therewith, or any easement." Now in construing those two sections, it is necessary to bear in mind what were the powers existing at the time that Act was passed. The previous Acts incorporated the Lands Clauses Consolidation Act 1845, including sect. 10 and 11, and therefore the absolute owner at that time could convey in consideration of a rentcharge or a sum in gross. Therefore, there was no need to give, and it is not to be supposed that this Act was designed to give, any person a power which was already in existence by virtue of the prior Acts. It appears to me clear that the object of this amending Act was twofold: to give to limited owners the same power of selling for a rentcharge in lieu of a sum in gross as the absolute owners had; and to enable an easement to be purchased instead of purchasing the land also for a sum in gross or a rentcharge. Now, dealing first with the case of the limited owner, it seems to me that, reading this Act with the Acts incorporated with it, and having regard to the amendment which one must conceive as intending to make in the existing law, the effect of it was to put the limited owner in precisely the same position as the absolute owner was in under the 10th section of the Lands Clauses Consolidation Act 1845, which was incorporated with prior Acts, and consequently, where the sale was by the limited owner in consideration of a rent in lieu of a sum in gross, sect. 11 applied to that rent, and charged it upon the rates and tolls. It is hardly conceivable that anything else should have been the intention of the Legislature. If that be so, it is perfectly clear that, as regards the whole of the rentcharge with which I have so far dealt, namely, that created by the deed to which I have alluded, it is properly described as charged upon the rates leviable under the Liverpool Waterworks Acts. But then part of the subject-matter was a rent of 1*l.* 5*s.*, created by another deed, and that was a rent payable in respect of the sale of an easement, which of course could only have been effected under the provisions of the Act of 1855, to which I have called attention. It is said that, though rent may issue out of land, it cannot properly issue out of an easement. That would no doubt be true.

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But when the Legislature, having in view obviously the 10th and 11th sections of the Lands Clauses Consolidation Act 1855, without making any special provisions in relation to the effect of a conveyance, provided that you might sell an easement, reserving a rent instead of in consideration of a payment in gross, just as you might convey land, can it have been intended otherwise than that the provisions of sect. 11 should apply to such a rent, even although it might perhaps not be, strictly speaking, termed a rentcharge? I cannot think, looking at the obvious object of sect. 2 and 3 of the special Act of 1855, that any other than that was the intention of the Legislature; and, if that be so, that disposes of the case of the appellant, subject only to the point which was made but scarcely pressed—and I do not wonder that it was not so—that the terms of sale indicated to the purchaser that this was not a charge merely upon the rates leviable under the Waterworks Act, but on the rates leviable by the corporation generally. I certainly am unable to read the language in that sense. It is stated that it is secured "by a statutory charge in the rates leviable by the corporation under the provisions of some of those Acts." Now what are the Acts mentioned? "The Liverpool Corporation Waterworks Act 1855 and subsequent Acts," which anyone would understand to mean subsequent Acts relating to the waterworks undertaking of the Liverpool Corporation. There seems to me to be nothing misleading in that, and nothing to indicate that the rates charged are other than those leviable under the Waterworks Acts. For these reasons I think the judgment below was right, and ought to be affirmed.

LINDLEY, L.J.—I am entirely of the same opinion, and I will only add a very few words. It appears to me that the appeal is based upon a misconception of the expression "rentcharge" in sect. 10 of the Lands Clauses Consolidation Act 1845. When you bear in mind what was done by the Act of the 4 Geo. 2, c. 28, which gave a power of distress for all rents, there is no magic in the word "rentcharge." Whether you talk of a rentcharge, or whether you talk of a rent, if it is a rent and if it is not a mere sum covenanted to be paid, it seems to me to be utterly immaterial, because under the Act of Geo. 2, you have a right of distress for it, and any rent for which you have the right of distress certainly appears to me to be a rentcharge within the meaning of the Lands Clauses Consolidation Act 1845. I think an attempt has been made to put upon the expression "rentcharge" a burden which it will not bear. That appears to me to be the real clue to the mistake in the argument which has been urged by the appellant. I will say no more, because the rest of the case is easy. I take the same view of the construction of the Act as the Lord Chancellor does.

DAVEY, L.J.—I only wish to say this, that I think a great deal too much stress has been put upon the use of the words "annual rentcharge" in the 10th section of the Lands Clauses Consolidation Act 1845. It was strictly accurate in that section, limited as that section was to a sale by a fee simple owner of lands, to use the word "rentcharge." Either it was a rentcharge because it carried a right to distrain, or, even if it was in law a rent-seck it would have the quality of a right to distrain attached to it, and would therefore be within the definition of rentcharge. But even if that were not so, it is observable that sect. 11 does not use the word "rentcharge"—it says "the yearly rent reserved by any such conveyance;" and I think, even if it was not a rentcharge properly so called, apart from sect. 11 it would be strictly accurate to call it a rentcharge in sect. 10, and to read sect. 11 as defining that upon which it was to be charged, and the rights which were given for the purpose of making that charge effectual. When I come to sect. 3 of the Liverpool Corporation Waterworks Act 1855, I think, with the other members of the court, that it must be construed as extending the provisions of sect. 10 to a limited owner, so as to give a limited owner power to sell in consideration of a rent, and it is to be observed that it is to be "at an annual or other rent." Now, it is argued that you cannot reserve a rent out of an easement. Well, a subject cannot at common law, but the King could at common law, and the subject may by statute, and although there may be no power of distress attached to it, it is a rent; that is to say, it is a rent issuing out of the subject-matter of the conveyance, a rent reserved out of the grant of the conveyance. I think the effect of the Act of 1855 is, for the ascertainment and payment of compensation for lands taken, to make that part of that code which applies to lands conveyed in consideration of rent applicable to a sale by a tenant for life or other limited owner, in consideration of an annual or other rent charged on any land or any easement of the Liverpool Corporation.

Solicitors: *Maples, Teesdale,* and *Co.*, agents for *Oppenheim* and *Malkin*, St. Helens; *Meynell* and *Pemberton.*

July 12 *and* 13.

(Before the LORD CHANCELLOR (Herschell), LINDLEY and DAVEY, L.JJ.)

ROSS v. WHITE. (a)

APPEAL FROM THE CHANCERY DIVISION.

Partnership action—Dissolution of partnership—Distribution of assets—Costs of action—Repayment of capital—Priority.

In an action for dissolution of a partnership between two partners, who were entitled to the partnership capital and to divide profits and losses in equal shares, it was found that a larger sum was due from the firm to one partner in respect of capital than to the other.

Held, that the partnership assets must be applied, first, in placing the partners on an equality as regards capital, and, secondly, in payment of the costs of the action; and that, if the assets should be insufficient for payment of the costs, the deficiency must be made up by the partners equally.

Decision of Kekewich, J. affirmed.

IN an action for dissolution of partnership an order was made for the dissolution of the partnership, and directing the usual accounts. The partnership firm consisted of two partners, who shared equally in the capital of the partnership, 3500*l.*, and also the profits and losses of the firm. Under

(a) Reported by J. H. BAKEWELL and W. C. BISS, Esqrs., Barristers-at-Law.

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the partnership articles advances might be made to the firm by either partner, with the consent of the other, and any such advance was to be considered as a debt due to the advancing partner from the firm, and to bear interest.

The chief clerk found by his certificate that there was due from the firm to the plaintiff the sum of 649*l.* in respect of an advance made by him to the firm; that 1405*l.* was due to the plaintiff, and 804*l.* due to the defendant in respect of capital; and that the partnership assets amounted to 1371*l.* 10*s.* 4*d.*

The action came on for further consideration before Kekewich, J. on the 8th May.

Dunham for the plaintiff.—The advance made by the plaintiff must be first repaid, and then the assets must be applied in adjusting the rights of the partners upon the capital account.

Dickinson for the defendant.—I admit that the advance made by the plaintiff must be paid first, but after payment of the debts of the firm the costs of administration should be provided for:

Binney v. *Mutrie*, L. Rep. 12 App. Cas. 160;
Lindley on Partnership, 6th edit., p. 600;
Potter v. *Jackson*, 42 L. T. Rep. 294; 13 Ch. Div. 845;
Austin v. *Jackson*, L. T. Rep. 11 Ch. Div. 942, n.

[Kekewich, J. referred to Seton on Decrees, 5th edit., p. 1812; *Rosher* v. *Crannis*, 63 L. T. Rep. 272.]

Dunham, in reply, referred to Lindley on Partnership, 6th edit., p. 620.

Kekewich, J.—My task is to ascertain the principles underlying the authorities that have been referred to, namely, the five cases cited and the two extracts from Lindley, L.J.'s book, and to apply them in determining the case before me. The first rule obviously is, that the costs of a partnership action are on the same footing as those of an administration action, and come out of the assets remaining after payment of debts, and that the assets, if insufficient, must be applied so far as possible, and the balance borne by the partners in proportion to their shares in the profits. The difficulty in this case is to ascertain what are the partnership assets available for paying the costs. It is settled by the cases cited that, if a sum be due to a partner in respect of a loan, he is to be treated as a creditor, and his claim paid, like that of any other creditor, before the costs. From *Rosher* v. *Crannis* (*ubi sup.*) we may further gather that we should not be dainty in considering whether the claim of a partner be a debt. Now, here, each of the partners was bound to bring in 1750*l.* as capital. Each brought in that sum, so that I do not require to consider what the case would have been had either not done so. Then each drew out money from time to time, and the assets which he drew out are to be set against his contributions. The plaintiff drew out only 345*l.*, so that there is due to him in respect of capital 1405*l.*; the defendant drew out so much that there is due to him only 804*l.* Thus more is owing to the plaintiff than to the defendant from the partnership. It is said that this cannot be treated as a balance due from the partnership to the plaintiff, because it cannot be ascertained until the partnership accounts be taken. But the only way in which such a balance can be arrived at is by first adjusting the rights of the partners among themselves. Then it is said that it is not a debt; but, as I have worked it out, it is a debt owing by the defendant to the plaintiff on partnership account. It therefore seems to me that this claim must be preferred to the costs. To say the contrary would, I think, be inconsistent with the Partnership Act of 1890, with the cases cited, and with Lindley, L.J.'s book. If the costs are paid before the partner, who has drawn out more, brings in enough to make his share of capital equal to that of the other, they will to some extent come out of money which is owing by one partner to the other. The principle of administration is, that the costs come out of the assets. Before they can be paid it is therefore necessary to find what the assets are, and these can only be found by deducting the partnership debts, of which this appears to me to be one. The assets must therefore be applied, first, in paying the advance to the firm made by the plaintiff; secondly, towards adjusting the rights of the partners; and then, if anything be left over, in paying the costs; if there be not enough left for the last purpose, then the principle of *Austin* v. *Jackson* (*ubi sup.*) comes in, and the partners must pay the costs in proportion to their interest in the partnership—that is, in this case, equally.

From this decision the defendant appealed.

Renshaw, Q.C. and *S. Dickinson* for the appellant.—It is admitted that the plaintiff is entitled to a first charge on the assets for the 649*l.* advanced to him, as it is in the nature of a partnership debt:

Austin v. *Jackson*, 11 Ch. Div. 942, n.;
Potter v. *Jackson*, 42 L. T. Rep. 294; 13 Ch. Div. 845;
Lindley on Partnership, 6th edit., p. 600.

But the rule is, that the costs of winding-up the partnership must next be paid. The orders in *Binney* v. *Mutrie* (12 App. Cas. 160, 166) and *Hamer* v. *Giles* (41 L. T. Rep. 270, 272; 11 Ch. Div. 942, 948) show this, and also *Butcher* v. *Poole* (49 L. T. Rep. 573; 24 Ch. Div. 273).

Warmington, Q.C. and *Dunham* for the plaintiff.—Before the defendant's costs are paid out of the partnership assets, he must repay the amount of capital which he has already received above the amount received by the plaintiff; that is, the difference between 1405*l.* due to the plaintiff and 804*l.* due to himself, viz., 601*l.* Therefore the money in court should first be applied, after paying the 649*l.* due to the plaintiff for the advance, in adjusting the rights of the partners with regard to capital, and then the balance applied in paying the costs, the partners making up the deficiency in equal shares:

Potter v. *Jackson* (*ubi sup.*);
Rosher v. *Crannis*, 63 L. T. Rep. 272;
Hamer v. *Giles* (*ubi sup.*).

The partnership debts, including sums due from the firm to the partners in respect of advances "or the like," must be paid out of the assets in priority to the costs: (Lindley on Partnership, 6th edit., p. 520.) The difference on the capital account due to the plaintiff is in the same position.

Renshaw in reply.—In the cases of *Potter* v. *Jackson* (*ubi sup.*) and *Rosher* v. *Crannis* (*ubi sup.*) the money due to the one partner was, in fact, a debt due to him from the firm.

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The Lord Chancellor.—In this case upon a dissolution of partnership the accounts were taken under an order of the court. As the result of those accounts, it appears that there is a sum of 649*l.* due from the defendant to the plaintiff, that being a sum of money advanced by the one partner to the partnership, which it is admitted must be treated as a debt; about that there is no dispute. Then the finding is, that each partner originally contributed an equal sum as capital, that each partner had drawn out some part of the capital which he contributed, and the defendant had drawn out a sum of 601*l.* in excess of the sum drawn out by the plaintiff. The sole question which arises now is with reference to the payment of the costs of the plaintiff and defendant in taking these accounts. Mr. Renshaw contends that, on principle, these costs ought to be paid out of the assets after the discharge of any debts, and before any distribution between the partners. It appears to me that, as a general proposition, that is well founded; but how is the matter to be dealt with in a case like the present where the fund in court after the plaintiff has received from it the 601*l.* and the 649*l.* is not sufficient to pay the costs? Mr. Renshaw contends that the costs ought to be paid out of the fund after the payment to the plaintiff of the 649*l.*, but before the plaintiff is allowed to take from those assets the 601*l.* I do not think that this view is correct. The effect of the transactions is this, that out of the assets of the partnership the defendant has really received 601*l.* in excess of what the plaintiff has received, and now he claims to take his costs out of the fund in court without making good to the assets of the partnership that which he has taken out in excess of the sum taken out by the plaintiff. I think he cannot do so. Before he can claim to take his costs out of the assets he must make good to the assets the sum which is found due from him. He has in truth assets of the partnership in hand, or what are to be considered as assets in adjusting the accounts between plaintiff and defendant, and out of those no doubt he can pay the costs; but while retaining those costs, and without bringing himself, as regards the assets of the partnership, on an equality with his partner, he cannot claim to take his costs out of the assets which are in court for the purpose of answering the claims against the partnership. For these reasons I think the judgment appealed from is right, and that the appeal must be dismissed with costs.

Lindley, L.J.—I am of the same opinion. I think as a general rule that what Mr. Renshaw said about the way in which the costs ought to be paid was right, but that is assuming the assets are as they ought to be, and if his client will restore to the assets the sum in his hands then his argument will be quite right. One would think at first sight that he was seeking in his argument to induce us to do a gross piece of injustice, but, when one considers it, one sees it is right. The answer to his case is, that before he can take his costs out of the assets he must make good what is due to the assets. I think, therefore, that the judgment of the court below is right, and that the appeal must be dismissed with costs.

Davey, L.J.—I agree that the judgment appealed against is right in substance, and that the appeal should be dismissed. I think Mr. Renshaw's argument is right, that, before you pay what is due to the partners *inter se*, you must take into account the costs incurred in taking the accounts and winding-up the affairs of the partnership; but the fallacy of his argument and the extent to which he carried it is this, that it leaves out of sight the fact that the sum which was overdrawn by the defendant and taken out of the partnership is really and truly part of the partnership assets, and it is the application of the principle which is wrong in his argument. The principle can only be applied subject to this, that the defendant cannot take his costs until he has made good his obligations to the assets of the partnership; in other words, he has in his hands what is really and truly a part of the assets of the partnership, and although it is quite true that he is entitled to his costs in the first instance, the plaintiff has a right to say to him, "Pay your own costs out of that portion of the assets which you have drawn out in excess of my drawings, and which you have in your hands." I think the present form of the order rather obscures the point. I think the right form of order (although it comes to exactly the same thing in substance) is: "Pay the plaintiff's costs out of the fund in court; let the defendant deduct his costs out of the 601*l.* which he owes to the assets; pay the balance into court, and then divide between them the balance that then remains in court." I think the order is right in substance, and that the appeal should be dismissed.

Solicitors for the plaintiff, *George Reader* and *Co.*, agents for *David Johnstone*, Bristol.

Solicitors for the defendant, *Meredith, Roberts*, and *Mills*, agents for *Sibly* and *Dickinson*, Bristol.

Wednesday, July 25.

(Before the Lord Chancellor (Herschell), Lindley and Davey, L.JJ.)

Foden v. Foden. (a)

APPEAL FROM THE DIVORCE DIVISION.

*Nullity suit—*De facto *marriage—Alimony* pendente lite*—Jurisdiction—Application after date decree* nisi *might have been made absolute—Allowance from date of service of citation.*

On the 7th Feb. 1893 *a decree of nullity of marriage was made on the husband's petition on the ground of his wife's relationship to his first wife. The wife had not entered an appearance or delivered any defence to the petition. The husband did not apply to have the decree made absolute, and, having obtained leave, the wife on the* 13*th April* 1894 *entered an appearance in the suit, and presented a petition for alimony* pendente lite.

Held, that there having been a de facto *marriage, the Court had jurisdiction to grant alimony* pendente lite *from the date of the service of the citation, and to refuse to make the decree nisi absolute until the order for alimony* pendente lite *had been issued.*

Decision of Jeune, J. affirmed.

On the 7th Oct. 1890 Charles Bickerstaffe Foden who was then a widower, went through the ceremony of marriage with a niece of his deceased wife.

(a) Reported by W. C. Biss and H. Durley Grazebrook, Esqrs., Barristers-at-Law.

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On the 23rd Aug. 1892 he presented a petition for a decree of nullity of marriage on the ground that the *de facto* marriage was void by reason of the wife's relationship to the first wife. The wife did not enter an appearance to the petition, and delivered no defence. On the 7th Feb. 1893 a decree *nisi* of nullity was made. The husband did not apply in Oct. 1893 to have the decree made absolute, as he might have done. On the 9th April 1894 the wife obtained leave to enter an appearance in the suit, in order that she might present a petition for alimony *pendente lite*. On the 13th April she presented a petition for alimony accordingly. On the 23rd May the registrar made an interim order for the payment of alimony *pendente lite*, at the rate of 60*l.* per annum, from the date of the application. This was afterwards altered by directing the payment to commence from the date of the service of the citation. The husband appealed from this order to the President, and he also applied to have the decree *nisi* made absolute.

The motion came before the President on the 18th June.

Holloway for the husband.

Pritchard for the wife. *Cur. adv. vult.*

July 9.—The PRESIDENT.—Charles Bickerstaffe Foden, the petitioner in this case, married, on the 30th Jan. 1860, Sarah Robinson, who died on 16th Oct. 1881. On the 7th Oct. 1890 the petitioner married Susan Barlow, who was the daughter of a sister of his former wife. On the 23rd Aug. 1892 the petitioner presented a petition for a decree of nullity on the ground that his marriage with Susan Barlow, being a marriage with his deceased wife's niece, was within the forbidden degrees. No appearance was entered on behalf of the respondent, and, on the 7th Feb. 1893 I pronounced a decree *nisi*. On the 9th April, 1894 the respondent obtained leave, by order of Barnes, J., to enter an appearance, with the object of presenting a petition for alimony *pendente lite*, and such petition was filed on the 13th April. On the 7th May 1894 the petitioner obtained an order for further time to file his answer to the petition for alimony *pendente lite*. Upon the hearing before the registrar on the 23rd May an order was made, directing a further answer to that petition on certain points and ordering the payment of interim alimony at the rate of 60*l.* a year from the 12th April 1894. The present application is an appeal from that order, and it is accompanied by a motion by the lady that the decree *nisi* may not be made absolute until a proper provision has been secured. There has certainly been some delay on her part in asking for alimony, but, as the order of the 9th April has remained without appeal, I do not think that such an objection can properly be taken, nor was it pressed before me. The point urged on behalf of the petitioner in the suit is, that I have no jurisdiction to make an order for alimony *pendente lite* in favour of the respondent, and the argument in support of that contention is based on the case of *Blackmore* v. *Mills* (18 L. T. Rep. 586). In that case the husband petitioned for a decree of nullity by reason of a previous marriage of the respondent, who, in an affidavit accompanying her petition for alimony, swore that her marriage with the petitioner was irregular as being contracted in Scotland after three days residence, contrary to 19 & 20 Vict. c. 96, s. 1, and it also appeared that she was at the time committed for trial for bigamy, it being alleged that she had, previous to her marriage with the petitioner, gone through a form of marriage with some other man. The Judge Ordinary, as I gather from the two reports, which are not in identical language, refused, in his discretion, to allow alimony *pendente lite*, as the woman had "sworn herself out of court" by her two affidavits stating that her marriage with the petitioner was null and void. The learned judge undoubtedly, as reported, used words to the effect that, as soon as the court is satisfied that there is no valid marriage, alimony *pendente lite* should be refused. But there are other authorities which appear to me to show that the discretion of the court to grant alimony pending suit, at any time before decree absolute, is not determined by the consideration that, on the materials before the court, it appears to be shown that the marriage was invalid. It is clear that, before the Act of 1857, alimony *pendente lite* could be ordered in suits for nullity, not only when the marriage was voidable but void (*Bird* v. *Bird*, 1 Lee, 209, 418), on the principle that, upon the factum of marriage being admitted, alimony *pendente lite* and costs follow. In this case, a question of fact, on which the validity of the marriage depended, was, no doubt, in issue. But in the more recent case of *Miles* v. *Chilton* (1 Rob. 684), decided in 1849, where the respondent, by her answers, admitted the nullity of the marriage, alimony *pendente lite* was allowed. It is true that the part of the answer containing this admission was rejected as irrelevant; but, on this point, Dr. Lushington said: "I am called upon to reject the allegation which I have just been considering, as it does not contain facts relevant to the issue; but, at the same time, I am asked to bear in mind its contents, for the purpose of refusing to receive the allegation of faculties. I apprehend, if I first of all reject the allegation, which I intend to do, that I reject its entire contents, and then it will be no longer before me. But, putting the admission of that allegation aside, I am reluctant, above all things, to disturb the well established principle of law, that, where a fact of marriage is acknowledged or proved, alimony follows as a matter of course." The case of *Langworthy* v. *Langworthy* (54 L.T. Rep. 776; 11 P. Div. 85) appears to me to be a strong authority in the present instance. In that case, a suit was brought in November 1883 by the lady, alleging a marriage on the 10th Jan. 1883, and claiming restitution of conjugal rights. The respondent asserted the illegality of the alleged marriage. In June 1884 alimony *pendente lite* was applied for, but was refused, on the ground that the fact of a marriage ceremony was in dispute. On the 7th July 1885 the President (Sir James Hannen) held that the alleged marriage of the 10th Jan. 1883 was null and void, and pronounced a decree *nisi*. On the 14th Aug. 1885 (as I find from the court minutes), an order was made by the President for alimony *pendente lite* at the rate of 1200*l.* per annum from the date of service of the citation. I am called upon to do here precisely what Sir James Hannen was asked to do there, namely, to order alimony *pendente lite* to be paid down to the time of the decree absolute, after a decision of the court has declared the marriage which took place *de facto* to

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be void *de jure*; and it is clear, I think, that the court in that case, in granting alimony, acted on the principle that the fact of a marriage carried alimony *pendente lite*. It is true that the point of jurisdiction was not contested before Sir James Hannen, but I think the reason for this was that Mr. Langworthy's very experienced advisers felt that opposition must be useless. I should think myself justified in ordering alimony *pendente lite* on the authority of *Langworthy* v. *Langworthy* (*ubi sup.*). But I will add that it appears to me that it would be unsafe to refuse alimony pending suit on the ground that, as the case stands at any moment before the final decree, the court believes the marriage to be void. However clearly this may appear, it is always possible that the Queen's Proctor or some other intervener may put another aspect upon the matter, and I think it more prudent to adhere to the principle that, as a rule, a marriage *de facto* carries the right to alimony *pendente lite* until it is finally declared to be void. The extension of provisions of rules *nisi* to all nullity cases, effected by the Act of 1873, appears to point to the possibility, at least, of intervention in all nullity cases. I therefore dismiss the appeal with costs. The application to make the decree absolute must stand over until an order for alimony *pendente lite* has been made.

From this decision Mr. Foden appealed.

Inderwick, Q.C. and *E. T. Holloway* for the appellant.—The court had no jurisdiction to make this order. The decree *nisi* having been made, there was no pending suit. When the marriage was found to be void by the court, the power to grant alimony ceased:

Blackmore v. *Mills*, 18 L. T. Rep. 586;
Whitmore v. *Whitmore*, 13 L. T. Rep. 723; L. Rep. 1 P. & D. 96.

The order for payment of alimony *pendente lite* is made on the assumption that the lady is the lawful wife:

Bird v. *Bird*, 1 Lee, 209, 211, 418.

Even if the order would have been made in the first instance, the application is now too late:

Noblet v. *Noblet*, 20 L. T. Rep. 716; L. Rep. 1 P. & D. 651.

The case of *Langworthy* v. *Langworthy* (54 L. T. Rep. 776; 11 P. Div. 85) was decided on the particular facts of that case.

Bayford, Q.C. and *Pritchard*, for the respondent, were not called on.

The LORD CHANCELLOR (after stating the facts continued):—It is contended, first, that the court has no jurisdiction to make this order; and, secondly, that, if there is jurisdiction to make it, this is not a proper case for its exercise. First of all, it is said that there is no pending suit, because a decree *nisi* has been made. That argument is quite untenable. Till the decree is made absolute the suit is clearly pending. Then it is said that so soon as the fact of the alleged wife's relationship to the former wife had been established to the satisfaction of the court, it was not within its jurisdiction to make an order for alimony, and some observations of Lord Penzance in *Blackmore* v. *Mills* (*ubi sup.*) were relied upon. I do not think that Lord Penzance, though it might have been quite right to refuse to grant alimony in that case, meant to lay down that the court had no jurisdiction to do so; if he did, I cannot agree with him. In *Bird* v. *Bird* (*ubi sup.*) in 1753, Sir G. Lee, the then judge of the Court of Arches, in a suit for nullity of marriage, brought by the husband, on the ground that at the time of the marriage the wife had another husband living, a *de facto* marriage being admitted, held that the husband must bear the expenses of the wife. Sir G. Lee said that, as there was no precedent, he must determine the case upon the general principles of law and reason. And he added, "I must presume, till the contrary appeared in evidence, that she was his wife *de jure* as well as *de facto*, for otherwise she must be guilty of bigamy, and is a felon by statute 1 Jac. 1, c. 11; but the law presumes, on the contrary, everybody to be innocent till they are proved to be guilty. I must therefore suppose her at present to be his lawful wife, and as such entitled to have costs, as she prays to defend herself in this suit." That was, no doubt, the first decision of the kind. But it appears to have been afterwards the settled practice of the Ecclesiastical Courts to grant alimony to a wife pending suit in all cases of this kind, unless there was some special reason to the contrary. This is shown by a note by Dr. Phillimore in his edition, published in 1833, of Lee's Reports, at p. 211, where he said, "In all matrimonial causes where a fact of marriage is established, and the parties have not separate incomes, the husband is liable, during the progress of the cause, to pay for the maintenance of his wife and the costs of the suit." There is nothing to show that this practice has not continued down to recent times. I think that the practice is in accordance with reason and good sense, and, if it had not already existed, I should have been inclined to make such an order now. I cannot, therefore, hold that there is no jurisdiction to make the order. It is said, however, that the wife did not make her application until long after the decree *nisi*. But it must be remembered that the husband had not then applied to have it made absolute. Under the circumstances I am not disposed to interfere with the exercise of his discretion by the learned President. If the jurisdiction exists, it was a mere matter of discretion. There are obvious reasons why an alleged wife should receive maintenance from her husband until her status has been finally determined by the decree of the court. The appeal must be dismissed.

LINDLEY, L.J.—I am of the same opinion. The important question in this appeal is that of jurisdiction. In early times there was some difficulty as to the jurisdiction, but in 1753, in the case of *Bird* v. *Bird* (*ubi sup.*), that difficulty was got over, and ever since then the jurisdiction has been admitted. I do not think that in the case of *Blackmore* v. *Mills* (*ubi sup.*) Lord Penzance intended to throw any doubt on the jurisdiction to make the order. The practice has continued since 1753, and we ought not to unsettle it. The jurisdiction does not depend on any particular section of the Divorce Acts, but on the practice of the old Ecclesiastical Courts. Then there is the question of discretion. The ordinary practice is to make the order from the date of citation. I think that no injustice will be done, and that we ought not to interfere with the way in which the President has exercised his discretion. The appeal must be dismissed.

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Davey, L.J.—I am of the same opinion. I think the President had jurisdiction to make this order, and I am not prepared to say that he has exercised his discretion wrongly. I do not think the case of *Blackmore* v. *Mills* (*ubi sup.*) lays down an absolute rule that in such a case as this the court has no jurisdiction to make such an order.

Solicitors: *Stanley R. Preston; A. S. C. Doyle.*

Wednesday, July 25.

(Before the Lord Chancellor (Herschell), Lindley and Davey, L.JJ.)

Neville *v.* Matthewman. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Practice—Payment into court—Admission as to possession of money.

The practice, as settled in Freeman *v.* Cox (8 *Ch. Div.* 148) *with reference to what constitutes an admission by a defendant that he has money in his hands for which he is liable to account to the plaintiff, on which he will be ordered on an interlocutory application to pay it into court, will not be extended.*

A testator gave a sum of 1000*l.* *in trust for his daughter and her children, and bequeathed the residue of his estate, which included a business, to his son, the executor and trustee. The daughter and her children brought an action against the executor and trustee of the will on the ground that he had committed a breach of trust by not properly investing the* 1000*l.*, *and an interlocutory application was made for an order that the trustee should pay the* 1000*l.* *into court, on the ground that it was not properly invested, and he had admitted in certain letters that it was in his hands, and that he had allowed it to remain in the testator's business, which he was carrying on for his own benefit. Ever since the testator's death the defendant had paid to the plaintiff* 50*l.* *a year as interest on the* 1000*l.* *The defendant filed an affidavit in which he gave particulars of his receipts and payments with reference to the testator's estate, and alleged that on the true construction of the will the testator's business was specifically bequeathed to him, and that there were not sufficient assets without it to provide for the* 1000*l.*; *and that he had paid the* 50*l.* *a year to the plaintiff (his sister) out of his own pocket, in order to carry out the wishes of the testator, his father.*

Held, that, even if the letters contained the alleged admission, yet, having regard to the affidavit, there was not an unequivocal admission by the defendant that he had the 1000*l.* *in his hands, and there appeared to be a* bonâ fide *dispute as to whether he had received sufficient assets to pay the* 1000*l.* *in full, and therefore he ought not to be ordered to pay the* 1000*l.* *into court.*

Decision of Chitty, J. reversed.

William Matthewman, late of Huddersfield, in the county of York, dyer, who died on the 14th Nov. 1874, by his will, dated the 16th Oct. 1872, after directing the payment of all his debts, funeral and testamentary expenses, and giving to his wife during widowhood the personal use and enjoyment of all his household furniture, and also the annual sum of 52*l.*: gave to his brother, John Matthewman, and his son, the defendant John Byram Matthewman, the sum of 1000*l.* upon trust to invest the same upon Government, real or leasehold securities, or upon the bonds, debentures, or debenture stock of any railway company or municipal body with power to vary any such securities, and to stand possessed of the income thereof upon trust to pay the entire income resulting from the said sum of 1000*l.* to his daughter Beatrice for life, and after her decease to stand possessed of the principal sum for her children; and, subject as aforesaid, the testator gave all his residuary real and personal estate to his two sons John Byram Matthewman and Wilfred William Matthewman, in equal shares, and directed his son John Byram Matthewman during the minority of the testator's son Wilfred William, to carry on the business for their joint benefit.

The defendant J. B. Matthewman was the surviving executor and trustee of the will. He carried on his father's business, and in 1877, when his brother came of age, he bought his share and interest in it. During his mother's life he paid her 52*l.* a year, and he also paid 50*l.* a year to his sister Beatrice (who had married Mr. Neville) until the end of 1893, when he commenced paying her at the rate of 40*l.* a year.

On the 3rd March 1894 Mrs. Neville's solicitors wrote to the defendant as follows:

We have been consulted by Mrs. Neville, of Apperley Bridge, as to her life interest in the sum of 1000*l.* directed to be invested under testator's will, and are instructed to apply to you for immediate payment of the arrears of income now due to her, and to inform you that, unless the amount, together with 6*s.* 8*d.* our charges, be remitted us, we have instructions to take such steps to recover same as may be deemed advisable.

On the 12th March they wrote:

Mrs. Neville has handed us your letter of 10th inst. She . . . objects to the amount of such income being reduced from 50*l.* to 40*l.* per annum without information, to which she certainly is entitled before such course be adopted by you. We have therefore to request at once particulars as to how and in what form of security the 1000*l.* directed to be invested under testator's will is invested in her behalf, and for payment of 15*l.* 15*s.* amount now due to her, and unless we receive cheque for that amount and the particulars asked for, we have instructions to institute proceedings against you without further delay.

To this the defendant replied:

I am surprised at the contents of yours of 12th inst. With regard to reduced interest, your client had notice and agreed and has been paid at the reduced rate without any objection being made. The investment is just where the testator left it.

In reply the solicitors wrote:

Unless you comply with the request in our letter of 12th inst. we shall proceed. Your letter received this morning is simply an evasive reply to ours.

To this the defendant replied:

In reply to yours of 15th inst. I have given you a full answer. The money is invested in above business [Folly Hall Dye Works], and has never been out. I have nothing to evade.

The following letter was then sent by the solicitors:

We are in receipt of your letter of 17th, which is not satisfactory to our client. We are therefore instructed

(*a*) Reported by W. C. Biss, Esq., Barrister-at-Law.

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to request that the terms of testator's will with regard to the 1000*l.* in favour of Mrs. Neville be carried out, and that such investment be made to her satisfaction. Unless we receive your reply that such course will be at once adopted, we shall take such proceedings in the interests of our client as may be deemed advisable, of which please accept this letter as notice.

On the 21st May this action was commenced by Mrs. Neville and her infant children (by a next friend), and the writ claimed a declaration that the defendant had been guilty of a breach of trust in retaining or investing in the business of the firm of William Matthewman, Folly Hall Dyeworks, Huddersfield [the testator's business] of which he was a member, the 1000*l.* bequeathed to the plaintiffs, and that he was bound to make good the same with all profits made thereby or with interest at 5 per cent., and it also asked that the defendant might be ordered to pay into court the 1000*l.*

The plaintiffs then moved before Chitty, J. for an order directing the defendant to pay 1000*l.* into court.

By his affidavit in opposition to the motion the defendant alleged that, by reason of the bequest and directions contained in the will with reference to the testator's business, the testator's assets comprised in such business were not liable to be applied or appropriated towards the raising of the sum of 1000*l.* bequeathed in trust for the plaintiffs, but were specifically bequeathed to himself and his brother W. W. Matthewman.

He also made a statement as to the assets and liabilities of the testator, from which it appeared that without the business there never had been any estate of the testator liable to be applied or appropriated towards raising the 1000*l.*, as it had been exhausted by the testator's debts and funeral and testamentary expenses.

He further stated that, notwithstanding the testator left no estate applicable to the payment of the widow's annuity and the sum of 1000*l.*, he had at all times down to the commencement of the action been desirous of making provision for his mother and sister in accordance with the desires expressed by his father in his will, and that down to the time of his mother's death in 1893 he had regularly paid her out of his own money an annuity of equal amount to that bequeathed to her by his father, which payments amounted together to the sum of about 1060*l.*; that from the time of the testator's death down to Aug. 1893 he regularly paid to his sister, the plaintiff Beatrice Neville, a sum of 50*l.* a year, with a view of making her a provision equivalent to that which his father had intended for her, and since Aug. 1893 until Nov. 1893 he had, with the same object in view, paid her a sum after the rate of 40*l.* a year; that he made a reduction in the amount he paid to her because he was of opinion that, if the sum of 1000*l.* intended by his father for her benefit had in fact existed it would not have produced a larger income than 40*l.* a year, and he estimated that he had paid his sister since the testator's death a sum of about 1047*l.* 10*s.*

The motion was heard by Chitty, J. on the 5th July, and the defendant was ordered to pay the 1000*l.* into court, and from this order he appealed.

Swinfen Eady, Q.C. and *Alexander Young* for the appellant.—There is no admission by the defendant that the money is in his hands, and this decision goes further than any former case:

London Syndicate v. *Lord*, 38 L. T. Rep. 329; 8 Ch. Div. 84:

Freeman v. *Cox*, 8 Ch. Div. 148.

It is also contrary to the decision of the Court of Appeal in *Hollis* v. *Burton* (67 L. T. Rep. 146; (1892) 3 Ch. 226).

Farwell, Q.C. and *Abraham* for the plaintiffs.—The defendant admits by his letters that the money is in the business, and therefore it is in his hands:

Porrett v. *White*, 53 L. T. Rep. 514; 31 Ch. Div. 52.

Besides, he had admitted that the assets are sufficient by making the payments to his mother and sister.

The Lord Chancellor (after referring to the facts and letters) continued:—It is obvious that, if the 1000*l.* had been invested in the securities mentioned in the will, it would not have produced 5 per cent. per annum. I think the defendant's statement that "the investment is just where the testator left it," indicates that he had not invested the money afresh according to the directions in the will, but that it remained as the testator left it, in the business. I am of opinion that the letters show that the defendant intended to say that, with regard to any of the testator's money belonging to his sister, it was invested in the business where the testator had put it. It is said that these letters contain an admission that the defendant has 1000*l.* in his hands. I should not be satisfied that there was such an admission if these letters stood alone. But they do not; and there is an affidavit by the defendant in which he gives particulars of the testator's estate, and shows that, if you take the whole estate of the testator and deduct his debts and the specific legacies given by the will, and the expenses of probate, the sum which remains is not enough to provide for the annuity given to the widow and the legacy of 1000*l.*, and the question then arises whether the widow is entitled to have her annuity provided for in priority to, or whether she is only entitled *pari passu* with, the legatees of the 1000*l.* During all these years the defendant has paid the full amount of her annuity to his mother, and the interest on 1000*l.* to his sister. Looking at these facts as a whole, I am of opinion, with all respect to the learned judge, that it would be monstrous to treat this as an unequivocal admission by the defendant that he has in his possession 1000*l.* belonging to the plaintiffs. The difficulty has arisen from his acting generously to his mother and sister. He was anxious his mother and sister should not suffer, and he paid them the full amount to which they could be entitled under the will. It is admitted that in old times this order could not have been made. At first such an order could only be made on an admission in the answer of the defendant to the bill that he had the money in his hands. Then a further step was taken, and it was held that an admission in an affidavit was sufficient. Sir George Jessel, M.R. took a further step, and held in *Freeman* v. *Cox* that an allegation in an affidavit that the defendant had the money, which was not answered, was sufficient. Beyond that I am not prepared to go. In that case Sir George Jessel, said: "I will therefore make a precedent.

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It seems to me that the principle on which the court has ordered payment of money into court has been that the defendant must admit that the money is in his hands for the purpose of the application. In *Jervis* v. *White* (6 Ves. 738) Lord Eldon took the affidavit of the plaintiff charging the defendant with having a sum of money in his hands and an affidavit of the defendant before answer together as an admission, and ordered the money to be paid into court. Here we have the affidavit of the plaintiff, and the service of the notice of motion on the defendant. This, I think, is a sufficient admission, the principle being to make the defendant pay into court what he does not dispute to be owing from him." That seems to me to be a sound principle; but, if on the facts before the court it is obvious that the defendant does in good faith dispute his liability, and that there is a serious question to be decided, it is premature to order him on an interlocutory proceeding to pay the money into court, when as the result of the trial it may be held that he never owed any of it. Of course, if there is an unequivocal admission that he has the money in his hands the defendant cannot get rid of it by saying, "I dispute the claim." There must be a *bonâ fide* dispute. There is a dispute in this case, and nothing to show the money is in peril. With all deference to Chitty, J., I think his decision goes beyond any previous case, and I am unable to agree with him. The appeal must therefore be allowed, and the costs both here and below must be the defendant's in any event.

LINDLEY, L.J.—I am of the same opinion. Unless care is taken when making orders to pay money into court a dangerous precedent may be created, and they will become very oppressive. This could not be so under the old practice. Great care was taken by skilled persons in framing the old answers to the bills of complaint, and if the defendant admitted by his answer having the money there was no danger in making the order. When the practice was extended and orders were made on an admission in the defendant's affidavit great care was necessary; but now when such orders are made on an allegation being made in an affidavit that the defendant has the money, which he does not answer, much greater care is necessary. I think in this case the judge pressed what is stated in those letters too far. I do not think they amount to an admission that the defendant has the money in his hands. They amount only to this, that the money was never invested in the strict sense at all, and it is where it was when the testator died—that is, in the business. There is a dispute as to the construction of the will, and the defendant alleges in his affidavit that the assets of the testator were insufficient to provide for the annuity to the widow and the 1000*l*. I cannot extract from the letters any admission by the defendant that he has 1000*l*. belonging to the plaintiffs in his hands, and I think it would be oppressive and extremely dangerous in this case to hold on those letters that the defendant admitted he had this 1000*l*. in his hands.

DAVEY, L.J.—I agree that an order of this character made on an interlocutory application may become an instrument of oppression and cause great injustice. The defendant alleges that the estate of this testator was insufficient to provide the annuity to the widow and the 1000*l*. to be invested. No doubt it was his duty as executor to realise and apportion the estate, and if it now proves insufficient it may expose him to some liability. But that is no reason for ordering him to pay the 1000*l*. into court. From the statements in his affidavit it appears that at the most the sister should have received 18*l*. a year, and the widow's annuity must have abated. The defendant, however, has paid the annuity to his mother in full and to his sister interest at 5. per cent. on 1000*l*., no doubt thinking that the business would improve, and would allow him to pay it in full. He may by that course have admitted assets, or he may show at the trial satisfactorily that the estate was insufficient. He may be right or he may be wrong as to the amount of the testator's estate, but that is a question for the trial of the action. Several questions have to be determined at the trial, and I do not think that such a case has been made out against the defendant that he ought to be ordered now to pay this 1000*l*. into court. The Lord Chancellor and Lindley, L.J. have stated the course which the practice relative to orders for payment into court has taken. At first the order was only made where the defendant admitted in his answer that the money was in his hands; then the practice was extended so as to include admissions in the defendant's affidavits; and then a further extension was made by Sir George Jessel, M.R., as shown in the judgment which the Lord Chancellor has read. I am not disposed to extend that practice any further. An order to pay into court previously to the trial of the action ought only to be made when it is satisfactorily made out that the defendant has the money in his hands, and there is no real defence to the demand. In the present case I think the defendant ought not to be ordered to pay it in. And now that there is so much less delay and expense in trying these questions than formerly, there is less reason for making such an order before judgment in the action. I agree that this appeal must be allowed.

Solicitors: for the plaintiffs, *Pitman* and *Sons*, agents for *Ferns* and *Sons*, Leeds; for the defendant, *Ramsden*, *Radcliffe*, and *Co.*, agents for *Ramsden*, *Sykes*, and *Ramsden*, Huddersfield.

Friday, July 27.

(Before the LORD CHANCELLOR (Herschell), LINDLEY and DAVEY, L.JJ.)

Re R. BOLTON AND CO. LIMITED; SALISBURY-JONES AND DALE'S CASE. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Company—Winding-up—Contributory—Director—Qualification shares—Fixed period for acquiring shares—Resignation within period.

Where, by the articles of association of a company, a period is fixed within which a director is to acquire his qualification shares, but he is empowered to act before so doing, the fact that he acts as director is not evidence of an agreement to take the shares, and, if he resigns within the period fixed for acquiring them he is under no obligation to acquire them, and therefore on the

(*a*) Reported by W. IVIMEY COOK and W. C. BISS, Esqrs., Barristers at-Law.

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winding-up of the company is not liable to be placed on the list of contributories in respect of those shares.

Decision of Wright, J. reversed (Lindley, L.J. dissenting).

THIS was an application by A. T. Salisbury-Jones, J. J. Dale, and F. W. Salisbury-Jones for an order that their names might be struck off the list of contributories of R. Bolton and Co. Limited in respect of their directors' qualification shares.

The company was registered on the 22nd April 1893 with a nominal capital of 12,000*l.* divided into 1400 6 per cent. preference shares of 5*l.* each, and 1000 ordinary shares of 5*l.* each. The company was formed for the purpose of purchasing and carrying on the business of a merchant engineer, formerly carried on by Reginald Bolton.

The applicants signed memorandum and articles of association as subscribers for one share each.

The material articles of association were the following:

89. The first managing director shall be R. Bolton. . . . The said R. Bolton and the remaining six subscribers to these articles shall be the first directors until such time as the latter or a majority of them shall nominate, by an instrument in writing under their hands, another director or directors to act with the said R. Bolton in place of the said remaining six subscribers.

91. The qualification of a director other than the managing director shall be the holding of shares of the company of the nominal amount of 100*l.* in ordinary or preference shares. A director may act before acquiring his qualification, but shall in any case acquire the same within three months from his appointment, and unless he shall do so, he shall be deemed to have agreed to take the said shares from the company, and the same shall be forthwith allotted to him accordingly.

94. The office of director shall be vacated. . . . (b) If by notice in writing to the company he resigns his office.

On the 30th May 1893 A. T. Salisbury-Jones signed certain share certificates.

On the 29th June 1893, within the three months fixed by the articles for acquiring the qualification shares, the applicants signed a document in the following terms:

In pursuance of clause 89 of the articles of association of R. Bolton and Co. Limited, we the undersigned do hereby appoint G. Millington . . . as director to act in place of the six subscribers other than the said Reginald Bolton.

Except as above stated, none of the applicants ever acted as directors.

On the 31st Jan. 1894 an order was made for the compulsory winding-up of the company.

At that date A. T. Salisbury-Jones was on the register for five fully paid shares, and the other applicants for one fully paid share each.

The official receiver settled A. T. Salisbury-Jones on the list of contributories for fifteen shares, and the other two applicants for nineteen shares each, in respect of their qualification shares.

On the 8th June 1894 the summons came on for hearing before Wright, J.

Rufus Isaacs for the applicants.—Under art. 91 the applicants were given three months within which to acquire their qualification shares. Before the expiration of that period they resigned their offices, and having done so they ought not to be placed on the list of contributories. The fact of their having so resigned distinguishes the present case from *Re Anglo-Austrian Printing and Publishing Union*; *Isaacs' case* (66 L. T. Rep. 593; (1892) 2 Ch. 158) and *Re Hercynia Copper Company* (70 L. T. Rep. 709; (1894) 2 Ch. 403) where the directors continued to act after the expiration of the qualifying period.

O. L. Clare, for the official receiver, was not called upon.

WRIGHT, J.—As I understand the law, the question in all these cases is whether there has been an agreement to take shares, and, if there has been such an agreement, the person who has entered into it must be put on the register of shareholders. In the present case the applicants were subscribers to the articles, which provided that the subscribers to the articles should be the first directors until such time as they should, acting as such, nominate another director or directors to act in their place. A. T. Salisbury-Jones acted as a director on one occasion within three months of his appointment, and he and the other two applicants on the 29th June 1893—within the three months specified in art. 91—at a meeting of directors signed a paper vacating their own office and appointing another person to succeed them as director. If that was not done by them as directors, it was not validly done at all. [His Lordship read art. 91 and continued:] The applicants agreed to become directors of the company. Their acting on the 29th June 1893 by resigning and appointing another director is sufficient evidence of their having done so. Then does the fact of their having resigned within the three months make any difference? The article provides that a director may act before acquiring his qualification, and shall have three months from his appointment within which to acquire it, but if he does not he shall be deemed to have agreed to take his shares from the company. I cannot read that as in any way discharging the agreement to take their shares which was arrived at when they agreed to become directors. The object of the provision was to give them time to buy their shares in the public market, or otherwise, if they wished to do so, instead of having them allotted to them by the company. In *Re Hercynia Copper Company* (*ubi sup.*) this precise question did not arise, and it has not arisen in any other case; but I cannot see anything in principle which shows that the mere fact of the resignation of a director destroys the agreement to take shares which he has entered into by becoming a director. An agreement can only be put an end to by performance, a legal release under seal, or novation. There is nothing of that sort in this case, and I must hold that the applicants are liable in respect of their qualification shares although they have resigned their office. The summons will be dismissed with costs.

From this decision the applicants appealed.

Rufus Isaacs for the appellants.—There was no implied agreement by the appellants to take these shares. They had three months within which to obtain their qualification shares, and having resigned before the expiration of that period they were not bound to obtain them:

Re The Wheal Buller Consols; Ex parte Jobling, 58 L. T. Rep. 823; 38 Ch. Div. 42;

Re Printing Telegraph and Construction Company of the Agence Havas; Ex parte Cammell, 70 L. T. Rep. 705; (1894) 2 Ch. 392.

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If there was such an agreement, they had a reasonable time within which to perform it, fixed by the articles at three months, and, as that reasonable time had not elapsed when they resigned, they cannot be held liable as contributories:

Re Colombia Chemical Factory Manure and Phosphate Works; Brett and Hewitt's case, 49 L. T. Rep. 479; 25 Ch. Div. 283.

This case is distinguishable from *Re Anglo-Austrian Printing and Publishing Union: Isaacs' case* (*ubi sup.*) and *Re Hercynia Copper Company* (*ubi sup.*), for in those cases the directors continued to act after the time for obtaining their qualification shares had elapsed. The provision here, that the director shall be deemed to have agreed to take the shares from the company, only comes into effect after the expiration of three months, and then it only applies to his qualification shares, and if he is not then a director he does not want qualification shares. It cannot mean that because a man has acted as a director without being qualified, yet at the expiration of the three months he is liable for the qualification shares though he is not then a director.

O. L. Clare for the official receiver.—By accepting the office of director, these gentlemen entered into a contract to take the qualifying number of shares. During the first three months they might buy them on the market, but after that time they must take them from the company. They cannot escape their liability by resigning before the expiration of the three months.

Isaacs in reply.

The Lord Chancellor.—The question which we have to determine in this case turns upon the construction of the 91st article of association of this company. It must be admitted that it is not possible in any point of view to put a thoroughly satisfactory construction upon it. Even if construed in the way Mr. Clare has construed it, it does not carry out effectively that which he says is its object, viz., to secure that the directors shall have a stake in the company. [His Lordship referred to articles 89 and 91, and continued:] The question is, whether the appellants in this case can be deemed to have agreed to take shares from the company. It is admitted on the authorities that, unless the last words of article 91 are applicable, although they may have acted as directors not only for a period of three months, but for a longer period, no agreement could be inferred on their part to take their qualification so as to entitle the liquidator to put them on the list of contributories, and the sole question is whether, in the events which have happened, the last words of article 91 apply to the appellants so as to justify the liquidator in putting them upon the list. It cannot be doubted that, if the present appellants had continued to act as directors for more than the three months, they would be deemed to have agreed to take the shares from the company, and they would then have been properly put upon the list. That was decided in *Re Anglo-Austrian Printing and Publishing Union; Isaacs' case* (*ubi sup.*). But the difficulty in this case is that they did not continue in office beyond the three months, but ceased to be directors about two months after signing the articles. Are they nevertheless to be deemed to have agreed to take shares from the company? It must be borne in mind that the qualification is not merely the acquiring, but the holding so many shares in the company. It is the duty of the directors, so long as they act as directors, not only to acquire, but to hold the qualifying shares, and unless they do so they cannot be said to be qualified directors. It appears to me that this article is designed to indicate that, though a man to be a qualified director must hold a certain number of shares, he may postpone acquiring those shares for three months and still have all the rights of a director. After that period he must acquire the shares, and must hold them so long as he is director, otherwise he cannot be a qualified director. Then comes the question whether a person who becomes a director, but who before the three months has expired has ceased to be a director, is bound then to acquire the shares, or, if he does not, whether he must be deemed to have agreed to take them from the company. The words are: "A director may act before acquiring his qualification, but shall in any case acquire the same within three months from his appointment, and unless he shall do so he shall be deemed to have agreed to take the said shares from the company." The primary obligation is that a director should acquire and hold so many shares as his qualification within three months from his appointment, and it is only in case of his default in doing so that he is to be deemed to take the shares. Was it intended by these words to require a person who had ceased to be a director within the three months to acquire his qualification? He could not acquire his qualification because he had ceased to be a director; he could only acquire the necessary number of shares. The object of the article is that a person who is managing the affairs of the company should have some shares in it. In my opinion, this is not a mere verbal distinction, because it is not the object of the article to place a certain number of shares, and, if Mr. Clare's contention is correct, the only effect would be that, although a man has ceased to be a director, and the purchase of shares could not qualify him, yet he must go into the market and buy shares which he may the instant after sell again, for, having ceased to be a director, he is no longer under any obligation to hold them. Can it then be contended that, after he has ceased to be a director he shall go into the market and acquire the shares, and so fulfil the words of the article, "acquire his qualification?" That is not the intention of the article. If this article provided that every person who became a director should necessarily acquire a certain number of shares, and should hold them for a certain time, I should be disposed to give effect to it and enforce it stringently. I think it is a very good object of articles to secure that the directors shall have a stake in the company, because I feel the difficulty of allowing persons to manage a company without having some stake in it, or of allowing them to have the power to part immediately with any such stake as they have. But the question is, Is that provided for by this article? I answer no. That is not provided for even upon the construction suggested by Mr. Clare, because he admits that the obligation imposed by the article upon these gentlemen would be satisfied by their acquiring shares, and that they need not hold a single share. They might go into the market and acquire the shares, and sell them again the next day, because the articles do not give the company

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any right to call on a director who has resigned to hold any shares, and it is only if a director fails to acquire his qualification within three months that he is to be deemed to have agreed to take the shares from the company. In my opinion, the obligation we are asked to declare as having existed is one which would not effect any advantage to the company, and does not seem to be within the intention of the parties. The learned judge below asks whether the fact of the directors having resigned within the three months discharges them from the agreement which they have entered into? I should agree that it would not. Where I differ from him is upon the question whether any agreement has been entered into. I do not read this article as imposing any agreement to take shares on a person who at the expiration of the three months is no longer a director.

Lindley, L.J.—In this case I have the misfortune to differ from the Lord Chancellor. I agree that the question turns upon the construction of the articles. The first question which occurs to me is as to the meaning in article 91 of the expression "a director." I understand that as meaning any person who assents to become a director, and who does become one. It is not necessary that he should hold the qualification for any particular time, and he may become a director and retire the next day if he chooses. The qualification of a director is the holding of so many shares; but a director cannot hold shares unless he acquires them, and he must hold them so long as he is director. In other words, in order to qualify, a director must hold—*i.e.*, must acquire and hold—shares of the stipulated value; but any director may act before acquiring his qualification. Then come the words which are important, "but shall in any case acquire the same within three months from his appointment, and unless he shall do so shall be deemed to have agreed to take the said shares from the company." "The said shares"—that is, the shares he has agreed to take in order to qualify. The object of the article was to prevent persons becoming directors who did not bind themselves to take shares. That seems to me to be the natural and not the forced meaning of the article. In my opinion, the appeal should be dismissed.

Davey, L.J.—This case is exclusively one of construction of the articles. The earlier cases are only important as showing, first, that in order to fix a director with liability you must find a contract by the director with the company to take shares within the 23rd section of the Companies Act 1862; secondly, that the articles, though not themselves constituting the contract, are nevertheless evidence of the terms upon which a director has contracted to become a director. I agree that, if these gentlemen can be shown to have entered into an absolute contract to take shares, they do not relieve themselves from the contract by resigning their position of directors. The question is, Are these gentlemen in that position? Their contract is that they will hold shares in the company to the extent of 100*l.* so long as they remain or act as directors; but that primary obligation is subject to this, that for a period of three months they may act without acquiring or holding their qualification. The obligation to acquire is only ancillary to the obligation to hold them, which is the primary obligation. When the directors resign they cease to be under any obligation to hold, and if they have not acquired the shares they are under no obligation to acquire them. Of course, if they have already entered into a contract to take shares, the fact of their resigning will not relieve them. In this case there is no absolute contract to acquire shares or take shares from the company. The contract to take shares from the company only arises if the director has not previously to the expiration of three months acquired his qualification *aliunde*. But, looking at the purpose of the article, I think the words "acquire his qualification" must be construed strictly, and that qualification means shares to be used as a qualification for enabling a director to act. The contract is that, if a director fail to acquire his qualification *aliunde*, he shall acquire it from the company. But if before the expiration of three months he is no longer in a position which requires him to hold his qualifying shares, he is no longer under any obligation to acquire them. On these grounds I agree with the Lord Chancellor that this appeal ought to be allowed.

Solicitors: *Russell* and *Arnholz*; *Firth* and *Co.*

July 13 *and Aug.* 4.

(Before the Lord Chancellor (Herschell), Lindley and Davey, L.JJ.)

Wigram v. Buckley. (a)

APPEAL FROM THE CHANCERY DIVISION.

Lis pendens—*Registration—Personal property—Book-debts—Mortgage—Priority—Laches.*

The doctrine of lis pendens *does not affect personal property other than chattel interests in land.*

In 1885 *the defendants assigned their present and future book-debts to the plaintiffs by way of mortgage. In June* 1892 *the plaintiffs commenced an action for foreclosure, which they registered as a* lis pendens, *and in July obtained an order appointing a receiver of the book-debts and an injunction restraining the defendants from dealing with them. No notice was given to the debtors of the plaintiffs' mortgage or of any of the proceedings. In* 1893 *the defendants assigned several of the debts comprised in the plaintiffs' security to a bank without notice of that security or the proceedings. The bank at once gave notice of the assignment to the debtors, and, on the 28th Nov.* 1893, *obtained judgment against the defendants for the amount due to them. On the 30th Nov. the receiver appointed on the plaintiffs' action took possession and claimed the debts,*

Held, that the doctrine of lis pendens *did not apply; but that, if it did, the laches of the plaintiffs disentitled them to priority.*

Decision of Chitty, J. reversed.

In Dec. 1885 the defendants assigned to the plaintiffs by way of security for a loan (*inter alia*), the goodwill of their business and all the book and other debts then due and owing, or which, during the subsistence of the security, should become due and owing to the defendants on account of their business. This mortgage contained a power to get in the debts. On the 28th June 1892 the plaintiffs commenced an action in

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

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order (*inter alia*) to recover the money due to them on their security and for a foreclosure or sale. On the 1st July 1892 the plaintiffs registered this action as a *lis pendens*, and on the 29th July 1892 they applied for and obtained an order, by consent, appointing a receiver of the book and other debts comprised in the above-mentioned security, and the defendants were restrained from carrying out a certain agreement for the sale of their business and book-debts to a limited company and from selling or disposing of any share or interest in the business or any of the property belonging to the business, otherwise than in the usual course of such business, in contravention of the covenants contained in the plaintiffs' mortgage of Dec. 1885. No notice was ever given to the debtors of the defendants of the plaintiffs' security, or of the action, or of the injunction, or of the appointment of a receiver. In 1893 the defendants made three assignments for value and by way of security to the London Banking Corporation of a number of debts comprised in the plaintiffs' security. Notice of these assignments was at once given by the bank to the various debtors whose debts were so assigned. The bank had no notice of the plaintiffs' security, nor of the action as a *lis pendens*, nor of the order appointing a receiver and granting an injunction. On the 28th Nov. 1893 the Banking Corporation obtained judgment against the defendants for the amount due from them to the Banking Corporation. After this—viz., on the 30th Nov. 1893—the receiver took possession and claimed the debts. Thereupon the Banking Corporation took out a summons for liberty to get in the debts assigned to them.

The summons was heard by Chitty, J. on the 1st May.

Horace Kent for the applicants.

Levett, Q.C. and *A. W. Rowden* for the plaintiffs.

Ward Coldridge for the trustee in bankruptcy of the defendants.

Chitty, J.—The applicants come to the court *pro interesse suo*, and their case is that they cannot proceed to take possession of their property by reason of the court having appointed a receiver at the suit of the plaintiffs in the present action. The subject-matter which they claim consists of book-debts, which were assigned to them either absolutely or by way of mortgage—about that there is a contest, but that is immaterial. The plaintiffs by deed in 1885 took a mortgage of book-debts due and to accrue due, and in respect of that mortgage they took a vested equitable assignment by way of mortgage of book-debts or *choses in action*, being property which ranges itself under the heads of personal property or personal estate. Having instituted this action, the plaintiffs moved for and obtained an order appointing a receiver, and also an injunction restraining the defendants, through whom the applicants claim, from dealing with, amongst other things, the book-debts, and there is no question that the order appointing the receiver and the injunction apply to the book-debts in question. The plaintiffs registered this suit as a *lis pendens* under the Act 2 & 3 Vict. s. 7. The applicants' deeds were all executed after the appointment of the receiver and the granting of an injunction, and after the registration of the suit as a *lis pendens*. They advanced their money in good faith, and they had no notice, in the strict sense in which that term is used, of the plaintiffs' claim. The receiver had not at the time when they took their assignment given notice to the debtors to pay the debts to him. These are the main facts, and the applicants' case is that notwithstanding the order appointing the receiver and the injunction, and notwithstanding the registration of the suit as a *lis pendens*, the applicants' title ought to prevail in this action as against the plaintiffs. Now the main point raised on behalf of the applicants by their counsel is that the doctrine of *lis pendens* does not apply to personalty. It is said, and, though I have not made any special research for the purposes of this judgment, I will accept the proposition as coming from counsel, that the decisions in no case affirm the application of the doctrine that I am considering to the case of personalty, and undoubtedly most of the decisions, in the nature of things, would be decisions relating to land or realty. Now, the doctrine of *lis pendens* applies, not to every suit, but to suits the object of which is to recover or to assert title to specific property, and I can see for this purpose no distinction between an action to recover land or to recover property which according to law or equity can, although personal estate, be specifically recovered. I put the case during the argument of special chattels—a case in which the doctrine of equity applies in regard to specific performance. I put also the present case, which is a suit specifically asserting a right in respect of the book-debts in question, and to recover the book-debts. Such a suit as this is a suit to which the common doctrine of *lis pendens* applies. Now, as Lord Cranworth explained in the well-known case of *Bellamy* v. *Sabine* (1 De G. & J. 566), the doctrine is not properly represented as a doctrine of notice. He says: "It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the courts often so describes its operation. It affects him, not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party." And there is a statement very much to the same effect by Turner, L.J. in the same case. That I take to be the true principle, and I can see again no distinction in the application of that principle to a different class of property—between what is called real estate and personal estate. Now, Lord Romilly considered that he had this point before him in *Berry* v. *Gibbons* (28 L. T. Rep. 5; L. Rep. 8 Ch. App. 747), and he then stated an opinion he had formed for the first time, but which was one which he had, as he says, always entertained. This judgment runs thus, so far as I need quote it (L. Rep. 8 Ch. App. 749, n.): "I have no doubt whatever about this case. The doctrine of *lis pendens* would be worth nothing at all if when the suit is registered the application of that doctrine is to be excluded on the ground that the parties do not actually know of the suit, or that the doctrine only applies to real estate. I have always thought, and I still think, the Act respecting *lis pendens* a very beneficial Act, for it was extremely mischievous that purchasers should be affected by a suit the existence of which they had no means of knowing; but

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now if a purchaser or assignee does not search for *lis pendens* it is his own fault." That case came before the Court of Appeal (29 L. T. Rep. 88; L. Rep. 8 Ch. App. 747), and the Court of Appeal, not in any way dissenting from those propositions and from the law as laid down by Lord Romilly, reversed his actual decision upon another ground, which was that the suit was one to which the doctrine of *lis pendens* did not apply. An administration decree had been made, no receiver had been appointed, and no injunction had been granted; but the executrix had dealt with part of the testator's property over which she had a legal dominion, and she pledged or mortgaged a picture of some value to a bank which had no notice of the suit. But the point upon which the Court of Appeal went was that the doctrine of *lis pendens* had no bearing on the case. James, L.J. said in his judgment: "The doctrine of *lis pendens* has no bearing on the case for a mere administration decree, no receiver having been appointed, nor any injunction granted to prevent the executrix from dealing with the assets, would not take away her legal powers so as to invalidate the title of persons claiming under a disposition made by her in the exercise of those powers." There would have been a different decision by the Court of Appeal if that action had been an action for the recovery of the picture, and there had been a receiver appointed of the picture, and an injunction granted against, say, the executrix or any other person to restrain the dealing with the picture. Such a suit would have been a suit which does fall within the doctrine in question. The judgment of Kay, L.J. in *Price* v. *Price* (56 L. T. Rep. 842; 35 Ch. Div. 297) is to the same effect, but I think it unnecessary to pursue the question further. In my judgment, the authorities, and the reasoning, and the plain principle to be deduced from them, and the proper limits of the doctrine of *lis pendens*, all justify me in the conclusion at which I have arrived, which is that, where specific property is sought to be affected by the suit, it is immaterial whether the specific property is land, or realty, or goods, or *choses in action*, or any other personalty. That being so, there being really no other personalty in the case, it seems to me that the application fails. It would be a strange thing if the court, after having granted an injunction to restrain a dealing with the specific property, were to entertain an application in the suit itself made for the purpose of enforcing an assign's title where the assignment is in contravention of the direct order of the court itself. It was urged that the statute for the protection of purchasers against the doctrine of *lis pendens* (2 & 3 Vict. c. 11) applied to real estate only, and the language of the 7th section was referred to, where the term used is "estate"—the person whose estate is intended to be affected thereby. If it had been right to say that "estate" there means real estate, then the result is that this statute, introduced for the protection of purchasers, mortgagees, and others, has not relieved them from the old doctrine of *lis pendens*, and consequently persons who claim have to face that doctrine in all its original severity. That is, putting it generally, that all Her Majesty's subjects are bound to take cognisance at their own peril of what is passing in Her Majesty's courts of justice with reference to specific property. But I think that construction would leave the purchasers of personal estate—and personal estate is largely dealt with at the present day—in an unfortunate position. I think the argument that the 7th section is confined to real estate is one which I ought not to adopt. No doubt the term "estate" used with reference to a man, would refer to property in which he could have an estate in the strict and technical sense of the term, and a man has no estate in personalty; he has an estate in land or other realty. But I am not satisfied that the Legislature intended to use the word "estate" in so narrow a sense, and to protect purchasers of real estate only, leaving purchasers of personal estate, as I have said, without the protection which it was thought just to afford to purchasers of real estate. And there is a ground for saying that the narrow construction of the word "estate" is not the proper one afforded by the Legislature itself in the subsequent Act of 1867 (30 & 31 Vict. c. 47). That Act was passed to confer jurisdiction upon the court to order the vacating of the registration of a *lis pendens*—a statute which was found to be urgently required by reason of some cases which had occurred shortly before the statute was passed, namely, that plaintiffs, by registering suits and not prosecuting them *bonâ fide*, could hamper defendants in their dealings with their property. The language to which I have referred as consistent with a reasonably large interpretation of the word "estate" is the commencement of the enacting part of the 2nd section, which says that "the court before whom the property sought to be bound is in litigation"; and the term "property" is a wide term quite sufficient to include personal estate. It seems as if the Legislature in the use of that term had put an interpretation on the word "estate" in the 7th section which would not confine it to realty, but would leave it to operate so as to include personalty also. In the present case it is not absolutely necessary for me to decide that the term "estate" in the 7th section includes personal estate, but I express my opinion that I think it does, and that the purchasers of personal estate are intended to have the same protection as is granted to those of real estate.

From this decision the London Banking Corporation appealed.

Horace Kent for the appellants.—The doctrine of *lis pendens* does not apply to personalty. The appellants had no actual notice of the action or the appointment of the receiver. The writers of text-books refer to the doctrine of *lis pendens* as affecting land only, and there is no case which holds that the doctrine applies to personalty except the decision of Lord Romilly, M.R. in *Berry* v. *Gibbons* (28 L. T. Rep. 5; 29 L. T. Rep. 88; L. Rep. 8 Ch. App. 747), which was overruled by the Court of Appeal on another point, and this question was not considered by that court. The ground of the doctrine is stated by Lord Hardwicke in *Worsley* v. *The Earl of Scarborough* (3 Atk. 392). The cases on this point are considered by Kay, L.J. in *Price* v. *Price* (56 L. T. Rep. 842; 35 Ch. Div. 297). The case of *Re Barned's Banking Company; Ex parte Thornton* (15 L. T. Rep. 523; L. Rep. 2 Ch. App. 171) supports the contention that personalty is not affected, especially the judgment of Lord Cairns. In sect. 7 of 2 & 3 Vict. c. 11, which provides for the

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registration of a *lis pendens*, the word "estate" is used, which is applicable to land only, and the use of the word "property" in the statute for vacating a *lis pendens* (30 & 31 Vict. c. 47) cannot extend the word "estate" so as to make it include chattels. Under the Mercantile Law Amendment Act 1856, chattels are not affected a judgment until the sheriff takes possession by of them under a *fi. fa.*; therefore, if this decision is correct, a *lis pendens* has more effect than a judgment. *Bellamy* v. *Sabine* (1 De G. & J. 566) is a case of real estate, and so are all the other cases on the subject. The plaintiffs have been guilty of laches, and on that account are not entitled to succeed.

Levett, Q.C. and *A. W. Rowden* for the respondents.—The doctrine of *lis pendens* applies to personalty as well as real property: (*Berry* v. *Gibbons*, *ubi sup.*) Few cases are found in the books referring to personal property, because on a sale of chattels the property, as a rule, passes at once. The doctrine does not take effect on the ground of notice, but because no one has a right while litigating with reference to any property to give other parties any right over it which can prejudice the right of the opposite party:

Bellamy v. *Sabine* (*ubi sup.*);
Bull v. *Hutchons*, 8 L. T. Rep. 716; 32 Beav. 615, 618.

It is the practice of conveyancers on a purchase of personal property to direct that searches be made for *lis pendens*:

Elphinstone & Clarke on Searches, p. 164;
Comyns' Abstracts of Title; Reversionary Interest in Consols, 3rd edit., p. 155.

The rule in *Dearle* v. *Hall* (3 Russ. 1) ought not to be extended to a new case (per Lord Macnaghten in *Ward* v. *Duncombe*, 69 L. T. Rep. 121, 129; (1893) A. C. 369, 394). The use of the word "property" in 30 & 31 Vict. c. 47, in place of the word "estate" in 2 & 3 Vict. c. 11, s. 7, shows that the Legislature intended the more extended meaning to be given to the word. Besides, these debts were assigned to the applicants in defiance of the injunction, and the court therefore will not give them any assistance in enforcing the assignment.

Kent in reply.

Cur. adv. vult.

Aug. 4.—LINDLEY, L.J.—The Lord Chancellor has read the judgments about to be delivered, and concurs in them. [His Lordship then stated the facts as set out above and continued:] It was not disputed that if the plaintiffs' action had not been registered as a *lis pendens*, and if there had been no injunction or receiver, the banking corporation, having no notice of the plaintiffs' title, would have acquired a better title than the plaintiffs to the debts assigned to them, although they were comprised in the plaintiffs' earlier security. This was conceded on the authority of *Dearle* v. *Hall* (3 Russ. 1), and is not open to controversy. But the plaintiffs contended, and the learned judge held, that, as the debts were the subject of an action to recover them, and such action was registered as a *lis pendens* and a receiver of those debts had been appointed, and the defendants had been restrained from dealing with them, the title of the defendants could not be allowed to prevail over that of the plaintiffs. The doctrine involved in this decision is very far-reaching and is of great practical importance to business men, and it requires very careful examination. For the reasons which I will state, I am clearly of opinion that the doctrine is unsound and cannot be supported. I will first consider the effect of the registration of the plaintiffs' action as a *lis pendens*, and I will then consider the effect of the order for an injunction and a receiver. In *Sorrell* v. *Carpenter* (2 P. Wms. 482) the Lord Chancellor said: "Where there is a conveyance made *pendente lite* . . . even though the alienation be for never so good a consideration, yet, if made *pendente lite*, the purchase is to be set aside, and this in imitation of the proceedings in a real action at common law, where, if the defendant aliens after the pendency of the writ, the judgment in the real action will over-reach such alienation. But, where there is a real and fair purchaser without any notice, it is a very hard case, especially in a court of equity, to set such a purchase aside." The judgment in a real action, if in favour of the demandant, was that he recover seisin of the land, and the writ of execution upon it was a writ of *habere facias seisinam*, which directed the sheriff to cause the demandant to have seisin of the lands which he had recovered: (see Roscoe on Real Actions, pp. 328 and 341.) There were no similar judgments or writs in actions at common law to recover goods and chattels. Even in detinue the defendant could, before the Common Law Procedure Act, keep the chattel he had got on paying its value to the sheriff. It is clear that the goods which a defendant had at the date of the writ of execution could be taken even from a subsequent purchaser, unless in market overt: (see Com. Dig. "Execution," D. 2.) But this is a very different matter. So far, therefore, as goods and chattels are concerned, the doctrine that no title could be made to them by an unsuccessful defendant pending litigation for their recovery had no foundation in common law, and, if the rule was different in equity, such rule cannot be based on the principle that equity follows the law. Any such doctrine would, if logically carried out, practically greatly embarrass ordinary trade, and be, to say the least, highly inconvenient to everyone except plaintiffs claiming goods. If the doctrine of *lis pendens* were applicable to personal property generally, bankers and others could not safely make advances on ships or goods and that which represents them in commerce, *e.g.*, bills of lading, dock warrants, wharfingers' receipts, nor upon stock and share certificates, nor upon debentures or policies, nor even on negotiable securities, without making searches in the Judgment Registry Office. Such a doctrine would paralyse the trade of the country, and there is no warrant for it either in the statutes relating to *lis pendens* or in the decisions of the courts. The first statute on the subject is 2 & 3 Vict. c. 11, s. 7. The language of this statute shows that the Legislature was dealing with "estates," *i.e.*, land and land only. It is true that in the amending Act, 30 & 31 Vict. c. 47, s. 2, the word "property" is used instead of "estate," but this variation in language by no means warrants the inference that the Legislature was altering the law by extending the effect of registration to ordinary goods and chattels. Nor has it ever been so understood. Reliance was placed on *Bellamy* v. *Sabine* (*ubi sup.*); but that was a case of

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real estate, and there is no ground for supposing that the observations made in that case were intended to apply to personal property. Similar remarks apply to the instructive judgments in *The Bishop of Winchester* v. *Paine* (11 Ves. 194, 197) and *Metcalf* v. *Pulvertoft* (2 V. & B. 200). Again reliance was placed on the practice of conveyancers who advise purchasers and mortgagees of personal estate to search the *lis pendens* registry. This is intelligible and reasonable enough. Conveyancers advise on abstracts of title and always try and keep their clients out of difficulties and possible litigation. If an abstract of title to personalty is laid before a conveyancer, he naturally advises an intended purchaser or mortgagee to make such inquiries as experience shows to be prudent in order to avoid trouble and vexation in future. There is no case in the books which warrants the notion that the doctrine of *lis pendens* applies to personal property other than leasehold property. It is true that Lord Romilly in *Berry* v. *Gibbons* (*ubi sup.*) decided that the doctrine applied as well to goods and chattels as to land; but his decision was reversed on appeal on other grounds, and there is nothing in the judgment of the Court of Appeal which justifies the inference that that court shared his opinion. The Court of Appeal gave an excellent reason for their decision, viz., that the registration of an administration suit as a *lis pendens* did not prevent an executor from disposing of the assets and conferring a good title to them. It was unnecessary to say or decide more. This was not the first case in which the Court of Appeal differed from the view taken by Lord Romilly of the effect of registering a proceeding as a *lis pendens*. In *Re Barned's Banking Company; Ex parte Thornton* (*ubi sup.*) a winding-up petition was registered as a *lis pendens* against a contributory, and Lord Romilly refused to set aside the registration. But on appeal Turner and Cairns, L.JJ. reversed his decision, and it is impossible not to see from their judgments that they considered that the registration of the petition affected land only, and in that case the land of the company sought to be wound-up. Lord Cairns points out (15 L. T. Rep. 525; L. Rep. 2 Ch. App. 179) that sect. 153 of the Companies Act 1862 expressly makes void alienations of a company's real and personal estate after a winding-up petition is presented, and he says distinctly that sect. 114, the *lis pendens* section, has no reference to personal estate at all. Upon principle and authority I am of opinion that the doctrine in question is applicable to personal property other than chattel interests in land. The inconvenience of extending the doctrine to ordinary personal property is so extremely serious that it would, in my opinion, be very wrong so to extend it now for the first time, even if such extension could be justified by reasoning from well-established general propositions which might serve as premises for arriving at such a conclusion. But then it is said that in this case there was not only a registered *lis pendens*, but an injunction and a receiver. But of these the present claimants had no notice whatever when they advanced their money and obtained and perfected their security. Their title is in no way affected by those orders, nor have the claimants, the bank, been guilty of any contempt of court. The case would have been different if the bank had had notice of the order appointing the receiver or granting the injunction, or even if the receiver had given notice to the debtors to pay their debts to him. Such a notice would have been equivalent to notice by the plaintiffs of the assignment to them. Lastly, I am of opinion that, in addition to all other grounds, the laches of the plaintiffs disentitles them from invoking the aid of the court against the bank. The plaintiffs gave the debtors whose debts were assigned to them no notice of the assignment, nor of the action, nor of the injunction, nor of the appointment of the receiver. They left the defendants to carry on their business and deal with the debts owing to them as if no assignment of them had been made. The action was not prosecuted with diligence; no step was taken in it between July 1892 and the end of Nov. 1893, by which time the bank had not only acquired and perfected their title, but had obtained judgment and sought to enforce it. This laches alone is fatal to the plaintiffs' case, and would be so even if the doctrine of *lis pendens* could be invoked by them: (see Sugd. Vendors and Purchasers, p. 758, citing his decision in *Drew* v. *Lord Norbury*, 3 Jo. & Lat. 267.) The appeal must be allowed, with costs here and below.

Davey, L.J.—It is admitted that there is no recorded decision in the Court of Chancery or in this court in which the doctrine of *lis pendens* has been applied to the title to a chattel or *chose in action* so as to postpone a person taking *pendente lite* without notice, who but for the existence of the action would have a good title against the plaintiff, if the case of *Berry* v. *Gibbons* (*ubi sup.*) before Lord Romilly be excepted. The foundation of the doctrine has been said to be by analogy to what was done in real actions. If so, there is a *primâ facie* presumption that the doctrine was applicable to real estate only. There can undoubtedly be found in the judgments of very eminent judges of the Court of Chancery statements of the doctrine which are in terms general and equally applicable to personal estate as to real estate. The judgment of Plummer, V.C. in *Metcalf* v. *Pulvertoft* (*ubi sup.*) is as good an example as any, and the maxim *Pendente lite nihil innovetur* has been more than once cited. But it will be found on examination that such expressions of opinion although general in terms, have been invariably made in cases dealing with real estate alone, and may therefore be interpreted as having reference to real estate only. The language of sects. 4 and 7 of 2 & 3 Vict. c. 11, providing for registration of *lis pendens* and the re-registration thereof, is, in my opinion, favourable to the inference that the provisions of those sections were considered to apply to real estate only. And it is impossible to read the judgment of Turner, L.J. and Lord Cairns in *Re Barned's Banking Company; Ex parte Thornton* (*ubi sup.*) without coming to the conclusion that those learned judges treated the registration of *lis pendens* as affecting real estate only, and indeed Lord Cairns expressly says so (15 L. T. Rep. 525; L. Rep. 2 Ch. App. 179), although as the particular question was not then under discussion, his words cannot be regarded as a decision. Great weight must of course be given to the opinion of a learned and experienced judge like Lord Romilly. But his decision on the case before him was overruled on other grounds,

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and I cannot agree with Chitty, J. in holding that the Court of Appeal, because they found other sufficient grounds for differing from Lord Romilly's judgment, and did not expressly dissent from his view of the law, must be taken to have given it the weight of their authority. In this state of authorities, I am of opinion that the Court of Appeal is at liberty to say, and must say, whether they will apply the doctrine to a case like the present affecting the title to *choses in action*, and in coming to a decision on that point the court ought to have regard to the effect of such an application on the business and dealings of mankind. This very case is as good an illustration as another. A man claiming to be mortgagee of the present and future book-debts of a firm commences an action to enforce his mortgage, obtains by consent the appointment of a receiver and an injunction to restrain the defendants dealing with the book-debts, and does nothing more. Neither the plaintiffs nor the receiver give any notice to the debtors from whom the book-debts are due, which are left in the order and disposition (to borrow an expression from the bankruptcy law) of the defendants. A year afterwards the defendants assign certain book-debts (some of which were even due at the date of the commencement of the action) to the applicants, who, without any notice of the plaintiffs' claim, complete their title by giving notice to the debtors. It is said that they ought to be postponed to the plaintiffs, because the latter, on the 1st July 1892, registered the action as a *lis pendens*. Is it reasonable or in accordance with the habits of business people to expect persons who deal in shares of joint-stock companies, bills of exchange, bills of lading, book-debts, and other similar property, to search the register of *lis pendens* before concluding any contract of sale or mortgage, at the risk of losing their money if the property in question is the subject of an action or of an order for an injunction or a receiver? Suppose an action to enforce a trust against the legal registered holder of shares in a railway company. He sells these in breach, perhaps, of an injunction; another person (probably not the immediate purchaser from him) takes a transfer. Would it be right or just to hold that transferee subject to whatever equitable rights may ultimately be established in the action? Could the multifarious business of life be carried on on such terms? Real estate and leaseholds stand on a different footing because they are the subject of title, and no prudent person in this country deals with them without at least some investigation of title; and this is known and recognised amongst business people. It may be said that the applicant derives title through the breach of an injunction by the defendants. Be it so. And in that case the defendants, who have set at defiance the order of the court, richly deserve the severest treatment the court can deal out to them. But how does this affect the applicants, who are not bound by the order and have no notice of it? I remember the warning of Lord Nottingham in the *Duke of Norfolk's* case (3 Ch. Cas. 33): "Pray let us so resolve cases here, that they may stand with the reason of mankind when they are debated abroad." Not then finding any decision in the history of the court which binds one to decide against the appellants, and being of opinion that so to decide would not "stand with the reason of mankind," I think that this appeal ought to be allowed. I think that the laches of the plaintiffs in prosecuting their action, and acting on the order for a receiver which they obtained, would in the present case be sufficient ground for not postponing the appellants to their claims; but I have preferred to take the larger and higher ground.

Solicitors: for the appellants, *Thomas Edwards*; for the respondents, *Lindsay*, *Greenfield*, and *Masons*; for the trustee in bankruptcy of the defendants, *Mason*, *Phillips*, and *Cotton*.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

Feb. 14, *April* 30, *and June* 9.

(Before HAWKINS, J.)

DOWNE v. SHEFFIELD. (a)

Will — Description — "Thereto belonging" — Evidence of testator's intention.

In this case the plaintiff claimed to be seised in fee simple and entitled to the rent and profits of a certain garden called the "malthouse garden." J. S. by his will gave and bequeathed "the malting-office with the two adjoining cottages, and the garden and out-offices thereto belonging," to J. D. the plaintiff, and by a codicil of a subsequent date devised all his real and personal estate, not otherwise disposed of, to T. S. the defendant. The question raised was, whether the "malthouse garden" claimed passed by the devise to the plaintiff.

Held, that the malthouse garden passed under the devise, and that the words "thereto belonging" referred to the whole subject of the first part of the devise, viz., the malthouse and the two cottages; and that evidence of the intention of the testator was not admissible, as there was no latent ambiguity in the language of the will.

ON further consideration.

This case was originally tried before Hawkins, J. and a jury at Leicester, on the 14th Feb. 1894, when evidence was taken. The jury were then dismissed, and the action was adjourned to London for further consideration by the learned judge.

The plaintiff claimed to have a declaration that he was seised in fee simple and entitled to the rents and profits of a certain "malthouse garden" under the will of one John Sheffield, claiming that it passed to him under the said will, whereby the testator gave and bequeathed to him "the malthouse office with the two adjoining cottages, and the garden and out-offices thereto belonging."

The facts sufficiently appear from the following pleadings and the judgment of Hawkins, J.

STATEMENT OF CLAIM.

1. John Sheffield, of Syston, in the county of Leicester, by his last will dated the 27th day of May 1892, gave and bequeathed absolutely to the plaintiff certain houses and land situate at Syston aforesaid, and described in the said will as follows: "The malting-office with the two adjoining cottages, and the garden and out-offices thereto belonging."

2. The said will contained certain other specific devises of real estate not affecting the hereditaments in question in this action.

(a) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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3. By a codicil to his said will, dated the 28th May 1892, the said John Sheffield devised all his real estate whatsoever and wheresoever not otherwise disposed of by his said will or the said codicil, to the defendant absolutely.

4. The said John Sheffield died on the 29th May 1892 without having revoked or altered the said devise to the plaintiff.

5. At the respective dates of the said will and of his death, the said John Sheffield was seised in fee simple of certain premises situate at Syston aforesaid, comprising a malting-office with two cottages and appurtenances adjoining the said malting-office on the east side thereof, and a garden and out-offices known as the "malthouse garden" adjoining and communicating by means of doors with the said malting-office on the west and north sides thereof, which said garden contains by admeasurement 3768 square yards or thereabouts, and was and still is in the occupation of one George Barker as tenant to the said John Sheffield and his devisee.

6. Since the death of the said John Sheffield, the defendant has claimed that the said garden known as the "malthouse garden" passed to him under the residuary devise contained in the said codicil, and that the same was not otherwise disposed of by the said will or codicil, and has given notice to the said tenant not to pay rent to the plaintiff in respect of the same or any part thereof, in consequence of which the said tenant has refused to pay any rent to the plaintiff.

7. The plaintiff contends and says that the said garden known as the "malthouse garden" is the garden named in the said devise contained in the said will and passed to him under the same, and he claims: (1) To have it declared that he is seised in fee simple and entitled to the rents and profits of the said garden known as the "malthouse garden." (2) An injunction to restrain the defendants from receiving the rents and profits of the same.

STATEMENT OF DEFENCE.

The defendant says that:

1. He does not admit that there were any out-offices belonging to the garden referred to in paragraph 5 of the statement of claim as the "malthouse garden," or that the same was a garden belonging either to the malt office or to the cottages referred to in the devise. At the date of the will and codicil and of the testator's death, there was no garden or out-offices belonging to the malting-office, but there was a garden, and there were certain out-offices belonging to the two cottages referred to in the devise and occupied therewith, and the garden referred to in the statement of claim as the "malthouse garden" was not then occupied either with the malt office or with the cottages, but was occupied separately by a market gardener and as a market garden.

2. Save as aforesaid, the defendant admits the allegations in the first six paragraphs of the statement of claim.

3. He does not admit that the garden referred to as the "malthouse garden" was known as the malthouse garden, or that it passed to the plaintiff under the said devise.

A. T. Toller contended that the plaintiff was entitled to the "malthouse garden" under the will, and cited *Doe d. Gore* v. *Langton* (2 B. & A. 680) in favour of the contention that he was entitled to produce evidence that such was the testator's intention.

W. Graham for the defendant.—No evidence can be given to explain the intention of a testator, except in the case of the same words applying to two different things. If there is an ambiguity there must be an intestacy. There is ample authority for this. The following cases were cited during the argument:

Charter v. *Charter*, L. Rep. 7 H. of L. 364; 43 L. J. 73, Prob.;
Ongley v. *Chambers*, 1 Bing. 483;
Earl of Newburgh's case, 5 Mad. 364;
Doe d. Chichester v. *Oxenden*. 3 Taunt. 147;
Doe d. Hiscocks v. *Hiscocks*, 5 M. & W. 363;
Jarman on Wills, vol. 1, 5th edit., pp. 380, 738, and the cases there respectively stated.

It is submitted that the garden attached to the cottages is the only garden that passes under the devise.

On the 9th June the following written judgment was delivered by

HAWKINS, J.—This action was tried before me at the last Leicestershire assizes, and was subsequently discussed before me in London. The plaintiff claimed to have it declared that he is seised in fee simple and entitled to the rents and profits of a garden called the malthouse garden, comprising about three-quarters of an acre of land at Syston, in the county of Leicester. John Sheffield, of Syston, by his will, dated the 27th May 1892, gave and bequeathed the malting-office, with the two adjoining cottages and the garden and out-offices thereto belonging, to his cousin, James Down, the plaintiff. By a codicil, dated the 28th May, he devised all his real and personal estate not otherwise disposed of to his brother, Thomas Sheffield, the defendant. The testator died on the 29th May 1892. The question is whether the garden claimed passed by the devise to the plaintiff. . . . I was pressed by plaintiff's counsel to receive evidence of the intention of the testator, but this was objected to by Mr. Graham, who cited *Hiscocks* v. *Hiscocks* (5 M. & W. 363), and *Charter* v. *Charter* (L. Rep. 7 H. of L. 364). I am of opinion that the evidence is not admissible, because I think there is no latent ambiguity in the language of the will when read in the light of all the circumstances known to the testator when his will was executed. Now, what were these circumstances? The whole of the property was purchased by the testator as one property and under one title. The malthouse was originally a dwelling-house, but it was afterwards converted into a malting-house. The whole property before the testator became the owner was occupied by a person named Want. The malting premises extended over the ground floor of that cottage, which actually adjoins them. The second of the two cottages is separated from the first by a narrow passage leading into a private way, called the Street, communicating with a public highway called Church-lane. This private way formed the southern boundary of the whole of the malt-office premises and both the cottages. A yard is attached to each cottage. To the north of these yards and immediately adjoining them is a quadrangular plot of land which forms the gardens or garden (as the case may be) to the cottages. It is separated from the yard of the one cottage by a low dwarf wall and privies, and from the yard of the other cottage by a coal-house, through which there is a way. On all the other sides it is bounded by walls, and for at least forty-five years it has been entirely divided by a low wall, eighteen inches high, into two separate plots, each cottage having the exclusive use of one of the two plots for a garden. A doorway affords a communication between the malt-office premises and the yard of the cottage immediately adjoining. As regards the cottage further from the malting-office, it was occupied for forty-five years by a witness named Pick, who

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for the whole of that time was employed at the malting premises. As to this garden in dispute and its surroundings—first, it has for many years been called the malt-office garden, although certainly for the last few years it has not been occupied with the malting premises, but has been let to a tenant who has used it as a garden. The only access to it from the public road is, and has always been, by means of the private way leading from Church-street; if by horses or carts, through certain gates leading into the yard of the malting-house premises, across the lower end of that yard, and through a barn at the north-west extremity of those premises; if by persons on foot, through a doorway leading out of the private street into and through a building called the grinding-house, across the south-west corner of the yard and through a doorway opening from the malthouse premises into the garden. There was, indeed, a small doorway opening out of the garden into a piece of land devised to a Miss Hamson, but it was not suggested that that was used as an access to the garden. In all other parts the garden was inclosed within high walls. The barn through which the cartway ran was used partly by the tenant of the garden for storing and preparing his vegetables and partly by the testator for storing timber. As to how the grinding-place was used there was no evidence. These two buildings do not seem to have been used for malting purposes, but they were attached to that which is called the malt-office and open into the yard, and I look upon them as out-offices or outbuildings. The question is whether the language used by the testator in his will indicates an intention by him that the malthouse garden should be included in the devise to the plaintiff. If it does, the plaintiff is entitled to the verdict. If it does not, then of course mere extraneous evidence of the testator's intention would be useless and inadmissible. I have given the matter much consideration, and have looked at it from every point of view presented to me by the learned counsel by whom it was very fully and ably argued, and I have arrived at the conclusion that the intention of the testator and the true interpretation of the devise can be arrived at by a careful study of the language employed, and that his intention was that the garden in question should pass to plaintiff. Having regard to the fact that the plot of land belonging to the cottages had been divided into two portions for about forty-five years, that no evidence was given that after the cottages were built the plot had ever been treated as one plot, that one of the two portions had always been exclusively used as a garden by the tenant of one of the cottages, and the other plot by the tenant of the other cottage, I think it impossible to treat them reasonably in any other way than as two gardens, each cottage having one attached to it, and I think it would be a misdescription to describe them as one garden. Each garden would also, in my opinion, pass with the cottage to which it was attached, as would also the domestic outbuildings belonging to the cottages respectively without special mention of them. Suppose the testator in his lifetime had conveyed, or by his will devised, one of the cottages to A. and the other to B., is it possible seriously to doubt that the garden and outbuildings for forty-five years used by the tenant of the cottage devised to A. would pass to A., and that B. would take with his cottage the garden and outbuildings used by the tenant of that cottage without any special mention of them in the devise. The word garden is clearly a wrong description of the two cottage gardens. As regards the malt-office garden, it was rightly conceded by Mr. Graham that, if the testator in the devise had described it as the malt-office and garden thereto belonging, the garden would have passed with the malthouse, but he insisted that the words "thereto belonging" must be read in their primary sense, and be taken to refer to the cottages. . . . The real question, to use the language of Lord Tenterden, C.J., to be considered and determined is, in what sense the words "thereto belonging" are to be understood in this will, and the sense that will best accord with the intention of the testator as it may be collected from other circumstances and other parts of the will, or the sense that ought to prevail: (see *Doe d. Gore* v. *Langton*, 2 B. & A. 692.) Now it is difficult to suppose, having regard to the circumstances in which this garden was placed—bought with the malthouse adjoining it, having no access to it from any public highway except through the malthouse premises, always known as the malthouse garden, and the tenant of it always using with it, for convenience of occupation, the barn forming part of the malthouse premises—that the testator intended to sever it from the malthouse premises, and that, too, without assigning, as he had the power to do, a separate access to it. . . . I think the desire of the testator was that the whole of that malthouse estate, including the malthouse garden and cottages, should go to his cousin James Downs, and that such desire is carried out by the words employed. According to the true construction of the devise I think the words "thereto belonging" refer to the malting-house. The subject-matter of the devise may be treated as consisting of two parts: the first being of the malting-office coupled with the two adjoining cottages; the second, of the garden and out-offices thereto belonging, and I see no reason for referring the words "thereto belonging" to the cottages only, instead of to the whole subject of the first part of the devise, viz., the malthouse with the cottages. By this latter construction the, to my mind, obvious intention of the testator will be fully carried out. If the property devised had been described as "the malthouse, the cottage adjoining the malthouse, and also the cottage adjoining that cottage and the garden and offices thereto belonging," there might have been some difficulty in referring the words "thereto belonging" to any but the last cottage; but treating the malting-office with the two adjoining cottages as one subject of the devise, and the garden and out-offices thereto belonging as a separate subject of devise, it seems to me to be clear that the words "thereto belonging" must have reference to the malting-office, inasmuch as the cottage gardens and out-offices would pass with the cottages without special mention. The devise of the garden and out-offices thereto belonging may well and reasonably, and I think ought to, be read as the garden and out-offices belonging to the malting-office, the term out-offices being satisfied by the barn and grinding-place, which belong to the malting-office, though not required to be used for malting purposes. By this construction every word of the devise will be satisfied. For the

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reasons above mentioned I think the plaintiff is entitled to my judgment with costs.

Judgment for the plaintiff in the terms of the declaration, except as to the injunction in respect of rent and profits.

Solicitors for the plaintiff, *Field, Roscoe*, and *Co.*, for *Stone, Billson, Wilcox*, and *Dutton*, Leicester.

Solicitors for the defendant, *Surr Gribble*, and *Co.*, for *R.* and *G. Toller* and *Sons*, Leicester.

Monday, June 11.

(Before CAVE and COLLINS, JJ.)

BARBER *v.* BURT AND OTHERS. (*a*)

Practice—County Court—Appeal—Absence of judge's note—Shorthand notes—Costs of obtaining—County Courts Act 1888 (51 *&* 52 *Vict. c.* 43), *s.* 121—*Rules of the Supreme Court* 1883, *Order LIX., rr.* 8 *and* 17.

On an appeal from a County Court on the ground of misdirection, and where it was impossible for counsel to ask the judge to take a note under sect. 121 *of the County Courts Act* 1888, *as the point of law did not arise until after all the evidence had been taken, and the summing up was completed, the appellant obtained and made use of a transcript of a shorthand note of the proceedings taken on the trial of the action. The appellant was successful, and on his application to be allowed the costs of such shorthand note, the Court held that under the circumstances such costs ought to be allowed to him. In general, however, and in ordinaryca ses, so much only of the shorthand notes as is relevant to the case of the party who applies for them, and is reasonably necessary for the purpose of the appeal, ought to be allowed.*

Baker *v.* Fraser (9 *Times L. Rep.* 237) *explained.*

THIS was an application by special leave in respect of the costs of a shorthand note taken at the trial of the above action in the City of London Court.

The action was brought to recover damages under the Employers' Liability Act 1880, and the result was that the jury brought in a verdict for the defendants. No note of the proceedings in the City of London Court was taken by the learned deputy-judge who tried the action, but a shorthand note of the whole trial was taken by the shorthand-writer who is appointed to that court by the City of London Corporation. On the 3rd April 1894 the plaintiff moved for a new trial on the ground of misdirection. On the appeal to the Divisional Court the plaintiff made use of the transcript of the aforesaid shorthand note. This, however, was not signed by the deputy-judge. It appeared that the reason why there had been no note taken by the judge was that the point of law arose on the summing up only, and that it had therefore been impossible for counsel to ask the learned deputy-judge to take a note until after all the evidence had been taken, and the summing up was complete.

The Divisional Court (Cave and Wills, JJ.) made an order that the case should go down for a new trial on the ground that it had not been properly put to the jury.

The appeal having resulted in favour of the plaintiff, he now applied to be allowed the costs of the shorthand note.

By the County Courts Act 1880 (51 & 52 Vict. c. 43), s. 121, it is provided as follows:

In any action or matter in which there is a right of appeal, and the judge has at the request of either party made a note of any question of law raised at such trial, or hearing, and of the facts in evidence in relation thereto, and of his decision thereon and of his decision of the action or matter, he shall at the expense of any person or persons being party or parties in any such action or matter, furnish a copy of the note so taken at the said trial or hearing, or allow a copy of the same to be taken, by or on behalf of such person or persons, and he shall sign such copy, whether a notice of motion in the matter of the said appeal has been served or not, and the copy so signed shall be used and received at the hearing of such appeal.

W. M. Thompson appeared on behalf of the plaintiff.—Sect. 121 of the County Courts Act 1888 cannot be applicable to this case, for it was here impossible for counsel to ask the learned judge to take a note until all the evidence had been taken, as the point of law did not arise until the judge had left certain questions to the jury. The plaintiff must therefore do the best he can under the circumstances, and should be allowed to make use of a shorthand note, and the whole question here is what amount of the shorthand note was it reasonable of him to procure. The appellant must support his appeal by such means as best suit his case, and all reasonable expenses incurred by him in so doing he is entitled to be allowed. This is clearly provided for by the Rules of the Supreme Court, Order LIX., r. 8 of which lays down that, on any motion by way of appeal from an inferior court, the court to which any such appeal may be brought shall have power, if the notes of the judge of such inferior court are not produced, to hear and determine such appeal upon any other evidence or statement of what occurred before such judge which the court may deem sufficient. Rule 17 of the same order further provides that the above rule shall apply to appeals to the High Court from County Courts and other inferior courts of record of civil jurisdiction.

P. Rose Innes for the defendants.—The plaintiff is not entitled to the costs of any of the shorthand notes of the trial, not even to that of the summing up. Moreover, it is unnecessary to have any shorthand note taken at all. Counsel could have taken a note on his brief of the various misdirections of which he complained. The defendants moreover ought not to be saddled with the costs of the shorthand note even of the summing up, because this court would have accepted the note made by counsel on his brief. This is the practice of this court, and shorthand notes should only be allowed in very voluminous cases. In the case of *Baker* v. *Fraser and another* (9 Times L. Rep. 237) it was held that the court had no power to allow the expense of a shorthand note as part of the costs of the cause.

CAVE, J.—I am of opinion that this application should be granted. We think that this is a case in which it was impossible for counsel to have asked for a note to be taken under the Act, because it was not until the case was over that it was found necessary. The point of law arose after the learned judge had completed his summing up, and under these circumstances the note could not be asked for, and therefore the rule could not apply. We think that in such cases a party who is dissatisfied with a judge's summing up, or

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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his judgment, should not be placed at a disadvantage, but may satisfy the court as to the grounds and character of his appeal by the means that are best available to him. Now, we understand that a shorthand-writer is employed in the City of London Court by the Corporation of London, and the best way is to apply to him for a transcript. These notes, however, are not judge's notes, and do not require to be signed by the judge, nor does the procedure laid down in sect. 121 of the County Courts Act apply to such a case. In most cases I should think that a note of the summing up would be sufficient, especially where the ground of appeal is misdirection. I think parties are entitled to some portion of the note taken, and they can take any portion they like, but in ordinary cases only so much of the note as is relevant to their case ought to be allowed. Here, however, the plaintiff's case was not clear on the summing up alone, and I think it was necessary for him to have a note of the evidence of the facts in order to throw a light on the former, and I am of opinion that he has acted reasonably in obtaining such note. Under these circumstances I think, therefore, that we should allow the plaintiff the costs of these notes. It is contended on behalf of the defendants that the costs of the shorthand note should never be allowed at all on appeal from an inferior court, and in support of that contention the learned counsel cited the case of *Baker* v. *Fraser and another* (9 Times L. Rep. 237), but that case must be read subject to the consideration that the practice in the City of London Court was not then properly understood by the Divisional Court. Since that time inquiry has been made, and the practice in that court has been explained, and we now know that an official shorthand-writer is employed in that court. The case of *Baker* v. *Fraser* is therefore not an authority as contended for.

Collins, J.—I am entirely of the same opinion, and for the same reasons. *Application allowed.*

Solicitor for the plaintiff, *J. S. Merton.*
Solicitor for the defendants, *H. A. Graham.*

Thursday, July 19.

(Before Mathew and Day, JJ.)

Reg. *v.* The Justices of Essex; *Ex parte* The West Ham Assessment Committee. (*a*)

Rating—Appeal against poor rates—Costs—Service of notice of appeal on both churchwardens and overseers and assessment committee—Appearance of both parties as respondents—Liability of unsuccessful appellant to two sets of costs—Union Assessment Committee Amendment Act 1864 (27 *&* 28 *Vict. c.* 39), *ss.* 2, 3.

An unsuccessful appellant, who has been ordered to pay the respondent's costs in an appeal to quarter sessions against a poor rate, is not, in the absence of special reasons, liable to pay two sets of costs, although he has served notice of appeal on the churchwardens and overseers of the parish, and also on the assessment committee of the union, as required by sect. 1 *of the Union Assessment Committee Amendment Act* 1864, *and although these two parties have appeared as respondents.*

Accordingly, where notices of such appeals were served both on the assessment committee and on the churchwardens and overseers, and both the assessment committee and churchwardens and overseers appeared as respondents, and where the appeals were, at the request of the appellant and with the consent of both sets of respondents, respited from sessions to sessions to abide the result of one appeal, and were finally by consent dismissed with costs to the respondents, it was held that the appellant, who had already paid the costs of the churchwardens and overseers, was not liable to pay the costs of the assessment committee, as there was only one question of principle involved in each appeal, and therefore two sets of costs ought not to be allowed as against the appellants.

Rule calling on the Justices for the county of Essex and the London County Council to show cause why a writ of *mandamus* should not issue commanding the justices to order the clerk of the peace for the county to tax the costs of the assessment committee of the West Ham Union out of sessions, in pursuance of the order made by consent on the 18th of Oct. 1893 by the Court of Quarter Sessions in eleven several appeals entered by the London County Council against poor rates in the parishes of East and West Ham.

The rule was obtained at the instance of the assessment committee of the West Ham Union.

In the affidavit filed on behalf of the assessment committee, upon which the rule was obtained, the facts were set out as follows:—

Certain rating appeals were brought by the London County Council against the churchwardens and overseers of the parishes of East and West Ham, and the assessment committee of the West Ham Union. The first notice of appeal, dated the 14th of Nov. 1890, was an appeal against a poor-rate made for the parish of East Ham, and was addressed to the assessment committee, and served upon the clerk thereof, as well as upon the churchwardens and overseers of the parish. Such appeal was respited from time to time at the request of the appellants, and by the consent of the assessment committee.

A similar notice of appeal with regard to a poor-rate in the West Ham parish was served by the London County Council on the churchwardens and overseers of the parish and the assessment committee. It was ultimately arranged that this appeal only should be fought, and that all the other appeals against rates made in the West Ham district should abide the result of this appeal, and should be respited from time to time by consent for that purpose.

Whilst such appeal was pending fresh rates were made from time to time in these parishes, and in respect of each of such rates the London County Council gave notice of appeal to the assessment committee, and to the churchwardens and overseers, and in pursuance of the arrangement between them, each of these appeals was respited from time to time, with the consent of the assessment committee, who instructed counsel to appear and consent to such respites.

The appeal came on for hearing at the Quarter Sessions for the county of Essex, on the 1st July 1891, when the assessment committee, the churchwardens and overseers, and the county council were respectively represented by counsel.

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law.

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who took part in the proceedings. The Court decided against the county council, and dismissed their appeal, subject to a special case to be stated, but refused to grant costs. No objection seems to have been taken to the assessment committee appearing, nor was any evidence required that they had complied with the provisions of sect. 2 of the Union Assessment Committee Amendment Act 1864 or that they were appearing under that section. This statement was, however, controverted in the affidavit filed in reply, where it was alleged that counsel for the assessment committee asked for costs, not against the county council, but against the churchwardens and overseers, and that the counsel for the latter objected, on the ground that the appearance by the assessment committee was unnecessary. The result was that the court made no order as to costs.

The special case purported to be and was between the London County Council, appellants, and the Churchwardens and Overseers and the Assessment Committee, respondents, and, as it was alleged, no suggestion was made that the assessment committee were not respondents, but the draft case was from time to time submitted to them by the county council, and alterations were made by them, and they finally agreed on the form of the same with the county council.

The special case was argued in the Queen's Bench Division in Feb. 1892 when all the parties appeared, and the Court dismissed the appeal. Upon the argument as to costs, the appellants contended that they ought to be compelled to pay only one set of costs, and stated that in their view the assessment committee were the only respondents who ought to have appeared. The Court seem to have been of opinion that only one set of costs ought to be given, and they gave these costs to the churchwardens and overseers, and watching costs to the assessment committee. These watching costs of the assessment committee were afterwards taxed and paid.

This decision was reversed by the Court of Appeal, but restored by the judgment of the House of Lords in Sept. 1893, the assessment committee taking no part in the appeal to the House of Lords, so that the judgment of the House of Lords was against the county council on the special case.

Before this judgment was given by the House of Lords, appeals had been entered by the county council against eleven poor rates made in these parishes, and had been respited from session to session on application of the county council, and with the consent of the assessment committee, to abide the result of the appeal to the House of Lords.

In consequence of the result of the appeal in the House of Lords, at the Quarter Sessions on the 18th Oct. 1893, counsel for the county council asked that the several appeals should be dismissed with costs to be taxed out of sessions, and counsel for the assessment committee and the churchwardens and overseers consented; and the Court dismissed the several appeals, and ordered the appellants (the county council) to pay "to the respondents the costs to be taxed out of sessions." These orders said nothing as to the payment by the county council of two sets of costs, and did not specify who the "respondents" were who were to receive the costs.

The churchwardens and overseers delivered their bills of costs in respect of the appeals, and the same were taxed by the clerk of the peace, and paid before the granting of the present rule.

The solicitor for the assessment committee attended before the clerk of the peace for the taxation of the costs of the assessment committee, but the solicitor for the county council took an objection to the taxation, on the grounds that no evidence had been given by the assessment committee that they had complied with the provisions of sect. 2 of the Act of 1864, and that in fact they had not complied with such provisions, and were therefore not proper respondents, and also that the costs of the churchwardens and overseers as to the West Ham rates had already been taxed and paid.

The clerk of the peace acceded to this objection, and refused to tax the costs of the assessment committee.

On the 4th of April 1894 an application was made on behalf of the assessment committee to the Court of Quarter Sessions for directions to the clerk of the peace to tax these costs. The whole question was fully argued, and on hearing that the assessment committee had given no proof that sect. 2 of the Act had been complied with, the Court refused the application to direct the clerk of the peace to tax the costs.

The above rule for a mandamus to the justices was then obtained.

In an affidavit filed in reply on behalf of the county council, it was stated that the reason why the notices of appeal were served on both the churchwardens and overseers and the assessment committee was that such service was required by certain statutes, especially by sect. 1 of the Act of 1864; that the churchwardens and overseers appeared as respondents to such appeals, and the assessment committee also appeared, but that such appearance of the assessment committee as respondents was not due to any action on the part of the appellants except the service of the notice of appeal upon them as required by statute, and was not in the name of the guardians of the union, nor with the consent of such guardians after compliance with sect. 2 of the Act; that the assessment committee have never claimed to show any appearance by them under sect. 2, and the appellants have throughout been led to assume that they were appearing of their own motion, and with such remedies as to costs as they might have under sect. 3; that all requests by the appellants for consents to respites were made to the assessment committee as having appeared under sect. 3; and that the appellants have never dealt with the assessment committee as respondents entitled to claim costs as against them; that the appellants have always objected to paying, and ought not to be compelled to pay, two sets of costs; and that the delivery of these bills was the first intimation to the appellants that the assessment committee claimed to be entitled to a second set of costs as against them.

The costs in question consisted of twelve bills of costs, one being a general bill in regard to the West Ham appeals, and the others being in regard to the formal respites and ultimate dismissal of the eleven appeals, the costs in all amounting to some 500*l*.

The Union Assessment Committee Amendment Act 1864 (27 & 28 Vict., c. 39) provides:

Sect. 1. Before any appeal shall be heard by any special or quarter sessions against a poor-rate . . .

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the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made, of the intention to appeal, and the grounds thereof, to the assessment committee of such Union.

Sect. 2. The assessment committee of such union may, with the consent of the guardians of such union, after notice shall have been sent to every guardian, appear as respondents to such appeal, but in the name of the guardians of such union, in like manner, and with the same incidents, and subject to the same liabilities, and entitled to the same remedies and rights, as in the case of persons other than the overseers to whom notice of appeal may be given.

Sect. 3. The costs which the committee may incur in consequence of becoming respondents to such appeal, or of having received notice thereof, shall, if not recovered from the appellants, as well as any costs the committee may be ordered to pay to the appellants, be paid by the guardians and charged to the common fund of the union, unless the court before whom such appeal is heard shall direct that such costs, or any part thereof, shall be charged to the parish, the rate of which is appealed against.

Bosanquet, Q.C. and *Wedderburn*, for the county council, showed cause against the rule.—This rule ought to be discharged, as the assessment committee by appearing served no useful purpose whatever. The county council, therefore, ought not to be made to pay their costs, as they have already paid one set of costs in respect of these appeals, namely, the costs of the churchwardens and overseers. No doubt the county council served a notice of appeal on the assessment committee, but this was because sect. 1 of the Act of 1864 requires such service. This service upon them does not entitle them to appear as respondents so as to render the appellants liable for their costs; and although by the order of the 18th of Oct. 1893 the appellants were ordered to pay "the respondents" their costs, this does not mean, as the assessment committee contended, all respondents who had chosen to appear, and who had appeared under any circumstances, but the words "the respondents" in that order mean respondents entitled to costs as against the appellants, and that is the churchwardens and overseers. The court has no power to award costs to the assessment committee as against the county council, inasmuch as they (the assessment committee) have not appeared under or by virtue of sect. 2 of the Act of 1864, and have not complied with the provisions of that section, so as to make themselves respondents. No evidence has ever been given that the assessment committee have complied with the provisions of that section, and the delivery of their bills of costs was the first intimation to the appellants that the assessment committee claimed costs as against them. The assessment committee appeared in these appeals with such remedies only as to costs as they might have under sect. 3 of the Act, and the appellants acted throughout as if the assessment committee were appearing under sect. 3, and not under sect. 2. Under these circumstances, as there was only one question in each appeal, and one point of principle, the county council ought not to be compelled to pay a double set of costs.

Edward Morten (*Jelf*, Q.C. with him,) for the assessment committee, in support of the rule.—We have appeared throughout all these proceedings as respondents under sect. 2. No question has been raised on that point until our bills of costs came to be delivered to the county council. If no proof was ever offered by us that we were so appearing, the reason was that no proof was ever required to that effect. We are, therefore, respondents appearing under sect. 2 of the Act, and as such we are entitled to our costs as against the county council under the order made by consent on the 18th of Oct. 1893, when the appeals were dismissed with costs to the respondents.

Mathew, J.—I think this rule must be discharged. It is not necessary to repeat in the judgment the imperative rule of procedure that there should not be two sets of costs, unless there are some special reasons for it, where there is but one question to be discussed between the parties. In this case we are asked to allow a double set of costs on the hearing of only one appeal, and the appeal is upon a question of principle and principle only. It is said, in the first place, that there is a statute which compels us to order these costs to be paid, and the statute relied on is the 27 & 28 Vict. c. 39, sects. 2 and 3. What occurred with reference to that statute is this. When the appeal was first lodged at quarter sessions, the assessment committee obtained from the guardians their sanction to appear as respondents. They made themselves in that way party to the appeal, and, under the section in question, if they failed to recover at quarter sessions the costs that they were incurring from the appellants, they were entitled, under sect. 3, to look to the guardians for the payment of these costs. What happened was that the court of quarter sessions, seized of the whole matter, determined that there should be no costs. Therefore, in respect of the first proceedings, there is nothing which entitles the assessment committee to call upon the London County Council to pay the costs. The assessment committee, having made themselves party to this appeal, became entangled, as I gather, in the practice of quarter sessions, which, it is said, necessitates the appearance of the respondents by counsel for the purpose of respiting the appeal. They appeared time after time, and the solemn form was gone through, as I understand, on twelve different occasions of entering and respiting the appeal, and in respect of this transaction the very large sum of 280*l.* is now claimed as payable by the London County Council for the costs incurred by the assessment committee. The appeal ultimately failed. Application was then made to quarter sessions for an order in respect of the costs of entering and respiting the appeals, and orders were made which, upon the face of them, appear to apply to the respondents. Orders that were ambiguous, and that were made without the attention of the magistrates being called to the question that there were two sets of costs claimed by the two respondents in respect of one appeal on one question of principle. The order having gone in that way, it is clearly reasonable and right, when the claim was subsequently made against the London County Council for these extra costs, that the opinion of the court of quarter sessions should be taken as to the meaning of their order. Having heard at great length the matter discussed before them, I have no doubt the Court of Quarter Sessions very properly came to the conclusion that nothing that had occurred at all warranted the assessment committee in saying that the London County Council were estopped from standing upon their

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strict rights. It is preposterous to say that anything happened to disentitle them to do so. They were representing the ratepayers, and nothing occurred to bind the ratepayers to any such an arrangement as Mr. Morten suggests. In that state of things we are asked to do that which the quarter sessions say they did not intend to do, and which no Act of Parliament I can find obliges us to do. Under these circumstances, I think this rule must be discharged, and with costs.

Day, J.—I concur.

Rule discharged with costs.

Solicitor for the London County Council, *W. A. Blazland*; for the Assessment Committee, *Hillearys*.

July 24 *and* 30.

(Before Mathew, J.)

Reid *v.* Wilson and Ward.

Reid *v.* Wilson and King. (*a*)

Penalties—Sunday observance—Lectures on entertaining subjects on Sundays—"House opened or used for public entertainment or amusement"—Disorderly house—Liability of chairman and keeper—Lord's Day Observance Act 1781 (21 *Geo.* 3, *c.* 49), *ss.* 1, 2.

Sect. 1 *of the Lord's Day Observance Act* 1781 *enacted that, "any house, room, or other place which shall be opened or used for public entertainment or amusement on any part of the Lord's Day, and to which persons shall be admitted by the payment of money, shall be deemed a disorderly house or place," and penalties are therein imposed upon (amongst other persons) the "keeper" of the same, and upon the person "managing and conducting such entertainment or amusement," and upon the person acting as "master of the ceremonies," or as "chairman" of any such meeting.*

In an action for penalties under this Act in respect of Sunday-evening lectures on entertaining subjects to which the public was admitted on payment of small sums, but which were not given for the purposes of profit, the jury having found that the hall which was hired for the lectures was, on the occasions in question, "a place open and used for public entertainment or amusement:"

Held, that a person who had taken the chair at the lecture, introduced the lecturer, and then had taken his place amongst the audience, was not liable to penalties under the Act, either as "chairman," "master of the ceremonies," or as "manager or conductor" of the entertainment; also that a person to whom the licence for the use of the hall had been granted by the authorities, and who, on behalf of the owner, had sanctioned the letting of the hall, was not liable as "keeper" of such place.

Further consideration by Mathew, J. in two actions tried before him with a special jury on the 29th June.

The actions were brought to recover penalties alleged to have been incurred by the defendants under sect. 1 of the Act 21 Geo. 3, c. 49 (an Act for preventing certain abuses and profanations on the Lord's Day called Sunday).

(*a*) Reported by W. W. Orr, Esq., Barrister-at-Law

Sect. 1 of 21 Geo. 3, c. 49, enacted:

Whereas certain houses, rooms, or places, within the cities of London or Westminster, or in the neighbourhood thereof, have of late frequently been opened for public entertainment or amusement upon the evening of the Lord's Day, commonly called Sunday; and at other houses, rooms, or places within the said cities, or in the neighbourhood thereof, under pretence of inquiring into religious doctrines, and explaining texts of Holy Scripture, by persons unlearned and incompetent to explain the same, to the corruption of good morals, and to the great encouragement of irreligion and profaneness; be it enacted: that any house, room, or other place, which shall be opened or used for public entertainment or amusement, or for publicly debating on any subject whatsoever, upon any part of the Lord's Day called Sunday, and to which persons shall be admitted by the payment of money, or by tickets sold for money, shall be deemed a disorderly house or place; and the keeper of such house, room, or place shall forfeit the sum of two hundred pounds for every day that such house, room, or place shall be opened or used as aforesaid on the Lord's Day, to such person as will sue for the same, and be otherwise punishable as the law directs in cases of disorderly houses; and the person managing or conducting such entertainment or amusement on the Lord's Day, or acting as master of the ceremonies there, or as moderater, president, or chairman of any such meeting for public debate on the Lord's Day, shall likewise, for every such offence, forfeit the sum of one hundred pounds to such person as will sue for the same.

A penalty of fifty pounds was imposed upon "doorkeepers, servants, or other persons" who shall collect or receive money or tickets, or deliver out tickets for admitting persons to such house, room, or place on the Lord's Day.

Sect. 2 enacted:

That any person who shall at any time hereafter appear, act, or behave him or herself as master or mistress, or as the person having the care, government, or management of any such house, room, or place as aforesaid, shall be deemed and taken to be the keeper thereof . . . notwithstanding he or she be not in fact the real owner or keeper thereof.

The facts and arguments are fully set out in the written judgment of the learned judge.

Sir *R. E. Webster*, Q.C. and *C. Chapman* for the plaintiff.

Robson, Q.C. and *Corrie Grant* for the defendants.

Cur. adv. vult.

July 30.—The following written judgment was delivered by

Mathew, J.—These were actions to recover penalties for acts alleged to have been done in contravention of 21 Geo. 3, c. 49. The facts that led to the litigation were these: A number of leading citizens at Leeds had formed themselves into a society for the purpose of giving on Sunday evenings, lectures on art, science, literature, and sociology. The public was admitted on payment of small sums, but the lectures were not intended for purposes of profit. A hall called the Coliseum was hired by the society, and a number of lectures was given, in respect of two of which the present proceedings were instituted. There was no evidence that any of the lectures before those in question were within the prohibitory clauses of the Act, but it was said that on the 7th and 21st Jan. of this year the lectures were of a forbidden character, and rendered the defendants liable to the penalties sought to be recovered. On the 7th Jan. Mr. Villiers gave a lecture on "Chicago

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past and present," with a description of the recent exhibition called "the World's Fair." The lecture was illustrated by lime-light representations of the places and persons described. The second lecture on the 21st Jan. was delivered by Mr. Max O'Rell on the characteristics of the three nations, England, Ireland, and Scotland. The defendant Mr. Ward, who was mayor of Leeds and president of the society, took the chair at the first lecture. At the second, the defendant Mr. King was chairman. On each occasion the chairman introduced the lecturer and then left the platform and took his place amongst the audience. Mr. Wilson, a defendant in both actions, was a solicitor. He had no personal interest in the Coliseum, nor was he shown to have had any knowledge of the character of the lectures proposed to be given. The hall belonged to a limited company in liquidation. Mr. Wilson had been secretary to the company, and afterwards acted as solicitor to the liquidator. It had been necessary to obtain from the local authorities a licence for the use of the hall, and that licence had been granted to Mr. Wilson, and it was admitted that the terms of the licence had not been departed from. A Mr. Watson, who was manager of the hall for the company, had agreed with the society as to the terms on which the hall was let, and Mr. Wilson, on behalf of the liquidator, had sanctioned the arrangement. At the trial of the actions, the jury came to the conclusion that the hall, upon the occasions in question, was a place open and used for public entertainment or amusement, and, upon the evidence given as to the highly-diverting means by which any information contained in the lectures was imparted, this conclusion seemed reasonable. After the verdict, the objection was taken by the counsel for the defendants that there was no evidence that the defendants had so acted as to bring themselves within the penalty clauses, and the case was reserved for further consideration. On the argument it was urged on the one hand that, upon the facts which were not in controversy, the liability of the defendants was established, and the judgment should be entered for the plaintiff; while, on the other hand, it was contended that the defendants did not come within the description of those rendered liable to penalties by the Act. The following are the material provisions of the statute: [His Lordship then read the provisions of sect. 1 of the Act]: (see 25 Geo. 2, c. 36, ss. 2 and 5, and 3 Geo. 4, c. 114.) It appeared from the statement of claim in each action that Wilson was proceeded against as keeper of a place used for public entertainment or amusement, and it was argued for the plaintiff that the facts that the licence had been granted to him, and that he had sanctioned the letting of the hall to the society, were conclusive upon this point. But Wilson was only the agent for the liquidator to procure a tenant or tenants for the hall. He had derived no profit from the tenancy, nor had he any responsibility for the use to which the hall was put for purposes of public entertainment, so long as the provisions of the licence were observed. He was not within the description of "keeper," contained in sect. 2. [His Lordship then read the description of a "keeper," as contained in that section.] He was no more the keeper of the hall than the liquidator. A landlord of a house used by others for purposes mentioned in the statute, or a house agent who was employed to find a tenant, could not, with any regard to accuracy, be called a keeper of the house, and I am of opinion that, as against Wilson, the action fails. Then, as to the defendants Ward and King; each was sought to be made liable, not as a joint keeper of the room under sect. 2, but on the following grounds: (1) As chairman; (2) as master of the ceremonies; (3) as the person managing or conducting the entertainment or amusement. As to (1) it is clear from the section that the meeting referred to means a meeting for the purpose of profane debate on the Lord's Day. As to (2) neither defendant could be said to have been master of the ceremonies. That description is applicable to amusements of a different character, which are in no respect analogous to the lectures in question. Nor can it be said—as to (3)—that either defendant managed or conducted the entertainment or amusement. The chairman on each occasion managed, not the entertainment, but the meeting of those present at the lecture. He had no authority but that derived from the consent of the audience. It was not shown that he had anything to do with the selection of the lecturer. He could not control the gentleman who gave the entertainment, who might be amusing or dull as he thought proper. The chairman could not compel him to be either grave or gay, and any interference on his part with the lecturer on the ground that he was too entertaining would probably be resented by the meeting, and would lead to the selection of another chairman. I do not consider that either defendant is shown to have been liable on any of the foregoing grounds. I am therefore of opinion that the defendants Ward and King are not liable, and I give judgment for all the defendants with costs.

Judgment for defendants with costs.

Solicitors for the plaintiff, *Desborough, Son,* and *Prichard.*

Solicitors for the defendants, *Darley* and *Cumberland,* for *E.* and *H. Wilson,* Leeds.

CROWN CASES RESERVED.

Saturday, April 21.

(Before Lord Coleridge, C.J., Hawkins, Mathew, Cave, and Grantham, JJ.)

Reg. *v.* Sowerby. (*a*)

*Criminal law—Practice—False pretences—Indictment—Necessary averment—Person to whom pretence made—*24 *&* 25 *Vict.* c. 96, *s.* 88.

An indictment for obtaining or attempting to obtain money, &c., by means of a false pretence which does not state to whom the pretence was made, nor from whom the money, &c., was obtained or attempted to be obtained, is bad.

The form of indictment in Rex *v.* Douglass (1 *Camp.* 212) *followed, and the form in* Reg. *v.* Hunter (10 *Cox C. C.* 642) *disapproved of.*

Case stated by the quarter sessions for the county of Durham, as follows:—

1. At the general quarter sessions held before me at the city of Durham in and for the county of Durham on Monday, the 1st Jan. 1894, defen-

(*a*) Reported by R. Cunningham Glen, Esq., Barrister-at-Law.

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dant was arraigned on an indictment of which the following is a copy:

The jurors for our Lady the Queen upon their oath present that William Marr and Obadiah Blenkinsopp on the 28th Sept. A.D. 1893 were in the employ and service of the Butterknowle Colliery Company Limited, at the Quarry Pit of the Butterknowle Colliery, in the county of Durham, as hewers of coal, and were entitled to payment from their said employers of the sum of fivepence for every tub of coal wrought and filled by them; and the jurors aforesaid upon their oath aforesaid do further present that Joseph Sowerby the younger, on the day and year aforesaid, unlawfully, knowingly, and designedly did by placing a token upon a certain tub of coals in the said pit falsely pretend that the said Joseph Sowerby the younger had wrought and filled the said tub of coals, by means of which said false pretences the said Joseph Sowerby the younger did unlawfully attempt to obtain the sum of fivepence of the moneys of the said Colliery Company Limited with intent to defraud, whereas in truth and in fact the said Joseph Sowerby the younger had not wrought or filled the said tub of coals as he then well knew, against the form, &c.

2. Defendant's counsel submitted that the indictment was bad upon the following points: (*a*) That it was not stated to whom the false pretence was made. (*b*) That it was not stated from whom the money was attempted to be obtained.

3. I was of opinion that the indictment contained sufficient particulars of the offence charged, and I overruled the objection, but reserved the above points for the consideration and opinion of this court.

4. Defendant thereupon pleaded not guilty to the said indictment, and was tried by a jury duly sworn, who returned a verdict of guilty. I postponed sentence until next sessions, and the defendant was liberated on bail pending the decision of the court.

5. The opinion of the court is requested whether the said indictment was good and sufficient in law, and whether the defendant was lawfully found guilty on such indictment.

J. Strachan, on behalf of the prisoner, submitted that it was necessary in an indictment for false pretences to allege that the pretence was made to a particular person, and to state from whom the article obtained by the false pretence had been obtained. This was the form in *Rex* v. *Douglass* (1 Camp. 212), which form had been followed ever since, except that in *Reg.* v. *Hunter* (10 Cox C. C. 642) the indictment was similar to the present, but there no objection was taken to its form.

No one appeared on behalf of the prosecution.

Lord COLERIDGE, C.J.—I have, though with reluctance, come to the conclusion that this conviction must be quashed. It is very important in criminal matters that we should follow the old precedents and authorities; and no case decides that an indictment for obtaining money by false pretences is good which does not state what the false pretence was. Now, a pretence means the holding out to some other person. The person to whom the pretence is held out must therefore be stated. The old form of indictment states that the defendant falsely pretended to a person named, and alleges that by means of such false pretence the prisoner obtained from the prosecutor, &c. Here there is no such statement, and neither the person to whom the pretence was made nor the person from whom it was attempted to obtain the money is stated. I do not know why the old form, which has lasted for nearly a hundred years, and which is known to all lawyers, was not followed here. This indictment, however, has not been drawn in that form, with the result that two essential parts of the charge are omitted. It is true that the indictment contains an averment that the moneys were the property of the Butterknowle Colliery Company; but that averment is rendered unnecessary by the statute which creates the offence, and an averment which is unnecessary cannot supply the place of an averment which is necessary. In my opinion, therefore, this conviction should be quashed.

HAWKINS, MATHEW, CAVE, and GRANTHAM, JJ. concurred.

Conviction quashed.

Solicitors for the defendant, *Field* and *Roscoe*, for *Maw, Teale*, and *Tomlinson*, of Bishop Auckland.

House of Lords.

June 8, 12, 14, 15, *and July* 30.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, ASHBOURNE, and SHAND.)

EDINBURGH STREET TRAMWAYS CO. v. LORD PROVOST OF EDINBURGH AND OTHERS. (*a*)

ON APPEAL FROM THE FIRST DIVISION OF THE COURT OF SESSION IN SCOTLAND.

LONDON STREET TRAMWAYS COMPANY v. LONDON COUNTY COUNCIL. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Tramway — Purchase of undertaking by local authority — Terms of purchase — Valuation of tramway—Tramways Act 1870 (33 *&* 34 *Vict. c.* 78), *s.* 43.

By sect. 43 *of the Tramways Act* 1870, *which was incorporated in the private Act of the Scotch appellant company, and was re-enacted in the private Act of the London company* (33 *&* 34 *Vict. c. clxxi., s.* 44), *it was provided that the local authority might, after the expiration of twenty-one years from the passing of the Act, by notice in writing, require the company to sell to them their undertaking upon the terms of paying to them the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever), of the tramway, and all lands, buildings, works, materials, and plant of the company, such value, in case of difference, to be determined by a referee nominated by the Board of Trade.*

Held (affirming the judgments of the courts below, Lord Ashbourne dissenting), that the value of the tramways must be measured by the cost of construction at the date of the sale, subject to a proper deduction for depreciation, not on the basis of a rental valuation.

THESE were two appeals involving the same point: the first, from a decision of the First Division of the Court of Session in Scotland (Lords Adam, McLaren, and Kinnear, the Lord President (Robertson), dissenting), reported in

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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31 Sc. L. Rep. 598, who had affirmed a decision of the Lord Ordinary (Lord Low); the second, from a judgment of the Court of Appeal (Lindley, Kay, and Smith, L.JJ.), reported in 70 L. T. Rep. 572, and (1894) 2 Q. B. 189, who had reversed a judgment of the Divisional Court (Mathew and Collins, JJ.) reported in 70 L. T. Rep. 97.

The Edinburgh Street Tramways Company, the appellants in the first case, were authorised in 1871 by a private Act to lay down tramway lines in certain streets of Edinburgh, Leith, and Portobello, and on a road in the county of Midlothian. The private Act incorporated the Tramways Act 1870, to the provisions of which the appellants were subject. By the 43rd section of the Tramways Act 1870 it was provided that:

Where the promoters of a tramway in any district are not the local authority, the local authority, if, by resolution passed at a special meeting of the members constituting such local authority, they so decide, may within six months after the expiration of a period of twenty-one years from the time when such promoters were empowered to construct such tramway, and within six months after the expiration of every subsequent period of seven years . . . by notice in writing require such promoters to sell, and thereupon such promoters shall sell to them their undertaking, or so much of the same as is within such district, upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway, and all lands, buildings, works, material, and plant of the promoters suitable and used by them for the purposes of their undertaking, within such district, such value to be in case of difference determined by an engineer or other fit person nominated as referee by the Board of Trade on the application of either party, and the expenses of the reference to be borne and paid as the referee directs. And when any such sale has been made, all the rights, powers, and authorities of such promoters in respect to the undertaking sold shall be transferred to, vested in, and may be exercised by the authority to whom the same has been sold, in like manner as if such tramway was constructed by such authority under the powers conferred upon them by a provisional order under this Act, and in reference to the same they shall be deemed to be the promoters.

Under the provisions of their private Act the appellants constructed within the respondents' district 11½ miles of tramway, and had incurred an expense in the construction, renewal, and maintenance of their aggregate lines of much more than their share capital, which amounted to 300,000*l.*, while their gross annual income exceeded 100,000*l.* per annum. By notice, dated the 12th Aug. 1892, the Corporation of Edinburgh, as the local authority under the Tramways Act 1870, required the company to sell to them so much of their tramway works as was within the district of the corporation. A difference having arisen between the corporation and the company as to the price to be paid by the former to the latter for the undertaking, the Board of Trade, acting under the statutory provisions, appointed a referee to determine the price to be paid. The referee (Mr. Tennant) fixed the price at 212,979*l*, which included the sum of 110,485*l.* for the construction and establishment of the tramway lines, less depreciation. In his award the referee stated it to be his opinion in law:

That in valuing the tramways I am not entitled to take into account the present profits or rental value of the undertaking, but that the proper value of said tramways to be determined by me, according to my construction of the statute, is such sum as it would cost to construct and establish the same under deduction of a proper sum in respect of depreciation to their present condition, and that in estimating such cost I am entitled to take into account the fact that said tramways are now successfully constructed and in complete working condition.

The appellants thereupon raised the present action for the purpose of reducing the award on the ground that the referee's view of the 43rd section of the Tramways Act 1870 was erroneous, and of obtaining a declaration that he ought under that section to have fixed the value to be paid by the respondents for the tramway on a rental basis. The Lord Ordinary and the First Division of the Court of Session—the Lord President dissenting—held that the referee's award was good, and that his view of the 43rd section of the Tramways Act 1870 was correct. The company now appealed.

In the second case, the London Street Tramways Company had under their Acts constructed tramways in certain streets and roads in the north of London. By sect. 44 of their private Act (33 & 34 Vict. c. clxxi.) the provisions of sect. 43 of the general Act were re-enacted. In pursuance of the said powers, the respondents duly gave notice in writing to the appellants that the respondents required the appellants to sell to them the tramways and works and undertaking authorised by the London Street Tramways Act 1870, and in pursuance of that Act the Board of Trade duly appointed Sir Frederick Bramwell as referee to determine the value, exclusive of any allowance for past or future profits, of the undertaking or any compensation for compulsory sale or other consideration whatsoever, of the tramways constructed under the authority of the Act, and of all land, buildings, works, materials, and plant of the tramways company suitable to and used by them for the purposes of the undertaking authorised by the Act. In the course of the proceedings the appellants proposed to tender evidence of the actual profits made by them on the purchased tramways, and stated that the object of such evidence was to arrive at the value of the tramways by taking a certain number of years' purchase of the profits to be shown by such evidence. The respondents objected to such evidence on the ground that, having regard to the terms of the London Street Tramways Act 1870, the referee was prohibited from taking past profits into consideration for the purpose aforesaid. The referee refused to receive such evidence on the ground that the terms of the said Act did not authorise or permit him to adopt a method of valuation based on years' purchase of profits. Thereupon the appellants tendered further evidence to show the rental value of the purchased tramways considered as let or capable of being let to a tenant, and stated that the object of such evidence was to arrive at the value of the purchased tramways exclusive of any allowance for past or future profits of the undertaking. The respondents objected to such evidence, but the referee admitted the same subject to such objection as might be taken on its being shown by cross-examination or further evidence that the proposed mode of arriving at a value by means thereof involved an allowance for past or future profits of the undertaking, and on such evidence and cross

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examination being completed and such objection taken the referee abstained from taking such evidence into consideration in arriving at the value awarded, on the ground that the mode of valuation to which such evidence was directed involved an allowance for past or future profits within the meaning of the section. The respondents tendered evidence to show the opinion of expert witnesses as to the proper cost of construction of the purchased tramways and the depreciation of such value by comparing the condition at the time of sale and purchase with the condition when newly constructed, and stated that the object of such evidence was to arrive at the value on the basis of cost less depreciation. The appellants objected to such evidence on the ground that evidence of the cost of construction, either with or without depreciation, was inadmissible for the purpose of ascertaining the value according to the true intent and meaning of the section. The referee admitted such evidence as giving information which he might properly take into consideration in determining the value within the meaning of the section under the circumstances aforesaid. The referee, with a view to ascertain the value of the purchased tramways, measured by what would be the cost of establishing the purchased tramways as existing at the time of sale and purchase, required evidence of the cost of obtaining the Parliamentary powers necessary to authorise the construction and use thereof, and evidence relating to certain outgoings which, in the course of the reference, had been incidentally mentioned and appeared to be outgoings of the kind necessarily or usually involved in the construction and establishment of tramways, such as the purchased tramways, and some such evidence was given. In the course of the proceedings an agreement was made between the appellants and the respondents as to the price to be paid by the respondents for such of the depôts of the appellants as the respondents required to purchase, and as to the separate valuations of the horses, cars, harness, and stable utensils, plant, machinery, tools, and other materials in such agreement more particularly described. The referee, having heard the evidence given on behalf of the appellants and the respondents respectively, and the arguments of their counsel respectively, duly made and published his award, dated on the 11th March 1893, by which he determined and awarded that the sum of 64,500*l.* was the value of the purchased tramways and the works thereof, other than the works comprised in the before-mentioned agreement, exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory purchase or other consideration whatsoever, except the consideration of the value to the appellants or the respondents measured by what it would cost either the appellants or the respondents to establish the purchased tramways if such tramways did not now exist, but taking into account a proper deduction in respect of depreciation. The appellants gave notice of motion to set aside or to send back to the referee the award, and the motion was heard before a divisional court in Jan. 1894. The learned judges, having taken time to consider, gave judgment in favour of the appellants, ordering the award to be remitted to the referee for reconsideration and redetermination, and the costs of the motion to be ultimately paid by the respondents. The respondents appealed from this judgment to the Court of Appeal, and their appeal came on to be heard in March 1894, and the court, having taken time to consider, gave judgment allowing the appeal, and discharging the order with costs of such appeal and of the Divisional Court. The company appealed.

Upon the case coming on for argument the Lord Chancellor said that, as the two appeals raised precisely the same question, they must be argued together, and that only one counsel would be heard on each side in each case.

Asher, Q.C., of the Scotch Bar (*Graham Murray*, Q.C. and *Vary Campbell*, both of the Scotch Bar, with him), for the appellants in the Scotch case, contended that the view taken by the arbitrator was not justified by the language of the statute. The word "tramway" is equivalent to the "undertaking" as a whole.

Sir *R. Webster*, Q.C. (*Cripps*, Q.C. and *H. Sutton* with him), for the appellants in the English case, urged that "present value," not "cost price," was the proper basis of assessment, and "present value" is the capitalised value of the rent at which the undertaking could be let to a tenant. "Value" had a known definite meaning when the Act of 1870 was passed. See

Pimlico Tramway Company v. *Greenwich Union*, 29 L. T. Rep. 605; L. Rep. 9 Q. B. 9;
Reg. v. *London and North-Western Railway Company*, 29 L. T. Rep. 910; L. Rep. 9 Q. B. 134;
Dobbs v. *Grand Junction Waterworks Company*, 49 L. T. Rep. 541; 9 App. Cas. 49;
Elston v. *Rose*, 19 L. T. Rep. 280; L. Rep. 4 Q. B. 4;
Reg. v. *Bridgwater Trustees*, 9 B. & C. 68;
Reg. v. *Tomlinson*, 9 B. & C. 163;
Reg. v. *Mitton*, 9 B. & C. 810.

The *Lord Advocate*, Balfour, Q.C. (*Moulton*, Q.C. with him), for the corporation of Edinburgh, respondents in the first case, maintained that the view taken by the arbitrator was correct. The whole matter is statutory. The appellants acquired no right of property in the roadway, but only a right to put down rails on it. There was no conveyance, but only a terminable concession. He referred to

Craig v. *Edinburgh Street Tramways Company*, 1 Ct. Sess. Cas., 4th series, 947.

Finlay, Q.C. (*Freeman* with him), for the London County Council, respondents in the second case, supported the same view, and argued that "tramway" only meant the rails laid down in the road, not the whole undertaking.

Asher, Q.C. and Sir *R. Webster*, Q.C. were heard in reply.

At the conclusion of the arguments, their Lordships took time to consider their judgment.

July 30.—Their Lordships gave judgment as follows:—

EDINBURGH STREET TRAMWAYS COMPANY *v.* LORD PROVOST OF EDINBURGH.

The LORD CHANCELLOR (Herschell). — My Lords: The appellant company was formed under the provisions of a private Act of Parliament in the year 1871. This Act incorporated part 2 and part 3 of the Tramways Act 1870. Sect. 43 of that Act entitled the respondents within six months after the expiration of a period of twenty-one years from the time when the

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appellants were empowered to construct the tramway, by notice in writing, to require the appellants to sell their undertaking. They accordingly, on the 12th Aug. 1892, gave notice to the appellants that, in exercise of their rights under that section, they would purchase the appellants' undertaking within the city of Edinburgh. The appellants and respondents having differed as to the price to be paid, the Board of Trade appointed Mr. Henry Tennant, of York, as referee, to fix what the price should be. In the narrative of the award or decree arbitral, which he made, Mr. Tennant stated that, in his opinion, after careful consideration of the terms of sect. 43 of the Tramways Act 1870, in valuing the tramways, he was not entitled to take into account the present profits or rental value of the undertaking, but that the proper value of the tramways to be determined by him, according to his construction of the statute, was such sum as it would cost to construct and establish the same under deduction of a proper sum in respect of depreciation for their present condition, and that in estimating such cost he was entitled to take into account the fact that the tramways were then successfully constructed, and in complete working condition. The present conjoined actions were thereupon raised by the appellants against the respondents for the purpose of reducing Mr. Tennant's award or decree arbitral, upon the ground that his view of sect. 43 of the Tramways Act 1870 was erroneous, and for declarator that he ought, under that section, to have fixed the value to be paid by the respondents for the tramways upon the rental basis, and for an order on him to proceed with the reference, and to find and declare the value of the tramway lines according to their rental value. Both the Lord Ordinary and the First Division of the Inner House have held Mr. Tennant's award to be good, and have assoilzied the respondents. The question on this appeal, is whether these decisions were correct. The question turns on the construction to be put upon the language employed in sect. 43 of the Tramways Act 1870, which prescribes the terms upon which the promoters of a tramway (in this case the appellants) are to sell their undertaking to the local authority. The words are as follows: "Upon terms of paying the then value (exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale, or other consideration whatsoever) of the tramway and all lands, buildings, works, materials, and plant of the promoters suitable to and used by them for the purposes of their undertaking." It is contended, on behalf of the appellants, that the value of the tramway must be ascertained by taking into consideration what rental could be obtained for it if let with all the statutory rights of using it possessed by the promoters, and then allowing whatever may be thought the proper number of years' purchase of the rental which could thus be obtained. The sum so arrived at, it was argued, would represent the then value of the tramway within the meaning of the section. Before discussing the language used by the Legislature, it is, I think, necessary to consider the nature of the rights and powers of the promoters which it is said are to be thus taken into account, and the manner in which they are conferred upon them. The promoters obtained authority, in the first place, to interfere with public highways by laying down tramways upon them, and maintaining the tramways so laid down. But the most important power which they obtained was that contained in sect. 34 of the Tramways Act 1870, which authorised them to use upon the tramways so laid down carriages with flanged wheels, or wheels suitable only to run on the rails prescribed by their Act, and provided that, subject to the provisions of their special Act and of that Act, the promoters and their lessees should have the exclusive use of their tramways for carriages with flanged wheels or other wheels suitable only to run on the prescribed rail. It will be seen that the power thus conferred is limited to the promoters and their lessees, the promoters being the persons or company authorised to construct the tramways. The right conferred is a personal one, and cannot be claimed by any persons who do not come within the designation of promoters or lessees of promoters. It is not conferred upon the promoters' assignees. A conveyance, therefore, by the promoters of their tramways, or even of their undertaking, would not carry with it the right to the statutory monopoly conferred upon the promoters by the section to which I have referred. I proceed now to consider the words of the provision upon which the question at issue turns. It is to be observed that, although the undertaking is described as the subject of the sale, it is to be sold, not upon terms of paying its then value, but upon terms of paying "the then value of the tramway, and all lands, buildings, works, material, and plant of the promoters suitable to and used by them for the purposes of their undertaking." It appears clear that the word "tramway" cannot be read as synonymous with "undertaking." The words which follow "tramway" are, to my mind, conclusive upon this point. What, then, does "tramway" mean as used in the section? I have examined every instance of its use in the statute, and it appears to me in every other case, at all events, to be used to describe the structure laid down on the highway, and nothing more, and I cannot see my way to give any other meaning to it in the section under consideration. The word "tramway" may, no doubt, without impropriety, be held to include all proprietary rights attached to it; but I do not think that it can with propriety be held to comprise all the powers in relation to the tramway which are conferred by the statute upon the promoters. I have already pointed out that the power exclusively to use the tramway was granted to the promoters as such, and is not capable of transfer by them. This is distinctly recognised by the enactment which immediately follows that under consideration. It is provided that, when a sale has been made, all the rights, powers, and authorities of the promoters in respect to the undertaking sold shall be transferred to, vested in, and may be exercised by the authority to whom the same has been sold in like manner as if the tramway was constructed by such authority under the powers conferred upon them by a provisional order under the Act, and in reference to the same they shall be deemed to be the promoters. It is by virtue of this enactment, and of this alone, that the local authority becomes entitled to the exclusive use of the tramway, which was previously vested in the promoters. It is the statute, and not the company which originally

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constructed the tramways, which confers upon the local authority this right. It is also worthy of note that some, if not all of the rights, powers, and authorities of the promoters are treated as not included even in the term "undertaking," inasmuch as they are spoken of as the rights, powers, and authorities of the promoters "in respect to the undertaking sold." I have so far dealt with the language of the section, without taking into consideration the words within the parenthesis, upon which so much of the argument turned; what was to be paid by the purchasers was the then value of the tramway, "exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other consideration whatsoever," It was contended for the appellants that the presence of the parenthesis indicated that in the opinion of the Legislature the term "value of the tramway" would, but for the words in the parenthesis, have justified an allowance for past or future profits of the undertaking, and must therefore include something more than the value of the structure. I cannot assent to this argument. The words of the parenthesis may well have been enacted by way of precaution to make sure that countenance was not given to any contention which would have involved fixing a sum in excess of the value of the structure. There is, I think, a fallacy involved in considering the meaning of the words which follow the parenthesis by themselves, and then inquiring how far the meaning attributed to them is to be modified by reason of the words which precede. Each part of the provision throws light on the other. It is by reading it as a whole that the intention of the Legislature is to be ascertained. The words found within the parenthesis, to my mind, support the view that "tramway" is to be construed in the manner which I have indicated, and not in that contended for by the appellants. It is said that the words "exclusive of any allowance for past or future profits of the undertaking" were introduced for the purpose of preventing the arbitrator making any addition to the value otherwise arrived at in respect of such profit. I find it difficult to understand how it could ever be supposed that an arbitrator would make any addition to the value of the tramway in respect of the past profits of the undertaking, or how it could ever have been thought necessary to prohibit his doing so. It is, however, quite intelligible that it might be thought necessary to guard against his allowing for, or, in other words, taking into account, past profits in arriving at the value of the tramway. But if the word "allowance" is used in this sense in relation to past profits, its meaning must be the same in relation to future profits. I therefore construe the words as enacting that neither the profits made in the past nor to be anticipated in the future were to be taken into account in assessing the value. It was argued that, if the value of the tramway were arrived at by taking so many years' purchase of the rental which could have been obtained for it if let, no profits would be allowed for in the value so ascertained. I am unable to adopt this view. How would it be possible to determine the rental which could be obtained except by reference to the profits which had been or which might be made? The rent which a tenant would be prepared to give would obviously depend upon the profits to be anticipated. It was further argued that the Legislature had only excluded an allowance for past or future and not for present profits. Why, it was asked, if all profits were to be excluded, were the words "past or future" inserted? To my mind the words cover all profits whether made or to be made. And the reason for their insertion appears to me plain. If the word "profits" alone had been used it would have been open to contention that only profits actually made were referred to, and that the provision did not exclude an allowance for profits to be anticipated in the future. Reading the enactment as a whole, I can find no indication, but quite the contrary, that the arbitrator, in determining the then value of the tramway, was to take into account those rights and powers which had been possessed by the promoters as such by virtue of the statute, and would be thereafter by the same statute conferred upon the local authority. Reliance was placed by the appellants upon the provisions of sects. 41 and 42 of the Tramways Act 1870, enabling the Board of Trade, if the promoters discontinued the working of their tramway, or were insolvent, to declare that their powers in respect of the tramway should be at an end. In the first of these cases, the Board of Trade were empowered to declare the powers of the promoters at an end from the date of the order, in the latter, at the expiration of six months from the making of the order, but in both cases it is provided that the powers of the promoters shall thereupon cease and determine, "unless the same are purchased by the local authority in manner by this Act provided." Inasmuch as sect. 43 applies to a purchase by the local authority within three months after any order made by the Board of Trade under either of the two preceding sections, it was contended that this showed that the purchase of the undertaking was regarded by the Legislature as a purchase of the powers of the promoters. I do not think it possible to give the effect contended for to this argument, and to construe the word "tramway" in that part of sect. 43 which regulates the terms of payment in a different manner to that which a consideration of the section itself suggests on account of the language employed in the two preceding sections. That language is certainly not very felicitous. Whether the undertaking is purchased or not, the powers of the promoters equally cease and determine; the purchase does not keep their statutory powers alive. The powers are possessed thereafter by the local authority by virtue of the statute, in precisely the same manner as they were acquired by the promoters. For these reasons I think the interlocutors appealed from should be affirmed, and the appeal dismissed with costs.

Lord WATSON and Lord SHAND concurred in the judgment of the Lord Chancellor.

Lord ASHBOURNE.—My Lords: The facts of the case have been so fully stated by the Lord Chancellor that I need only refer to them at such length as may make my meaning plain. The direct question raised before your Lordships is whether the arbitrator was right in valuing the tramway at what it would cost to make, or whether he ought to have ascertained what it could have been let for to a tenant who could use it, and then have capitalised its annual value. The cases of the *Edinburgh Street Tramways Company*

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and of the *London Street Tramways Company* have been argued together, as they depend upon precisely the same point. The question in the Edinburgh case depends upon the construction of sect. 43 of the General Tramways Act 1870, and the London case depends upon sect. 44 of the London Street Tramways Act, but the two sections are in identical terms, as is the case with many other sections of the Act. For convenience I shall refer only to the sections of the General Tramways Act 1870, and shall not deem it necessary to note specially the corresponding sections of the London Street Tramways Act of 1870, which are mentioned in detail in the judgments in the London case. The decision is of deep moment to all the tramway companies in Great Britain and involves interests of considerable magnitude. The section is not clear. In any view of the case it is a cumbrous and unfortunate piece of drafting, not plain or direct, and each side is confronted with difficulties in its interpretation. It is not surprising to find that amongst the judges before whom the case has come there have been wide differences of opinion, and therefore I have applied myself to the consideration of the case, with many doubts and misgivings as to the soundness of my own judgment on important points, where, though I might be supported by the opinions of judges of eminence, I know my conclusions have been opposed to authorities for whom I entertain the very highest respect. The clause requires the closest and most critical examination and analysis in order to see what is the method of the transfer, what is sold, and what is to be paid. What is the method? As Mathew, J. in the London case, has forcibly said, "Nothing would have been easier than to have said that at the end of the twenty-one years there shall be a transfer of your undertaking, and you shall be paid for the cost of materials *in situ* capable of being worked, less depreciation." But the Legislature in its wisdom has used a long, complicated, and involved sentence, from which we have to spell out and infer such meaning as we can. The transaction is to take place by a sale. A sale involves a selling and a buying, a bargaining, and here an arbitration. If what was meant was a statutable transfer at a statutable price, it was certainly not felicitous drafting to enact that the transaction should be carried out by the machinery set out at such length in the section. But a far more important consideration in the matter is what is sold and transferred under the section. The undertaking, of course, is sold, but the great difficulty is to give the due and proper meaning to the word "tramway." Is it only the tramway *in situ*, or the tramway with the power to use it? This is really a governing point in the case. Does the sale of the tramway include, or involve, or carry with it the right to use it? The words of the section are: "When any such sale has been made, all the rights, powers, and authorities of the company in respect of the undertaking sold . . . shall vest" in the purchaser. The words here, again, are not the best or the clearest. They must be read not only with the rest of the section, but also in connection with other sections, in order to see whether the right to the tramway is treated in the Act as carrying with it the right to use the tramway. Sect. 41 deals with the discontinuance of tramways, and enacts that in certain cases the Board of Trade may, by order, declare that from the date of the order the powers of the promoters shall be at an end, "and the said powers of the promoters shall cease and determine, unless the same are purchased by the local authority in manner by this Act provided," *i.e.*, by sect. 43. Thus sect. 41 expressly states that the powers, including the right to use, are purchased under sect. 43. Sect. 42 is to the like effect. It deals with the insolvency of promoters, and provides for the ceasing of their powers "unless the same are purchased by the local authority in manner by this Act provided, *i.e.*, again by sect. 43. In this connection it is important to note sect. 44, which enacts: "Where any tramway in any district has been opened for traffic for a period of six months the promoters may, with the consent of the Board of Trade, sell their undertaking to any person, corporation, or company, or to the local authority of such district; and when any such sale has been made, all the rights, powers, authorities, obligations, and liabilities of such promoters in respect to the undertaking sold shall be transferred to, vested in, and may be exercised by, and shall attach to the person, corporation, company, or local authority to whom the same has been sold, in like manner as if such tramway was constructed by such person, corporation, company, or local authority under the powers conferred upon them by special Act, and in reference to the same they shall be deemed to be the promoters." In my opinion a sale under sect. 44 would carry with it the right to use the tramway. Similar words are used in sect. 43. The machinery of sale is resorted to, "the rights, powers, and authorities" are also transferred, and I cannot resist the conclusion that under both sections the buyer was intended to purchase and acquire with the tramway the right to use it. It was argued before your Lordships that the powers were to be regarded as the creatures of the statute, given independently by its provisions to "the promoters," and that the sale had nothing to say to them, and did not carry, affect, or transfer them. I do not find any such idea in the judgments of the Court of Appeal in the London case. Lindley, L.J. says: "The vendors have only a right of user, that is by sect. 20; they have no land to sell, they have only an easement so far as the land is concerned, but they have an exclusive right to use the tramway by sect. 29, and to grant licences to other persons to use it by sect. 37. These rights will be enjoyed by the purchasers, and these rights must be borne in mind in ascertaining the value of the tramway. These rights exclude any valuation of the tramway as so much old iron to be broken up and removed. The tramway must be valued as an existing tramway, used as such by the vendors before the sale, and to be used as such by the purchasers after the sale." The words of Smith, L.J. on this point are very strong and clear: "I cannot doubt that what is to be sold and bought is not merely the tramway *in situ* as a structure, but the undertaking of the company as a going toll-earning concern—that is to say, the tramway as then in use, with the rights, powers, and authorities of the company to maintain it in the public streets, run cars thereon with flange wheels to the exclusion of all others, to take the prescribed tolls for so doing, and to exercise the other powers contained in the Act. Of this I

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have no doubt. The words of the section are clear—'and thereupon the company shall sell,' not their rails and sleepers, but 'their undertaking,' and when such sale has been made, 'all the rights, powers, and authorities of the company in respect to the undertaking are to vest in the county council.'" Smith, L.J. in the clearest words gave his opinion that the company had to sell "the powers granted to the company of running cars with flange wheels thereon to the exclusion of all others, and of taking the prescribed tolls and the other powers in the Act mentioned," and he adds emphatically, "that this is what is to be sold by the company to the London County Council I do not doubt." I concur in this view of Smith, L.J., which I regard as of the highest importance as stating and explaining the great value of the subject-matter to be sold. It may be that the language of the section is involved and roundabout, that the conveyancing is defective, but to my mind it is much more in accordance with the language of all the sections of the Act to hold the conclusion I have indicated than to spell out a narrower one in contradiction to what I believe to be the meaning of sect. 43 itself, as well as to the clear words of sects. 41 and 42, and the construction required to give effect to sect. 44. If, then, the undertaking sold comprised or included a tramway capable of being used and with a right to use it, the next great question is, What is the price to be paid for it under the section? The section answers (leaving out the parenthesis for the present), "the then value of the tramway, and all lands, buildings, works, materials, and plant." The actual tramway, in a very literal sense, consists of little else except its iron rails. "The then value of the tramway" from the old-iron point of view would be a ludicrous mockery, and accordingly everyone—judges and arbitrators alike—repudiate any such construction and admit that a wider interpretation must be sought. Smith, L.J. says, "There can be no doubt that in any ordinary case, where an undertaking, such as the present, is to be sold and paid for, its present, that is, its then value is in practice arrived at by capitalising its rental value." Mathew, J. more in detail says: "Value is to be ascertained as it would have to be ascertained, where, for instance, the property was rated, and, therefore, you must use it in its proper sense. This tramway is a hereditament, capable of earning profits, and assessable under the Poor Law Act. In arriving at its value it is clear from the *Pimlico case* (29 L. T. Rep. 605; L. Rep. 9 Q. B. 9), that the meaning of the word value is recognised in many cases in *pari materia*, statutes for instance, relating to metropolitan valuation in the Act of 1869, and also in the Union Assessment Act. To get at the value you take the profits, deduct the tenants' charges and profits, and what is left is the rent which would be paid by a tenant for the opportunity of earning his profit, which would be earned by the occupier, who is the tenant. That is the rent, and by capitalising that rental you get at the value of the hereditament." I therefore take it that apart from the parenthesis "the then value" would be held to have its ordinary meaning, as stated by Smith, L.J. The onus of proving that the ordinary meaning should not be given to the words "the then value" is cast upon those who deny it, and the respondents insist that for this purpose they are entitled to rely upon the parenthesis, which says, "exclusive of any allowance for past or future profits of the undertaking, or any compensation for compulsory sale or other considerations whatsoever." *Primâ facie*, these words imply that, but for their use, the thing excluded would have been included. An exception, a parenthesis, an exclusion, under ordinary circumstances, would be held to qualify and lessen the generality of preceding words. Here, according to the contention, they are used not to abate but to destroy and contradict the ordinary meaning of the words "the then value." If the argument is correct that the value of the tramway is only the value of the materials *in situ*, profits would not need to be excluded, because not comprised in the original subject-matter. It is admitted that "the then value" is not to be found in the value of old iron; it is admitted that something very much more is to be assessed. Where is the line to be drawn? Smith, L.J. well puts the question, "Are the words of exclusion in this section so strong, when applied to the things to be paid for—namely, a tramway *in situ*—as to exclude the ordinary way of ascertaining present value?" It must be borne in mind that the County Council can only acquire ownership rights under the sale. They can let, but cannot themselves use, occupy, or work the tramway. They are debarred from making occupiers' profits, and therefore it is most reasonable to provide that no allowance should be made for them in the sale. It is most fair that in a sale to a public authority "the then value" should not be run up by the history of "past" or the anticipation of "future" profits. These words "past or future" are suggested by the word "then." The provision is that no "allowance" is to be made, and that is very far from an enactment that "the then value" may not be ascertained according to the ordinary rule and practice in like cases. The argument of the respondents concentrates attention exclusively upon the parenthesis, and ignores and belittles everything in the section which would explain its terms. The Lord Justice General in his judgment well says: "The contention of the corporation seems to me exposed to the grave objection that it allows words having a subordinate and qualifying position to kill the plain import of the main proposition to which they relate, and does so by ascribing to those words more meaning than *primâ facie* they bear. I cannot conceive why the Legislature should describe the transaction as a sale, and say the terms are to be the payment of the existing value of the tramway, and then incidentally and by way of exclusion put in words which make the terms inconsistent with sale and purchase, and inconsistent also with payment of existing value." It must be remembered that "the then value" of lands and buildings has also to be measured under the same section, and it would be almost impossible to ascertain the value of land and buildings without considering what rent a tenant would pay for them. The land and buildings may have cost large sums, and no one could suggest the reasonableness of giving less than their fair value under this provision. No "allowance" is here to be made for "past or future profits," but "the then value" is to be arrived at by the ordinary methods. It is also not to be forgotten that under this section a tramway company might be compelled to

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sell the most paying and successful part of its undertaking, retaining only the part which barely, if at all, paid its expenses. Under this section, admittedly, they could get no compensation for compulsory sale, or for severance. The company concede that they, under its terms, are debarred from "any allowance" for their profits in "the past" or their hope of greater profit in "the future"; but could it have been intended that in providing that they were to get "the then value" they were to get less than would come to them under the ordinary rule, and be subjected to an arbitrary standard discovered by the arbitrator? The *Kirkleatham* case (69 L. T. Rep. 661; (1893) A. C. 444) is important as showing (to quote Collins, J.) "the words which the Legislature uses when it does intend that the thing sold and the thing paid for shall be the materials, and not the right to use the materials." The section in the present case is framed in an entirely different manner, because, in my opinion, the Legislature contemplated a different operation with different results. No question of hardship can be considered. The construction of this section is all that is before your Lordships. I venture to think that the construction suggested by the County Council is unreasonable, and that it would be natural to expect that if the Legislature contemplated such a meaning they would have said so in plain language. The weighty words of Mathew, J. are worthy of attention: "This Act of Parliament was intended to inform the public who were disposed to become shareholders in any undertaking of this sort, and one would expect plain language addressed to such persons and their advisers as to what Parliament meant. If Parliament meant to imform the public 'You shall not have, at the end of twenty-one years, compensation for the value of the undertaking, but the undertaking shall be sold and the materials *in situ*, less depreciation,' I cannot help thinking that very few tramways would have been constructed under these circumstances, because a shareholder proposing to take shares must satisfy himself that the profits of the undertaking would not only pay him interest upon his investment, but would restore to him wholly or partially, at the end of twenty-one years, his capital." I have already intimated the doubts which I must entertain of the soundness of my views when I recognise the high authority of those who have reached a different conclusion; but, with all deference and submission, in my opinion the judgment appealed from should be reversed.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Rees* and *Frere*, for *Drummond* and *Reid*, Edinburgh.

Solicitor for the respondents, *A. Beveridge*, for *W. White Millar*, Edinburgh.

LONDON STREET TRAMWAYS COMPANY v. LONDON COUNTY COUNCIL.

The LORD CHANCELLOR (Herschell).—My Lords: I have carefully considered the distinctions pointed out between this case and that in which judgment has just been delivered, but I think with those of your Lordships who heard the case that there is no such difference as to lead to a different conclusion.

Lord WATSON and Lord SHAND concurred.

Lord ASHBOURNE.—My Lords: I differ from the rest of your Lordships in this, as in the preceding case.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Ashurst, Morris, Crisp*, and *Co.*

Solicitor for respondents, *W. A. Blaxland.*

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, March 16.

(Before Lord ESHER, M.R., LOPES and DAVEY, L.JJ.)

ECKERSLEY AND OTHERS v. THE MERSEY DOCKS AND HARBOUR BOARD. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Arbitration—Arbitrator—Agreement to refer to a named person—Probability of bias—Staying proceedings in an action—Arbitration Act 1889 (52 & 53 *Vict. c.* 49), *s.* 4.

The rule that a judge, magistrate, or other person holding a judicial office, must not be judge in his own cause, and must not act if there is any reason to suspect him of bias, does not apply in the case of a person who has been chosen by the parties as arbitrator.

When the parties to a contract have agreed that all disputes which may arise under the contract shall be referred to the servant of one party, the court will not refuse to stay an action in respect of such disputes upon the ground that such servant may be suspected of bias in favour of his employer, or may have to decide questions as to his own competency, skill, or care.

THIS was an appeal by the plaintiffs from an order of the Queen's Bench Division (Mathew and Cave, JJ.) affirming an order of the judge at chambers staying proceedings in the action.

The plaintiffs had contracted with the defendants to do certain excavation work for the purpose of making a new dock at Liverpool. The contract was in writing.

During the progress of the works to be done by the plaintiffs, the defendants were making certain excavations in a dock, called the Canada Dock, which adjoined the piece of land upon which the plaintiffs were working. The work in the Canada Dock was being done under the superintendence of the son of the engineer of the defendants, who was acting as assistant engineer to his father.

The plaintiffs alleged that, owing to the negligence or incompetency of the son of the engineer, water escaped from the Canada Dock and flooded the works which were being executed by the plaintiffs, and hindered and impeded their works and damaged their plant.

The plaintiffs brought this action against the defendants substantially to recover damages for the above matters.

The contract provided, by clause 45, that if, in the opinion of the engineer (of the defendants), the contractors should fail to duly carry out and

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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perform their contract, or to exercise due diligence, and make due progress with the works, the defendants were to have the power to take the works out of their hands and put an end to the contract.

Clause 47 provided that, if the contractors should not proceed with the work, or any portion of it, to the engineer's satisfaction, either as regarded materials, plant, or workmen, or the manner in which the work was being done, or the despatch which was being made, or if for any other reason the engineer should be of opinion that it was expedient that any parts or part of the work should be done by the defendants and not by the contractors, then the defendants might, on giving notice signed by the engineer or their solicitor, proceed themselves to execute the work unperformed by the contractors, and recover the expenses which they might incur in or about the exercise of the powers given to them by this clause from the contractors, the amount of such expenses to be ascertained and fixed by the engineer.

Clause 53 provided that:

All disputes and differences of every kind which might arise between the contractors and the board during the progress, or after the completion, of the works contracted for, in relation to or arising out of any of the plans or drawings, or any of the provisions of the specification or the contract, or in relation to any of the works, or the payment to be made for the same, or as to the accounts between the board and the contractors, shall be and the same are hereby referred to the engineer of the board as sole arbitrator, with power to make awards from time to time as he may think proper, and with power to make such orders in any such award as to the costs and charges of and attending any such reference, and of the award, as the said engineer shall in his discretion think proper, and every award of the engineer shall be finally binding and conclusive upon the parties in relation to the disputes and differences as to which such award is made, and shall not be disputed on any ground whatever.

The defendants applied, at chambers, for an order staying all proceedings in the action, upon the ground that the action was brought in respect of disputes and differences which came within the arbitration clause.

The plaintiffs contended that the claims in the action did not come within the arbitration clause, and that, in any case, the action ought not to be stayed because the engineer, who would be the arbitrator, would probably be biassed in favour of the defendants.

In the affidavits filed by the plaintiffs in opposition to the application to stay proceedings, it was stated that the engineer's son hoped to succeed his father as engineer of the dock board, and that the question of the son's appointment had already been discussed by the dock board. The plaintiffs alleged that those facts were not known by them when they entered into the contract.

The master made an order staying all proceedings in the action, which was affirmed by the judge at chambers.

The Divisional Court (Mathew and Cave, JJ.) dismissed the plaintiffs' appeal against that order.

The plaintiffs appealed.

Moulton, Q.C. and *J. A. Hamilton* for the appellants.—It is not reasonable or right to refer the matters in dispute to the arbitration of the engineer of the defendants, under the circumstances of this case. There is a reasonable probability of bias upon his part. One of the principal questions will be as to the negligence and competency and skill of his son when acting as his assistant engineer. The son hopes to succeed his father as engineer of the dock board, and, if his father decides that he has not acted with due skill and care in this matter, his chance of obtaining the appointment will be prejudiced. Under such circumstances there must be a reasonable probability of bias in favour of his son. The case of *Nuttall* v. *Mayor of Manchester* (8 Times L. Rep. 573) really applies to this case. That case was referred to in *Jackson* v. *Barry Railway Company* (68 L. T. Rep. 472; (1893) 1 Ch. 238), where Smith, L.J., says that in *Nuttall* v. *Mayor of Manchester* (*ubi sup.*) the court thought that "the arbitrator would be judge in his own cause, and be deciding whether or not he had himself been guilty of negligence." This case is even a stronger one than that in regard to the probability of bias. [They also argued that the claims in the action did not come within the arbitration clause, but it is not necessary to report that part of the case.]

Sir *R. Webster*, Q.C., *Bigham*, Q.C., *Carver*, and *Llewellyn Davies* for the respondents.—Under this contract disputes might well arise as to the skill, competency, and conduct of the engineer, but the parties have agreed that the engineer shall decide such disputes, knowing that they might arise. The appellants cannot, therefore, object to these disputes being referred to the engineer, upon the ground that he may be judge in his own cause. The facts alleged in this case do not show even such a strong probability of bias as if the engineer had to decide as to his own conduct. [They were stopped by the Court.]

Lord Esher, M.R.—In this case the plaintiffs are contractors, and they entered into a contract with the defendants, the Mersey Dock and Harbour Board, to do certain works within the ambit of the Liverpool Docks. The works were to excavate a certain piece of ground within the ambit of the docks for the purpose of making a new dock, or a new basin, to give some assistance to the Liverpool Docks. They entered into a contract, and in that contract was a stipulation that, "All disputes and differences of every kind which may arise between the contractor and the board during the progress or after the completion of the works contracted for in relation to or arising out of any of the plans or drawings, or any of the provisions of the specification or contract, or in relation to any of the works, or the payment to be made for the same, or as to the accounts between the board and the contractor, shall be and the same are hereby referred to the engineer of the board, as sole arbitrator, with power to make awards from time to time as he may think proper, and with power to make such orders in any such award as to the costs and charges of and attending any such reference, and of the award, as the said engineer shall in his discretion think proper, and every award of the engineer shall be finally binding and conclusive upon the parties in relation to the disputes and differences as to which such award is made." It seems to me that words cannot be larger, and that they are a submission to arbitration in the cases spoken of. Now the claim of the

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plaintiffs is this: they allege that certain things were done by the servants of the Mersey Dock and Harbour Board, not on or within the space which was the subject-matter of the contract, that is to say, this portion of the ground which was to be excavated, but outside of it, and that certain things were there done which caused water to flow into the part which the plaintiffs were excavating. In my opinion all those things are within the submission. But then the appellants say that the court ought not to stay the action, because they ought to be satisfied that there is sufficient reason why the matter shall not be referred to the engineer. What is their ground for saying that? They say that he might be biassed in that which he had to do for reasons which they state. They argue that it is sufficient for them to say that he might be biassed, although the court should be of opinion that there is no ground for supposing that he would in fact be biassed. If you examine that proposition, it comes to this, that he might be suspected of being biassed, although he would not in truth be biassed; that is to say, it is an attempt to apply the doctrine which is applied to judges—I do not mean only to judges of the Superior Court, but to all judges—that they must be not only not biassed, but, even although it be proved to demonstration that they would not be biassed, yet if the circumstances are such that people—not reasonable people, but many people—would suspect them of being biassed, that then they ought not to sit as judges. That is the rule that is applied to judges. Is that a rule which can be applied to such a contract as this, where, as between the contractor and a principal, the parties both agree that the chief servant of one of the parties shall be the arbitrator? If it was not for that agreement, in the case of the engineer of such works as these, if you applied the rule which is applied to judges, it is obvious that such an engineer, under whose superintendence the work was to be done, never could act as the arbitrator. Some people would suspect that he would be biassed in favour of his own employers, whose servant he is. But that cannot be, because the parties have agreed that such a person, who might be so suspected, shall be the arbitrator. Therefore, the allegations must go further, and must go, in my opinion, to this extent, that it must be shown, I will not say that he would be biassed, but that there is a probability that he would be biassed. That much at least must be shown. That seems to me to be distinctly the decision in the case of *Jackson* v. *The Barry Railway Company* (*ubi sup.*). The case relied upon by the plaintiffs is *Nuttall* v. *The Mayor of Manchester* (*ubi sup.*). That case has been discussed since it was decided, and, as I understand it, it has been explained upon the ground, first of all, that there had been a very unseemly dispute between the engineer in that case and the contractor—a personal dispute raising a vindictive feeling—and also that he had expressed an opinion so strongly as to amount to a pre-judgment. If that is the ground of the decision in *Nuttall* v. *The Mayor of Manchester* (*ubi sup.*), then that case is to be supported entirely, but is not in point in this case, because such facts do not exist in this case and are not suggested. But if it is said that, according to a reading of the report, which I cannot help thinking is not a full report of what the judges decided, the mere fact of the conduct of the engineer himself being likely, or being sure, to come into question, is sufficient of itself to satisfy the court that there is a reason why the matter should not be referred to him, all I can say is that it seems to be contrary to all the cases, and is absolutely contrary to the case of *Jackson* v. *The Barry Railway Company* (*ubi sup.*). If that be the right view of the case we ought not to agree with it, and we ought to say that we overrule it. Therefore it must be shown, at least, that it is probable that the engineer in this case would be biassed. Now, what is relied upon by the plaintiffs to show that? It seems to be admitted that, if he had to consider whether he himself had given a negligent order, or whether he himself had given an unskilful order, that that would not justify the court in saying that he should not be the arbitrator; but we are asked to say so because that very same negligence was committed, or ill-advised or incompetent order was given, by his son. That involves this, that we must think that a man who would not, according to their own case, be probably biassed, a man of whom nobody could suspect—I will not say suspect—but of whom nobody could say it was possible that he would act with bias in judging of his own acts, would be probably biassed to give a wrong decision, which he knew to be wrong, in favour of his son. All I can say is, that that is a view of human nature which I do not adopt. When we have a man of high character, one whose character for impartiality cannot be impeached when his own conduct is called into question, if I am told that such a man would not have strength of mind and honesty enough to act impartially where his son's conduct is called into question, all I can say is, I do not accept the suggestion. I certainly do not accept it in this case. I am therefore of opinion that the decision of the Divisional Court, of the judge at chambers, and of the master, all of which coincided, cannot be set aside by this court, and that this appeal must be dismissed.

Lopes, L.J.—I am of the same opinion. The contract in question is a contract for excavation required in the construction of a new branch dock at Liverpool. The contract is to excavate a certain portion of land for the board, and it appears that the defendant board, during the progress of the work which the plaintiffs contracted to excavate, proceeded to further excavate the Canada Dock, which adjoins the spot where the plaintiffs were working under their contract; and it appears that the result of what was being done by the defendants was this, that water passed from the Canada Dock, which they were excavating, on to the place where the plaintiffs were at work, and hindered and impeded the plaintiffs' works and damaged their plant. That is one claim, and there are others also. I am of opinion, with regard to the first point, that the Divisional Court were right, and that the disputes are within the terms of clause 53. Then the other point is this: It is said that, even assuming this is a dispute within the terms of the contract, still the action ought not to be stayed because the engineer is disqualified, from the nature of the dispute, from acting as arbitrator. It is said that he will have to decide upon the professional competency, not of himself, but of his son; and that it would not be right and proper that he should be called upon to do so, and be considered at the same time

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an impartial arbitrator. Now it is to be observed that the rule to be applied to a case of this kind is entirely a different rule to that which is to be applied to magistrates, or judges, or any persons in a judicial capacity, where the tribunal is not chosen by the persons who are sending their differences to it, but is a tribunal constituted apart from any agreement or any consent on their part. No doubt in cases of that kind the rules are very strict. There is no principle which is better recognised than this, that a man is not to be a judge in his own cause, and in the case of magistrates it has been held that it is an established principle that, if there is any reason which can be suggested which would affect the minds of ordinary people or induce them to think that there might be any bias, that would be sufficient to render the tribunal incompetent. But that is entirely different to the case which is now before us, where, as I have said, the parties have chosen their own judge, and have agreed that the disputes are to be referred to the engineer as sole arbitrator. It is of the essence of the submission that questions are to be submitted to this engineer, as arbitrator, which must involve matters connected with his own competency, with his own care, with his own caution, and with the way in which he may have discharged the duties which belonged to him under this contract. The parties agree, in point of fact, that the arbitrator is to adjudicate on matters in which he has an interest. Further than that, I understand it was admitted and was not disputed at the bar that, if the matter in question here were a matter which involved the professional competency or the professional skill of the engineer himself, he would not be disqualified. Then, what is the additional fact in this case? What is there to distinguish it from a case where his own professional competency is involved? Simply this, that he would have to decide upon the professional competency of his son, instead of upon his own. It appears to me that that can make no substantial difference upon which this court ought to act. I am unable to say myself that that raises in my mind any reasonable probability of any partiality on his part. The master before whom the matter came arrived at that conclusion; the judge before whom this matter came confirmed that view; the Divisional Court acted in the same way, and I am glad to think that here we are able to give effect to the discretion which has been exercised by those tribunals. I think, therefore, this appeal fails.

Davey, L.J.—I am of the same opinion. Upon the first point, I think that the dispute, when one thoroughly understands the facts and the contentions of the parties, is one which is thoroughly within the arbitration clause. Upon the other point I confess I have had more doubt; but, upon consideration, I must say I do not think there are sufficient circumstances to make it right in the present case to deprive the defendants of the benefit of the contract for arbitration which they have entered into. No doubt, in a certain sense, the engineer will be the judge of his own conduct, and no doubt that is a position which *primâ facie* raises some surprise in a judicial mind; but that is the contract of the parties. The parties have contracted that the servant of one of the parties to the contract shall be the arbitrator, and it appears to me that they have contracted that he shall be the arbitrator in cases which necessarily involve the correctness of his own opinion, the competency of his advice and opinion as engineer, and the regularity of his own proceedings. It is sufficient for that purpose to refer to article 45, which provides that, if the contractors, in the opinion of the engineer, fail in the performance of any part of the undertaking, then the defendants may take the works out of his hands, and put an end to the contract. Suppose the engineer had been of opinion that the contractor had failed in the due performance of his contract, and the dock board had taken the works out of their hands, it could not be suggested that that did not fall within the 53rd clause, and yet the question in dispute would be whether the opinion of the engineer that the contractors had failed in due performance was well founded or not under the circumstances. The same observation must be made upon clause 47, which provides that, if the contractors do not proceed with the work, or any portion of it, to the engineer's satisfaction, either as regards materials, plant, or workmen, or the manner in which the same is being done, or the despatch which is being made, or if for any other reason the engineer shall be of opinion that it is expedient that any part or parts of the works should be done by the board, and not by the contractors, then he is to take the works out of their hands, and he is to assess the amount of compensation payable to the board. In all those cases it is perfectly obvious that the parties did contemplate and intend that the engineer, notwithstanding the interest he would have in the subject-matter in dispute, should be the tribunal by which the disputes between the parties should be settled. It is therefore not, in my opinion, any objection to the engineer acting in this dispute that his conduct, or the conduct of his son as assistant engineer in directing the other works of the board, would be or might be called in question. It must have been within the contemplation of the parties that the engineer might have to superintend other works undertaken by the board during the progress of the contract works, and it seems to me to be an objection which the contractors waived and deprived themselves of the right to insist on when they agreed that the engineer should be the sole arbitrator as regards themselves. I have only to add this, that I think that the suggestion that, although he might be trusted on a question concerning his own professional skill, he cannot be trusted on a question concerning his son's professional skill, is one which the court ought not to entertain. I am therefore of opinion that, having regard to the nature of the contract, we cannot disturb the order of the court below.

Appeal dismissed.

Solicitors for the appellants, *Wynne, Holme,* and *Co.*, for *Layton* and *Springworth*, Liverpool.

Solicitors for the respondents, *Rowcliffes, Rawle,* and *Co.*, for *A. T. Squarey*, Liverpool.

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Friday, July 6.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

Re LAMB; *Ex parte* THE BOARD OF TRADE. (a)

APPEAL IN BANKRUPTCY.

Bankruptcy — Trustee — Appointment — Objection by Board of Trade—Difficult for trustee to act with impartiality—Decision of High Court as to validity of objection—Appeal by Board of Trade—Right of appeal—Bankruptcy Act 1883 (46 *&* 47 *Vict. c.* 52), *ss.* 21, 104.

When the High Court has decided against the validity of an objection by the Board of Trade to the appointment of a trustee, under sect. 21 *of the Bankruptcy Act* 1883, *an appeal will lie to the Court of Appeal; and such appeal may be brought by the Board of Trade as "a person aggrieved" within the meaning of sect.* 104 *of the Act.*

By sect. 21, *sub-sect.* 3, *of the Bankruptcy Act* 1883 *the Board of Trade may object to the appointment of a trustee upon the ground that "his connection with the bankrupt or his estate makes it difficult for him to act with impartiality;" and, by sub-sect.* 3, *the High Court may decide upon the validity of such objection.*

The creditors of L., a bankrupt, appointed G. as trustee, he being already the trustee of E., a bankrupt. The only asset of E.'s estate was a large claim against L.'s estate. G. was a creditor of L. for about 400*l., and of E. for* 3000*l. The Board of Trade objected to the appointment, upon the ground that G.'s connection with the bankrupt and his estate would make it difficult for him to act with impartiality in the interests of the creditors generally.*

Held (reversing the decision of Williams, J.), that the objection was a valid one.

THIS was an appeal by the Board of Trade against an order of Williams, J. deciding against the validity of an objection by the Board of Trade to the appointment of a trustee (70 L. T. Rep. 694).

A large majority of the creditors in the bankruptcy of Lamb nominated Gregson as the trustee in bankruptcy of Lamb's estate. Gregson was already the trustee in bankruptcy of the estate of one Emmerson.

Practically the only asset of Lamb's estate was a two-thirds interest in the Maplin Sands, and in a sum of money representing a part of the Maplin Sands.

Emmerson alleged that he was entitled to one-half of Lamb's interest in that property; and this was the only asset in his bankruptcy.

Gregson was a creditor of Emmerson's estate for 3000*l.*, and of Lamb's estate for about 400*l.*

The Board of Trade objected to confirm the appointment of Gregson as trustee of Lamb's estate upon the ground that his connection with or relation to the bankrupt and his estate made it difficult for him to act with impartiality in the interests of the creditors generally.

The Bankruptcy Act 1883 (46 & 47 Vict. c. 52) provides:

Sect. 21, sub-sect. 1. Where the debtor is adjudged bankrupt, or the creditors have resolved that he be adjudged bankrupt, the creditors may, by ordinary resolution, appoint some fit person, whether a creditor or not, to fill the office of trustee of the property of the bankrupt.

Sub-sect. 2. The person so appointed shall give security in manner prescribed to the satisfaction of the Board of Trade, and the board, if satisfied with the security, shall certify that his appointment has been duly made, unless they object to the appointment on the ground that it has not been made in good faith by a majority in value of the creditors voting, or that the person appointed is not fit to act as trustee, or that his connection with or relation to the bankrupt or his estate, or any particular creditor, makes it difficult for him to act with impartiality in the interests of the creditors generally.

Sub-sect. 3. Provided that where the board make any such objection they shall, if so requested by a majority in value of the creditors, notify the objection to the High Court, and thereupon the High Court may decide upon its validity.

Sect. 104, sub-sect. 2. Orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal as follows: (*b*) An appeal shall lie from the order of the High Court to Her Majesty's Court of Appeal.

The Bankruptcy Rules 1886 provide:

Rule 299.—(1.) Where the Board of Trade objects to the appointment of a trustee, and is required by a majority in value of the creditors to notify the objection to the High Court, the requisition shall be in the Form No. 114 in the appendix, with such variations as circumstances may require. On receipt of such requisition the Board of Trade shall forthwith transmit a copy thereof to the senior bankruptcy registrar of the High Court, who shall fix a time for the hearing of the matter. At the hearing the person objected to, and every creditor, and the Board of Trade, shall be entitled to be heard.

(2.) The Board of Trade may also with the copy of the requisition communicate to the court the grounds of its objections.

The majority in value of the creditors of Lamb's estate requested the Board of Trade to notify the objection to the High Court. This was done, and the board communicated to the court the grounds of its objections.

The matter came before Williams, J., sitting in bankruptcy, and he made an order in the following terms: "This court doth declare that the said objection is invalid."

The Board of Trade appealed.

Sir *J. Rigby* (A. G.) and *Muir Mackenzie* for the appellants.—Two preliminary objections will be taken to the hearing of this appeal. The first is that there is no right of appeal, because what was done by Williams, J. was not the making of an "order"; and the other is that, even if an appeal lies, the Board of Trade is not "a person aggrieved" within the meaning of sect. 104, sub-sect. 2, of the Bankruptcy Act 1883. Williams, J. made an "order" declaring the objection of the Board of Trade to be invalid. The parties on both sides were heard, and the judge decided between them and made an order in favour of one party. The Board of Trade is a "person aggrieved" and has a right to appeal. In *Ex parte Official Receiver; Re Reed, Bowen, and Co.* (56 L. T. Rep. 876; 19 Q. B. Div. 174) it was decided by the Court of Appeal that the official receiver, when he acts as the servant of the Board of Trade, is entitled to appeal as a "person aggrieved." The principle of that case entirely applies to the present case. If the Board of Trade cannot appeal in this case, there is no person who can appeal.

Herbert Reed, Q.C. and *Carrington* for the respondents.—This was not an "order." Sect. 21,

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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sub-sect. 2, of the Bankruptcy Act 1883 gives the Board of Trade power to object to a trustee: and sub-sect. 3 provides that, under certain conditions, "the High Court may decide on the validity" of the objection. The High Court, in such a matter, does not determine a litigation between the parties, but acts only as the authority which has to determine as to the validity of the objection, instead of the question being finally settled by the Board of Trade. This is a peculiar proceeding. The objection of the Board of Trade is final, if the objection is not notified to the High Court; if it is notified, then the High Court is, instead of the board, to settle the question. This was not a judgment or an order; there was not a litigation, and there were no parties. The question is to be presented before the High Court by the board, and it was never intended that the board should be in the position of a "person aggrieved," or that there should be any appeal. By some of the rules a right of appeal is expressly given to the Board of Trade; for instance, rule 202, which has been held not to be *ultra vires* in *Re Stainton; Ex parte Board of Trade* (57 L. T. Rep. 202; 19 Q. B. Div. 182). That shows that the Board of Trade is not intended to have a right of appeal except when it is expressly so provided.

Lord Esher, M.R.—As to these preliminary points, it is perfectly clear that what the judge did was a decision in the nature of a judgment, and was an order. Whenever a dispute between parties can be brought before a judge in his judicial capacity for him to decide, and it is brought before him and decided, there is a hearing and a determination which is equivalent to a judgment, and the judge has to make an order. This, therefore, was an order within the meaning of sect. 19 of the Judicature Act 1873, and upon every order of the High Court there is an appeal to this court; and it is also an order within the meaning of sect. 104 of the Bankruptcy Act 1883, which in terms gives a right of appeal to this court from every order in bankruptcy. It is further said that this appeal is not brought by a "person aggrieved" within sect. 104, sub-sect. 2. In this case, if this appeal is brought by the wrong person, there is no other person who can appeal. I think that the appellants here were a "person aggrieved," according to the definition given in *Ex parte Official Receiver; Re Reed, Bowen, and Co.* (*ubi sup.*). It was determined in that case that any person who makes an application, or is brought before the court upon an application, and has a decision given against him, is a "person aggrieved." In this case the creditors brought the Board of Trade before the judge; and when the board went before the judge the board was to be heard, and there was to be a determination. The Board of Trade, therefore, the decision being against them, were a "person aggrieved." This appeal, therefore, can be maintained.

Kay, L.J.—I am of the same opinion. By sect. 21 of the Bankruptcy Act 1883, the creditors may appoint some fit person, whether a creditor or not, to be the trustee (sub-sect. 1); and the Board of Trade shall certify his appointment, unless they object to the appointment on the ground that "his connection with or relation to the bankrupt, or his estate, or any particular creditor makes it difficult for him to act with impartiality in the interests of the creditors generally" (sub-sect. 2); and where the Board of Trade make any such objection they must, "if requested by a majority in value of the creditors, notify the objection to the High Court, and thereupon the High Court may decide on its validity." Then rule 299 provides that "where the Board of Trade objects to the appointment of a trustee, and is required by a majority in value of the creditors to notify the objection to the High Court, the requisition shall be in the Form No. 114 in the appendix, with such variations as circumstances may require. On receipt of such requisition the Board of Trade shall forthwith transmit a copy thereof to the senior bankruptcy registrar of the High Court, who shall fix a time for the hearing of the matter. At the hearing the person objected to, and every creditor, and the Board of Trade, shall be entitled to be heard." It is plain, then, that the judge of the High Court, having such an objection notified to him, is bound to give a hearing to the person objected to, to the creditors, and to the Board of Trade. The Board of Trade, therefore, is upon the hearing before the judge in the position of a litigant person, and the judge has to decide whether their objection is valid or not. This matter came before the judge of the High Court, and he made a declaration as follows [reads.] Referring, then, to sect. 104, which authorises appeals, it says that "orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal." The preliminary objection has been raised that the Board of Trade is not a "person aggrieved." The Board of Trade was a person whom the judge was bound to hear upon the question whether the objection was a valid objection, and the decision was given against them. It cannot be said that they were not "aggrieved" under those circumstances. Where two persons are in the position of litigant parties before the High Court, and a decision is given against one of them, it cannot be said that he is not a "person aggrieved." Then it was said that this was not an "order." Where the High Court makes a declaration as to rights, and a further order as to costs, which is drawn up and sealed, it cannot be said that it is not an "order." It is, in my opinion, plainly an order. Take the case of an originating summons issued in the High Court for the purpose of having the construction of a document decided, and a decision by the court as to its construction. That is not a judgment, but it is certainly an order, otherwise there would be no appeal. This was an order of the High Court in a bankruptcy matter against which an appeal can be brought, under sect. 104 of the Bankruptcy Act 1883.

Smith, L.J.—I am of the same opinion. There is an express provision in sect. 104 of the Bankruptcy Act 1883, that "orders in bankruptcy matters shall, at the instance of any person aggrieved, be subject to appeal." The first question is whether this was an "order." Williams, J. had to hear and determine a matter before him in which three different parties had a right to appear and be heard, and he had to decide and make an order in favour of one of the parties. An appeal, therefore, can be brought. Then a second point is raised that this appeal is not brought by a "person aggrieved." This case comes entirely within the principle of *Ex parte*

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Official Receiver; *Re Reed, Bowen, and Co.* (*ubi sup.*), and I entirely agree with the decision of the majority of the court in that case.

Objections overruled.

The appeal was then argued upon the facts.

Sir *J. Rigby* (A.-G.) and *Muir Mackenzie* for the appellants. Gregson being already the trustee of Emmerson's estate, the real question is whether he ought to be the trustee of both estates. Emmerson alleges that he is entitled to one half of what is practically the only asset of Lamb's estate, and there are no assets of Emmerson's estate except that claim. Gregson has a far larger claim against Emmerson's estate than against Lamb's, and if Emmerson's claim against Lamb's estate is established, Gregson will get a much larger amount than if Lamb's estate successfully resists that claim. Gregson's interests in the two estates are conflicting; and a question must arise between the estates which Gregson, if he is trustee of both estates, will have to deal with on behalf of both estates. In that position it would be difficult for him to act with impartiality, and therefore the objection of the Board of Trade is a valid objection under sect. 21 of the Bankruptcy Act of 1883.

Haldinstein, for creditors, in support of the appeal, was not heard.

Herbert Reed, Q.C. and *Carrington* for the respondents.—The best course in the interests of the creditors of both estates, is to appoint Gregson to be the trustee of both estates, in order that the assets may be realised first of all and to the best advantage. No question as to the claim of Emmerson's estate need arise until the assets have been realised; and when that question does arise, the interests of the creditors of either estate can be amply safeguarded. The trustee cannot decide the question; the court will decide that question. A creditor of each estate can be appointed to fight the question. When partners are made bankrupts, the same person is trustee of the joint and separate estates, and when any question arises between the joint and separate estates, that course is usually taken:

Re Ridgway, 9 Morr. 269.

The trustee does not intervene at all. The words of sect. 21 are, "if his connection with . . . makes it difficult, &c." That means, if the difficulty will arise immediately upon the appointment. Here no difficulty will arise, if at all, until after the realisation of the assets.

Sir *J. Rigby* (A.-G.) was not heard in reply.

Lord Esher, M.R.—I differ from the decision of Williams, J., upon the ground that he has taken the wrong question into consideration. He has considered the question whether it would be better for the creditors to have only one trustee for the purposes of realising a particular asset, and I think that he was wrong in doing so. The right question to consider is whether, if the same person is appointed the trustee in this and in Emmerson's bankruptcy, he will be brought, in the course of the administration and winding-up of Lamb's estate, into a position which will make it difficult for him to act with impartiality in the interests of the creditors generally or of Lamb. That question was not the one considered by Williams, J. The Board of Trade here objected to the appointment of Gregson as the trustee of Lamb's estate, and gave their reasons for their objection, which were that Gregson's connection with the bankrupt and his estate would make it difficult for him to act with impartiality in the interests of the creditors generally. I do not deny that, when the Board of Trade made their objection, and the creditors disagreed with their objection, the creditors had a right to have the objection taken before the High Court, and to dispute whether the objection was a valid objection or not. To determine that question the judge must go into the facts of the case. When he has decided, there is an appeal to this court. That is an appeal from the decision of a judge without a jury, and the Court of Appeal has a right to differ from the judge as to his estimate of the facts, or, if they agree with him as to the facts, to disagree with his conclusions. We must first consider what is the question to be decided. It is, whether the objection is a valid objection; the objection being that Gregson's connection with the bankrupt and his estate makes it difficult for him to act with impartiality in the interests of the creditors generally. The question is not whether Gregson would or would not act with impartiality, but whether it would under the circumstances be difficult for him, as an ordinary man, to act with impartiality. Now Gregson is the trustee of Emmerson's estate, and Emmerson's estate has a claim against Lamb's estate. As trustee of Lamb's estate Gregson ought to resist the claim of Emmerson's estate. He is a creditor of Emmerson's estate to the extent of 3000*l.*, and of Lamb's estate to the extent only of about 400*l.* He would then be in this position, that, if he only faintly resists Emmerson's claim, and the latter succeeds, he is a creditor of the latter for 3000*l.*, but if he succeeds on behalf of Lamb, he is only a creditor for about 400*l.* on the latter's estate. The question is whether it would not be difficult for Gregson to act so much against his own interests as to do all in his power for Lamb's estate as against Emmerson's estate, so that, if Emmerson failed, he would lose altogether his 3000*l.* Under such circumstances I think that, as a matter of business, it would be difficult for a man of ordinary honesty to act impartially. The respondents say that the proper view to take is that a difficulty may arise later on, after the assets have been realised, and that for the purposes of realisation it would be for the advantage of all the creditors to have one trustee of both estates. Assuming that to be so, when the assets have been realised, and before the estates are wound-up, the other question must arise. The difficulty must therefore arise at some time, if not at once. I think that Williams, J. acted upon the view put forward by the respondents; but that was a wrong ground upon which to act. It is obvious that, during the course of the realisation and winding-up of the estates, Gregson would be placed in a position in which it would be difficult for him to act with impartiality, even though we thought that he would in fact act with impartiality. The objection, therefore, of the Board of Trade was a valid objection and must prevail. The appeal must be allowed.

Kay, L.J.—Creditors are not always the best persons to decide what is the best thing to be done in their own interest. That fact has been recognised by the Legislature, and sect. 21 of the

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Bankruptcy Act 1883 provides that the Board of Trade may object to the appointment of a trustee upon certain grounds, and that, if the creditors so desire, the validity of such an objection may be decided by the High Court. That question now comes before us by way of appeal from the decision of Williams, J., deciding against the validity of the objection by the Board of Trade to the appointment of Gregson as trustee. Now Gregson was the trustee of Emmerson's estate. Practically the only asset of the two estates is an interest in the Maplin Sands; and there is a question between the two estates as to whether Emmerson's estate has really any interest in that property, though Emmerson claims to be entitled to half of Lamb's interest. Gregson is a creditor of Emmerson's estate for 3000*l.*, and of Lamb's estate for about 400*l.* This question between Lamb's and Emmerson's estates is at present unsettled, and, if there are any assets to be divided, it must be decided as a litigious question between the trustees of the two estates. If therefore, Gregson is made trustee of both estates he will have to fight against himself. The case is, therefore, clearly within the last words of sect. 21, sub-sect. 2, "upon the ground that his connection with, or relation to the bankrupt or his estate or any particular creditor, makes it difficult for him to act with impartiality in the interests of the creditors generally." Williams, J. recognised that fact, for he said: "No doubt in point of form Gregson has an interest, as being one of the creditors of Emmerson's estate, which might conflict with his duty when having to consider whether Emmerson's estate had a proper claim to one-half of the assets of Lamb's estate. In the face of that I could not say that the discretion exercised by the Board of Trade was unreasonable." The objection by the Board of Trade to the appointment of Gregson as trustee was an objection upon the ground that his connection with the bankrupt and his estate would make it difficult for him to act with impartiality, and it was therefore a valid objection under sect. 21, sub-sect. 2. I do not wish to lay down any general rule, but to deal only with the present case, and in this case I see good reason why Gregson's position would make it difficult for him to act with impartiality. The only question which Williams, J. had to decide was whether the objection was a valid one or not, and it was not for him to say that, even if it was a valid objection, yet the appointment of Gregson would be the best thing for all the creditors. It is said that it will be best to realise the assets first, and that this question as to the interest of Emmerson cannot arise until after realisation. Assuming that to be so, it cannot make the objection of the Board of Trade not a valid objection. The appeal fails, and must be dismissed.

Smith, L.J.—Was Gregson's connection with the bankrupt and his estate such as to make it difficult for him to act with impartiality in respect of Lamb's estate? If it was, then the objection of the Board of Trade was a valid objection. If a man has a pecuniary interest in the success of one party, and not in the success of another, and he is called upon to act between them, it would be difficult for him to act with impartiality. In this case, the pecuniary interest of Gregson in Emmerson's estate was 3000*l.*, and in Lamb's estate only about 400*l.* Standing in that position, can it be said that Gregson's connection with the estate is not such as to make it difficult for him to act with impartiality? I think that it cannot be so said. Williams, J. did not answer that question, and therefore his decision was wrong. I am of opinion that the objection of the Board of Trade was a valid objection.

Appeal allowed.

Solicitor for the appellants, *The Solicitor to the Board of Trade.*

Solicitors for the creditors supporting the appeal, *Lindo* and *Co.*

Solicitor for the respondents, *W. Rawlins.*

Thursday, July 12.

(Before Lord Esher, M.R., Kay and Smith, L.JJ.)

Pharmaceutical Society v. Armson.(a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Pharmacy Acts—Sale of poisons—Medicine containing poison — Proprietary medicine — "Patent medicine"—Pharmacy Act 1868 (31 *&* 32 *Vict. c.* 121), *ss.* 1, 2. 15, *and* 16.

The Pharmacy Act 1868 *imposes a penalty of* 5*l. upon any person who sells "poisons" without being duly qualified* (*sect.* 15), *and the articles described in the schedule are to be deemed to be "poisons"* (*sect.* 2); *and sect.* 16 *provides that "nothing hereinbefore contained shall interfere with the making or dealing in patent medicines."*

The defendant, a grocer, sold an ounce bottle of a proprietary medicine which contained one-tenth of a grain of a scheduled poison. The whole bottle, if taken at once by a child in ordinary health, would certainly be injurious and might be fatal, and to an infant would probably be fatal.

Held (*affirming the decision of the Queen's Bench Division*), *that a proprietary medicine was not a "patent medicine" within the meaning of sect.* 16; *and that the defendant had sold a "poison" within the meaning of sect.* 15.

This was an appeal by the defendant from the judgment of the Divisional Court (Charles and Bruce, JJ.), affirming the judgment of the County Court judge (70 L. T. Rep. 733).

The action was brought in the County Court by the Pharmaceutical Society to recover a penalty of 5*l.* from the defendant, under sect. 15 of the Pharmacy Act 1868, for having sold a poison contrary to the provisions of that Act.

The defendant was a grocer, and was not a pharmaceutical chemist or a chemist and druggist within the meaning of the Pharmacy Act 1868.

The defendant sold an ounce bottle of a proprietary medicine called "Powell's Balsam of Aniseed," which was a cough mixture for use by adults and children.

The County Court judge found as a fact that this medicine, among other ingredients, contained one-tenth of a grain of morphine, which is a "preparation of opium." He also found as a fact that, "if the whole contents of the bottle were taken at once by a child in ordinary health it would certainly be injurious, and might be fatal, and to an infant probably fatal."

(a) Reported by J. H. Williams, Esq., Barrister-at-Law.

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The Pharmacy Act 1868 (31 & 32 Vict. c. 121) provides:

Sect. 1. From and after the thirty-first day of December one thousand eight hundred and sixty-eight, it shall be unlawful for any person to sell or keep open shop for retailing, dispensing, or compounding poisons, or to assume or use the title "chemist and druggist," or chemist or druggist or pharmacist, or dispensing chemist or druggist, in any part of Great Britain, unless such person shall be a pharmaceutical chemist, or a chemist and druggist within the meaning of this Act, and be registered under this Act and conform to such regulations as to the keeping, dispensing, and selling of such poisons as may from time to time be prescribed by the Pharmaceutical Society with the consent of the Privy Council.

Sect. 2. The several articles named and described in the schedule (A.) shall be deemed poisons within the meaning of this Act, and the council of the Pharmaceutical Society of Great Britain (hereinafter referred to as the Pharmaceutical Society) may, from time to time by resolution, declare that any article in such resolution named ought to be deemed a poison within the meaning of this Act; and thereupon the said society shall submit the same for the approval of the Privy Council, and if such approval shall be given, then such resolution and approval shall be advertised in the *London Gazette*, and on the expiration of one month from such advertisement the article named in such resolution shall be deemed to be a poison within the meaning of this Act.

Sect. 15. From and after the thirty-first day of December one thousand eight hundred and sixty-eight, any person who shall sell or keep an open shop for the retailing, dispensing, or compounding poisons, or who shall take, use, or exhibit the name or title of chemist and druggist, or chemist or druggist, not being a duly registered pharmaceutical chemist, or chemist and druggist, or who shall take, use, or exhibit the name or title pharmaceutical chemist, pharmaceutist, or pharmacist, not being a pharmaceutical chemist, or shall fail to conform with any regulation as to the keeping or selling of poisons made in pursuance of this Act, or who shall compound any medicines of the British Pharmacopeia, except according to the formularies of the said Pharmacopeia, shall, for every such offence, be liable to pay a penalty or sum of five pounds, and the same may be sued for, recovered, and dealt with in the manner provided by the Pharmacy Act for the recovery of penalties under that Act; but nothing in this Act contained shall prevent any person from being liable to any other penalty, damages, or punishment to which he would have been subject if this Act had not passed.

Sect. 16. Nothing hereinbefore contained shall extend to or interfere with the business of any qualified apothecary or any member of the Royal College of Veterinary Surgeons of Great Britain, nor with the making and dealing with patent medicines, nor with the business of wholesale dealers in supplying poisons in the ordinary course of wholesale dealings, and upon the decease of any pharmaceutical chemist or chemist and druggist actually in business at the time of his death, it shall be lawful for any executor, administrator, or trustee of the estate of such pharmaceutical chemist or chemist and druggist, to continue such business, if and so long only as such business shall be *bonâ fide* conducted by a duly qualified assistant; and a duly qualified assistant within the meaning of this clause shall be a pharmaceutical chemist or chemist and druggist registered by the registrar under the Pharmacy Act or this Act: Provided always that registration under this Act shall not entitle any person so registered to practise medicine or surgery, or any branch of medicine or surgery.

Schedule A., part 2, among other poisons, specifies "opium and all preparations of opium or of poppies."

The County Court judge gave judgment for the plaintiffs.

Upon an appeal to the Queen's Bench Division, the Court (Charles and Bruce, JJ.) dismissed the appeal, holding that the case was governed by the decision in *Pharmaceutical Society* v. *Piper* (68 L. T. Rep. 490; (1893) 1 Q. B. 686).

Leave to appeal was given, and the defendant appealed.

Moulton, Q.C. and *Bonsey* for the appellant.—This was a "proprietary medicine," and comes within the exceptions of sect. 16 as to "patent medicines." According to the ordinary use of the English language "proprietary medicines" are "patent medicines," and are commonly so called. There are not, in fact, any medicines in use in respect of which letters patent have been granted under the Great Seal. The object of the Act was to prevent the dispensing of medicines by incompetent persons, and to secure skill in the compounding of medicines. In the case of "proprietary medicines" the vendor does not compound the medicines, and has no knowledge of the ingredients; he sells them in the same state as he obtains them from the proprietor. It is quite immaterial, therefore, whether he is a chemist or not, and the provisions of sects. 1, 2, and 15 were not intended to apply to such a case. In this case there was only one tenth of a grain of morphine in one ounce of other ingredients. It cannot be said that the whole compound is a poison merely because one of the ingredients is a poison. The question whether a medicine is a poison or not cannot depend upon the size of the bottle in which it is sold. The thing sold must be itself a poison, and a compound cannot become a poison merely because one of the ingredients is a poison. The Act does not say that a compound containing a poison is a poison within the Act. The decisions of the Queen's Bench Division, that the question depends upon the quantity of poison contained in a bottle, are wrong:

Pharmaceutical Society v. *Piper*, 68 L. T. Rep. 490; (1893) 1 Q. B. 686;
Pharmaceutical Society v. *Delre*, 70 L. T. Rep. 139; (1894) 1 Q. B. 71.

Crump, Q.C. and *T. R. Grey* for the respondents.—A "proprietary medicine" is not a "patent medicine" within sect. 16 of the Act. "Patent medicines" are medicines in respect of which letters patent have been granted. In several statutes the two kinds of medicines are separately mentioned:

44 Geo. 3, c. 98, schedule;
52 Geo. 3, c. 150, schedule;
38 & 39 Vict. c. 63, sect. 6, sub-sect. 2.

In the case of a medicine which has been patented, there is a good reason for the exception, for the ingredients are all described in the specification; but in the case of proprietary medicines the ingredients are kept secret. The fact that a poison is compounded with other ingredients makes no difference:

Berry v. *Henderson*, 22 L. T. Rep. 331; L. Rep. 5 Q. B. 296.

[He was stopped by the Court.]

Bonsey replied.

Lord Esher, M.R.—This appeal must be dismissed. It is an appeal against the decision of the Divisional Court upon an appeal from the judgment of a County Court judge. With regard to the facts of the case, we are not authorised to

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depart from the facts as found by the County Court judge. We must take it, therefore, to be a fact that in the article sold by the defendant there was a poison named in part 2 of schedule A. to the Pharmacy Act 1868 (31 & 32 Vict. c. 121). We do not know what the other ingredients are; but one of the ingredients is a poison named in that schedule. We do know that there were other ingredients. The County Court judge decided that the defendant was liable to the penalty imposed by sect. 15 of the Pharmacy Act 1868, for having sold this medicine, which he did sell as a medicine, because he was not a person entitled to sell such a medicine not being a chemist or druggist. It is said that the defendant did not sell the poison named in the schedule to the Act. The argument is that the poison was mixed with other ingredients. Nothing, however, was done to the poison to alter its chemical nature: it was still left with its chemical nature unaltered, but it was mixed with other ingredients. Does that, according to the ordinary use of language, make this not a poison? If poison is put into a glass of wine, does it then cease to be a poison? I think not. That has often been a mode of poisoning people. So in this case, if a poison is put into a medicine, and a person sells that medicine, he sells the poison. There is nothing whatever in the Act of Parliament which, according to ordinary language, says that a person may sell a poison when mixed with other ingredients though he may not sell it by itself. This same argument was used in *Pharmaceutical Society* v. *Piper* (*ubi sup.*), where it was answered by Collins, J., and it was decided that a person did sell a poison though it was mixed with other ingredients. I am of opinion, therefore, that the defendant did sell a poison. It was also argued that the quantity of poison was infinitesimal, and that the defendant, therefore, did not sell a poison. If the quantity of poison is so infinitesimal that the court will treat it as not existing at all, then the maxim *De minimis non curat lex* applies. That is not so in this case, and the defendant did sell the scheduled poison. Then it is argued that this case comes within the exceptions of sect. 16 because the article sold was a "patent medicine." It is said that all proprietary medicines are known as "patent medicines." I doubt whether that is so; but it is wholly immaterial. We have to construe the Act of Parliament. When we find that, in statutes dealing with this same subject-matter of patent medicines, proprietary medicines and patent medicines are distinguished, and that this Act deals with patent medicines only, we must say that this Act applies only to patent medicines in respect of which letters patent have been granted. I agree with the judgment of Collins, J., in *Pharmaceutical Society* v. *Piper* (*ubi sup.*), which is supported by the judgment of Lush, J., in *Berry* v. *Henderson* (*ubi sup.*). I think that both those cases were rightly decided, and that this appeal fails.

Kay, L.J.—This was an action by the Pharmaceutical Society against the defendant to recover a penalty under sect. 15 of the Pharmacy Act 1868, which makes any person who sells a poison, not being a chemist or druggist, liable to a penalty of five pounds. The material facts have been found by the County Court judge. This is a proprietary medicine, called "Balsam of Aniseed," which contains one-tenth of a grain of morphine in each bottle. This might be fatal to a child if the whole bottle were taken at once, and would certainly be injurious. The maxim *De minimis non curat lex* cannot, therefore, apply in this case. I daresay that, in a case where the proportion of the poison was so exceedingly small as to be quite innocuous, then the maxim might apply. This is not a case of that kind. It has been argued that this was not a sale of the poison "morphine" because it was only a sale of a compound which contained "morphine." Upon looking at the Act of Parliament it is clear that that argument cannot be maintained. The Act provides, by sect. 1, that "it shall be unlawful for any person to sell . . . poisons . . . unless such person shall be a chemist or druggist"; and sect. 2 says that the articles named in schedule A. shall be deemed to be poisons within the meaning of the Act. Turning to schedule A., "opium, and all preparations of opium or of poppies" are named. Any person, therefore, who sells "opium or any preparation of opium" sells that which no person except a chemist or druggist can sell without incurring a penalty. The argument that, because this particular article is a compound of which the poison is only one ingredient, it may therefore be sold by an unqualified person, is absurd. Suppose a compound were made of all the articles named in the schedule, would it be said that a person selling that compound did not sell any one of the poisons in it? It cannot possibly be the meaning of the Act of Parliament that an unqualified person may sell any one of the specified poisons if it is mixed with other ingredients in a bottle the whole contents of which, if taken at once, may kill a child. Such a construction would destroy the effect of the Act. If a mixture contains a considerable quantity of poison, such as would be injurious if all taken at once, a sale thereof by a person not duly qualified is contrary to the Act. It is further argued that this case is within the exception contained in sect. 16, which provides that "nothing hereinbefore contained shall extend to or interfere with . . . the making or dealing in patent medicines"; and it is said that, in ordinary language, all proprietary medicines are now classed as "patent medicines." Is that the meaning of "patent medicines" in the Act? We have seen how the Legislature has dealt with them in other Acts of Parliament; "patent medicines" have always been distinctly dealt with, as in the statute 52 Geo. 3, c. 150. I entirely agree with the judgment of Collins, J. in *Pharmaceutical Society* v. *Piper* (*ubi sup.*). The reasons for the exception of "patent medicines" are clear. Where a medicine is patented under the Great Seal a specification is lodged describing the ingredients and mode of manufacture, so that any person can ascertain the ingredients of a patented medicine. That is one reason for the exception. Another reason is that, if by statute such a patent is good, it would be a hardship to take away from the inventor that which he had exercised as a right under the Great Seal. For these reasons I think that it is plain that, in sect. 16, the words "patent medicines" mean medicines in respect of which letters patent have been granted, and do not extend to mere proprietary medicines, in respect of which no letters patent have been granted.

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SMITH, L.J.—This was an action by the Pharmaceutical Society against a grocer to recover a penalty under sect. 15 of the Pharmacy Act 1868, for selling a poison without being a duly qualified person. The first question is, whether the defendant sold a "poison" within the meaning of the Act; and the second question is, whether, if he did so sell a poison, it was a "patent medicine" within the meaning of sect. 16. Three cases have been decided upon this question: *Berry* v. *Henderson* (*ubi sup.*); *Pharmaceutical Society* v. *Piper* (*ubi sup.*); *Pharmaceutical Society* v. *Delve* (*ubi sup.*). What then is the meaning of the Act of Parliament? For myself, I do not see much difficulty in that question. The general object of the Act is to secure that poisons shall be dispensed only by duly qualified persons, and therefore, I should say, to prevent grocers selling poisons. The Act says, in sect. 1, that it shall be unlawful for any person to sell poisons unless such person is a pharmaceutical chemist, or a chemist and druggist within the meaning of the Act; and sect. 2 provides that the articles specified in schedule A. shall be deemed to be poisons. The meaning of those two sections is, that no one but a chemist shall sell the poisons specified in the schedule. In the schedule there is a catalogue of poisons, and in part 2 "opium, and all preparations of opium," are specified. If the Act stopped there, I cannot see how it can be said that the defendant did not sell a poison within the meaning of the Act, because it has been found as a fact that a scheduled poison is, in a substantial quantity, contained in the medicine. In my opinion he certainly has done so. It is argued that he sold it mixed with something else. Even if he did, that cannot make any difference, for still he sold the poison. Then it is said that the case is within the exceptions of sect. 16, this being a "patent medicine." No letters patent have been granted in respect of it, but it is said that a proprietary medicine is included in the term "patent medicine." I cannot construe sect. 16 in that way without any authority. In other statutes the distinction is drawn between "patent medicines" and "proprietary medicines." It is therefore, I think, quite clear that in sect. 16 only patent medicines, in respect of which letters patent have been granted, are meant. The appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Neve* and *Beck*.
Solicitors for the respondents, *Flux, Son*, and *Co.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

June 16 *and* 19.

(Before NORTH, J.)

Re SNAITH; SNAITH *v.* SNAITH. (*a*)

Will — Construction — Legacy — Direction to set apart—Interest.

T. S., by his will, gave all his residuary real and personal estate to trustees upon trust to pay certain legacies and annuities, and proceeded, "and my trustees will hold the sum of 2000l. upon trust to invest the same in good security, and to pay the same to the five sons of my late brother J. S., that is to say, to Richard S., R. S., N. S., J. S., and A. Y. S., 400l. each when they shall attain the age of twenty-one years respectively, and if one or more of them die before reaching the said age, their shares to be equally divided among their survivors; and, as to all the rest of my estate, I give the same to T. S. Hall.

Held, on an originating summons taken out by one of the five sons of J. S., that the will directed the severance of the fund for the benefit of the five legatees, and that they were entitled to interest on their legacies from the day of the testator's death.

Re Medlock (54 *L. T. Rep.* 828; 55 *L. J.* 738, *Ch.*) *followed.*

THOMAS SNAITH by his will appointed Nicholas Snaith, Thos. Snaith Hall, and Michael Snaith, jun., his executors and trustees, and after making certain specific devises and bequests, devised and bequeathed all the residue of his real and personal estate to his executors "to hold the same upon trust in good security for the following legacies and annuities:" then followed the gift of certain legacies and annuities, and the will proceeded:

And my trustees will hold the sum of 2000*l.* upon trust to invest the same in good security, and to pay the same to the five sons of my late brother John Snaith, that is to say, to Richard Snaith, to Riddle Snaith, to Nicholas Snaith, to John Snaith, and to Alfred Young Snaith 400*l.* each when they shall attain the age of twenty-one years respectively. And if one or more of them die before reaching the said age, their shares to be equally divided among their survivors. And as to all the rest and residue and remainder of my estate and effects both real and personal, I give and devise and bequeath the same to my said nephew Thos. Snaith Hall, my heir and residuary legatee.

The testator died on the 15th June 1885.

The trustees paid the legacies of 400*l.* to Richard Snaith and Riddle Snaith on the 8th Oct. 1888 and the 19th May 1891 upon their respectively attaining the age of twenty-one years.

On the 23rd Sept. 1889 the trustees invested the sum of 1164*l.*, being the amount of the three remaining legacies, less duty, in the purchase of 1197*l.* 13*s.* 9*d.* Consols.

Nicholas Snaith, the third son of John, attained twenty-one on the 19th June 1893, and his legacy was then paid to him without interest.

Nicholas Snaith then took out this originating summons against the sole surviving trustee and the executors of Thos. Snaith Hall, the last deceased trustee and residuary legatee, for a declaration that he was entitled to interest at 4 per cent. on his legacy from the testator's death, or to one-fifth of the income of the securities on which the 2000*l.* had been invested.

Theobald for the plaintiffs.—The only question is whether these legacies carry interest from the testator's death. It is settled law that they do carry interest if they are directed to be set apart from the rest of the testator's estate for the benefit of the legatee. There may be some question what amounts to a direction to set apart, but here it is clear. *Re Medlock* (54 L. T. Rep. 828; 55 L. J. 738, Ch.) is exactly in point. [NORTH, J. referred to *Re Inman*; *Inman* v. *Rolls* (69 L. T. Rep. 374; (1893) 3 Ch. 518). In that case there was merely a direction to raise and pay 5000*l.* to each son who attained twenty-one, no direction to

(*a*) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

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invest, and nothing to show any intention to sever the legacy from the residue. The case is therefore consistent with *Re Medlock*. It is true that Kekewich, J. there commented on Kay, L.J.'s (then Kay, J.) statements of the law in *Re Medlock*, but he does not differ from the decision. *Kidman* v. *Kidman* (40 L. J. 359, Ch.) and *Johnston* v. *O'Neill* (3 L. Rep. Ir. 476) are in my favour. *Dundas* v. *Wolfe Murray* (1 H. & M. 425) is a strong authority in favour of interest being given here, for, in that case, the direction was to raise only, not raise and invest. [NORTH, J.—In that case the residue was settled.] In this case the direction to raise and invest is a clear segregation of the 2000*l.* for the benefit of the legatees, and not of the estate. *Re Judkin's Trust* (50 L. T. Rep. 200; 25 Ch. Div. 743) is clearly distinguishable; there was no direction to set apart or invest, and the fund had only been separated because the residue became payable first.

Yate Lee for the surviving trustee.

Micklem for the executors of Thomas Snaith Hall.—The course which the trustees have pursued in paying the legacies without interest was the right one. The mere fact of severance being contemplated by the testator is only an argument in favour of interest, it is not conclusive:

Festing v. *Allen*, 5 Hare, 573.

The same rule is laid down in *Dundas* v. *Wolfe Murray* (*ubi sup.*), though there the court came to the conclusion from the whole scheme of the will that the testatrix intended a severance for the benefit of the legacies. The present case is governed by *Re Inman*, *Inman* v. *Rolls* (*ubi sup.*) and *Re Judkin's Trust* (*ubi sup.*). The testator only directs the severance of the 2000*l.* for convenience to provide for the payment of five sums of 400*l.* because the residue might be payable before the legacies. In *Re Medlock* the gift was of an invested fund, and the judge drew from the whole will an inference that the widow was not to take the income.

NORTH, J.—I think the law on this subject is clear, and the cases are not in conflict with each other; the only question is in the application of the rule to particular instances. If the legacy is directed to be severed merely for purposes of administration, as because the residue is to be paid over at once, or to be invested in land, then a contingent legacy does not carry interest until it vests. But if a severance from the residue is directed for any purpose connected with the legacy itself, that fact, without anything else, is sufficient to make the legacy carry interest. In this case, I think the testator intended to sever this sum of 2000*l.* from the rest of his estate for the benefit of the legatees. One thing which assists me in coming to that conclusion, is that he never contemplates any part of this sum forming part of his residuary estate. Of course, it would have fallen into the residue if all the sons of John had died under twenty-one, but the testator is so clear that it has all been disposed of that he does not direct that any part shall fall into his residuary estate. I think the wording of the whole passage shows that the testator was considering the benefit of the legatees, not the convenience of administering his estate, in directing this severance. He directs the trustees to hold 2000*l.* upon trust to invest the same upon good securities; they are not directed to appropriate existing securities, which would have been all that was necessary for purposes of administration, but to invest a sum of cash. Then follows the direction to pay the same to the five sons of my brother John; that is to say, 400*l.* to each when they shall attain the age of twenty-one years respectively, "and if one or more of them die before reaching the said age, their shares to be equally divided among their survivors." There is no doubt of the meaning of that. If one or more die before attaining twenty-one, the survivors are to take not only 400*l.* each, but the whole 2000*l.* So that that whole sum is to be severed from the residue for their benefit, not merely set apart to provide five legacies. Then comes the gift of the residue remaining after setting apart the 2000*l.* That being so, I cannot distinguish the case in any way from *Re Medlock* (*ubi sup.*), except that this case is rather stronger, for the direction to invest, which is only implied in *Re Medlock*, is expressed here, and makes the direction to sever for the benefit of the legatees clearer and more emphatic. There must be a declaration that the plaintiff was entitled to interest at 4 per cent. on his legacy from the day of the testator's death to the 23rd Sept. 1889, and from that date to his share of the dividends upon the Consols then purchased.

Solicitors: *Clarkson, Greenwells*, and *Co.*, agents for *Francis* and *Bates*, Newcastle; *Flux, Leadbitter*, and *Co.*, agents for *W. H. Brett*, Morpeth.

July 1, 4, 5, 6, 7, 8, 11, 12, 13, 1893, *and May* 9, 1894.

(Before NORTH, J.)

THE MAYOR AND CORPORATION OF BRADFORD v. PICKLES. (a)

Water—Subterranean springs—Water company—Cutting off supply to springs—Rights of adjoining landowner — Bonâ fides — *Injunction — Bradford Waterworks and Improvement Acts* 1842 *and* 1854.

In the year 1842 *the Bradford Waterworks Company was incorporated by Act of Parliament with power to take certain lands known as Trooper or Many Wells Farm, and to divert and take the water from the several springs and streams called Many Wells arising or flowing in and through the said farm; and it was enacted that, after the said Many Wells springs had been purchased by the company, it should not be lawful for any person other than the company to divert, alter, or appropriate in any other manner than by law they might be legally entitled, any of the waters then supplying or flowing from the same, or to sink any well or pit, or do any act, matter, or thing whereby the waters of the said springs might be drawn off or diminished in quantity. The Act also provided that, if the owner of any minerals under the company's works, or within forty yards thereof, wished to work them, he should give notice to the company, and if the company thought the working likely to damage their works, and were willing to make compensation, the owner should not work them. The said farm and springs were purchased by this company, and in* 1854 *the undertaking and*

(a) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

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all the powers of the company were transferred to the Bradford Corporation. The defendant was the owner of land lying on the slope of a hill immediately above the Many Wells springs, in and under which land the water supplying those springs was collected. Neither the company nor the corporation had purchased or paid compensation for the defendant's land or the water under it. In 1891 *the defendant gave notice to the corporation that he intended to work his minerals by means of a shaft and drift or tunnel shown on a plan annexed. The minerals consisted of stone only, and the tunnel was not required for the actual working, but as a drain to carry off the water. The corporation did not offer to pay compensation for the defendant's minerals, and he then began to construct his tunnel. The corporation brought this action to restrain him from continuing the tunnel or making any other shafts or tunnels by which the water in the Many Wells springs would be diminished. It was proved that the tunnel, if completed, would intercept and drain away most of the water which supplied the springs, but that it would intercept it before it had gathered into any defined channel. It was alleged, and the Court held it to be proved, that the proposed tunnel was not being constructed by the defendant with the* bonâ fide *intention of getting the stone on his land, but with the object of intercepting the plaintiffs' water and forcing them to pay compensation or buy his land.*

Held, (1) *that by the common law an owner of land has a right to make what shafts and tunnels on his land he pleases, and that the court cannot examine his motive and restrain him because they are not made* bonâ fide *for the benefit of his own land or mines*; (2) *but that the works in question were forbidden by the Acts referred to, and the plaintiffs were entitled to an injunction on that ground. The defendant was ordered to pay half the costs of the action.*

THIS was an action brought by the Mayor and Corporation of Bradford in Yorkshire to restrain the defendant Pickles from making, or continuing, or using a certain drift or tunnel on his land, and from further sinking a certain shaft, and from making or continuing any other works, or doing anything whereby the waters of the Many Wells springs or of a stream called Hewenden Beck on a farm called Trooper or Many Wells Farm, in the parish of Bradford, might be drawn off or diminished in quantity, or polluted or injuriously affected, and from interfering in any way with the rights of the corporation to the said waters.

The claim of the corporation was founded upon the following Acts of Parliament :—

By an Act passed in 1842 (5 & 6 Vict. c. vi.) the Bradford Waterworks Company was incorporated for supplying Bradford with water. The company were empowered to acquire lands for the purposes of their undertaking, and it was enacted by sect. 233 that,

Subject to the restrictions and provisions in this Act, it shall be lawful for the company from time to time to divert or alter the course of a certain beck, called Hewenden Beck or Harden Beck, and also to divert and to take the water from the several streams and springs hereinafter mentioned, that is to say (*inter alia*) the springs and streams of water called Many Wells arising or flowing in and through a certain farm, lands, and grounds called Trooper or Many Wells Farm.

Sect. 234. After the said Many Wells springs have been purchased by the company it shall not be lawful for any person other than the said company to divert, alter, or appropriate in any other manner than by law they may be legally entitled any of the waters supplying or flowing from the same, or to sink any well or pit, or to do any act, matter, or thing, whereby the waters of the said springs may be drawn off or diminished in quantity: and if any person shall illegally divert, alter, or appropriate the said waters, or any part thereof, or sink any such well or pit, or shall do any such act, matter, or thing whereby the said waters may be drawn off or diminished in quantity, and shall not immediately on being required so to do by the said company, repair the injury done by him, so as to restore the said springs and the waters thereof to the state in which they were before such illegal act as aforesaid, he shall forfeit to the said company a sum not exceeding five pounds for every day during which the said supply of water shall be diverted or diminished by reason of any work done or act performed by or by the authority of such person, in addition to the damage which the company may sustain by reason of their supply of water being diminished.

The Act also contained a provision (sect. 196) that any owner or lessee of minerals lying under or within forty yards of the works of the company who desired to work them should give notice to the company, and should not work them if the company were willing to pay compensation for them. The company purchased under their Act the Many Well's farm and springs, and constructed a basin or well of masonry at Many Wells, in which they collected the water and conducted it by mains into Bradford.

In 1854 an Act was passed (17 & 18 Vict. c. cxxiv.) dissolving the old company and incorporating a new one with the same name. All the property and powers of the old company were vested in the new one, and the Act of 1842 was repealed, but sect. 234 of that Act was re-enacted in the same words by sect. 49 of the new Act. The Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17) was incorporated with this Act.

By the Bradford Corporation Waterworks Act 1854 (17 & 18 Vict. c. cxxix.) the corporation were authorised to purchase the whole undertaking of the company incorporated by the last mentioned Act, and it was enacted that upon such purchase all the property, rights, and powers of the company should vest in the corporation. The corporation very soon afterwards purchased the undertaking of the company.

Evidence was gone into at great length from which it appeared that the Hewenden Beck ran in a northerly direction down a valley on the west side of which the land rose to a considerable height. In the bottom of this valley the water company constructed a reservoir called Hewenden reservoir chiefly as a compensation reservoir to supply water to mills which might have their water supply interfered with by the operations of the company.

The Many Wells springs were a group of springs suddenly issuing from the hillside on the west of the valley, at the height of thirty or forty feet above the level of the water in the Hewenden reservoir, with an outlying spring at a place called the watering-place (from an old trough formerly placed there for the use of cattle) lying higher than and about six chains to the south of the Many Wells spring proper. About forty or fifty yards to the west of Many Wells, and higher up the

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slope, was a public road called Doll's Lane, which extended to and passed close by the watering-place. Before the company's works were constructed the water from these springs ran down in open defined channels to Hewenden Beck.

The land purchased by the company in June 1843 extended from Doll's Lane to and beyond Hewenden Beck, including the Many Wells spring proper, and extending up to but not including the watering-place. The company constructed stonework conduits and a basin or well of masonry at Manywells to gather the water of the springs there, and they intercepted the water which rose at the watering-place as it entered their land at a point some fifty feet from the old trough, by placing there a second trough. and conveyed it thence in a pipe to Many Wells, All the waters thus gathered at Many Wells were conveyed in mains to Bradford, without going down into the Hewenden reservoir.

The defendant owned about 140 acres of land adjoining the land of the corporation on the west and higher up the slope of the hill.

The upper strata of the land in the district comprising the lands of the corporation and of the defendant consisted, below the surface soil, of what is known as millstone grit, consisting in the main of sandstones of various kinds, much fissured and easily pervious to water. Below this were strata of indurated clay and shale, forming a watertight floor or bed. These strata were intersected by two main faults running practically east and west, and lying from 300 to 400 yards apart, the Many Wells springs being about equidistant from each fault. According to the evidence of the experts, whose view the learned judge considered to be made out, these faults formed barriers impervious to water; and therefore the rain falling on the higher land to the west of the Many Wells springs found its way down to, and saturated the lower measures of the millstone grit, and, being unable to get away to the north or south through the faults, found its way out at those springs on the side of the hill where the clay and shale approached its outcrop, the dip of the land to the east being more rapid than the dip of the strata.

The defendant had at one time worked a quarry upon his land, but had only worked down to a point very much higher than Many Wells springs when he ceased to work because of faults in the stone.

Early in 1890 the defendant sunk a shaft which he called a trial shaft, in his own land at a point a little to the south of the southern fault. Twice during the sinking of this shaft water occurred, but disappeared upon a bore hole being driven below the bottom. When the sinkers got about eighty feet down, water again occurred, and a bore hole sunk for thirty-three feet more failed to get rid of it.

In Aug. 1890 the defendant, as he stated, consulted an engineer as to the best way of getting rid of the water in order to work his stone, and the engineer advised him to make a drift or tunnel through the shale, 600 yards long, commencing at a point 5 feet below the bottom of the bore hole, *i.e.*, 118 feet below the surface, and passing through both the southern and the northern faults, by which tunnel and an open drain 285 yards long to be made from the end of it, the water would be conducted into Hewenden Beck at a point to the north of and below the reservoir.

On the 5th Dec. 1891 a notice was given by the defendant to the plaintiffs stating that he intended within thirty days to work the minerals under his lands by sinking the shafts driving the drift or tunnel, and making the drain shown on a plan attached thereto, and at the levels, and otherwise in accordance with the plan and the sections thereon, and for the purpose of this working of his mines and minerals to do all such other works as might be necessary, and to drain the same by means of engines or otherwise.

The notice also stated that it was given out of courtesy only, and was not to be deemed an admission by the defendant of any right on the part of the plaintiffs to have such a notice under the provisions of the Waterworks Clauses Act, the Bradford Corporation Waterworks Acts, or any other statutes whatsoever.

The plan annexed to this notice showed that the proposed tunnel was to be made with its highest point a few feet below the bottom of the trial shaft above mentioned, and gradually to fall thence at a gradient of 4 feet to the mile. It was to be 3 feet high and 3 feet wide. In order that the tunnel might be kept on the defendant's ground it was necessary that it should pass close to a farm called East Many Wells, where the course of the tunnel changed from north to east, and at this point a shaft, called No. 3, was marked on the plan. But the tunnel was not laid in a direct line from No. 1 to No. 3. It was laid out in a straight line from No. 1, in a north-easterly direction, to a point marked on the plan as a site for No. 2 shaft, which was near the Many Wells springs, about 40 yards 6 inches from that part of the plaintiffs' masonry about the spring which rose above the surface of the ground. From this point it turned off at an angle of about thirty-eight degrees, and ran straight to No. 3 shaft, which lay almost due north of No. 2. The result of this plan of laying the tunnel was that No. 2 shaft was placed very near the Many Wells springs, about 90 yards nearer than it would have been if it had been laid out in a straight line from No. 1 to No. 3, and that the length of the tunnel was increased from 485 yards, the distance in a direct line, to 525 yards.

The defendant, on the 27th June 1892, signed a contract for the execution of the works according to the plan, and the works were shortly afterwards commenced. After some correspondence the writ in this action was issued.

Before the trial No. 2 shaft had been sunk to a depth of 41 feet, and a bore hole made by a plunger some few feet further. The shaft was intended to be sunk to the depth of 81 feet, and according to the evidence would then be about 28 feet lower than the outflow at that point of the Many Wells springs. The evidence also showed that the shaft, though about 40 yards distant from the masonry of the plaintiffs, was only a little over 30 yards from some underground artificial conduits, constructed nearly fifty years ago, which collected the water from the springs and brought it into the basin; and that as soon as and whenever the defendant's plunger was worked the water in the plaintiffs' basin was at once polluted and filled with sand, in suspension, to such an extent that it was quite unfit for use, and had to be turned off from the mains.

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Cozens-Hardy, Q.C., *B. Eyre*, and *C. M. Atkinson* for the plaintiffs.—The plaintiffs are entitled to restrain the defendant's works on three grounds: (1) It is an interference with the plaintiffs' statutory right to the water. (2) It is an interference with their common law right. (3) The defendant's works are not being made *bonâ fide* for the purpose of getting his minerals, but are a mere device to make the plaintiffs buy his land. As to (1) sect. 234 of the Act of 1842, which is re-enacted by sect. 49 of the Act of 1854, forbids any persons to divert or appropriate otherwise than by law they may be legally entitled any of the water supplying or flowing to the Many Wells springs; that is sufficient to give the plaintiffs a right to restrain the defendant. The limitation "in any other manner than by law they may be legally entitled" cannot be so read as to destroy the meaning of the whole clause and permit everyone to do anything they could have done before. But, even if it could be so read, this limitation does not apply to the next words of the section, "or to sink any well or pit, or to do any act, matter, or thing whereby the waters of the said springs may be drawn off or diminished in quantity." In that clause the prohibition is absolute, and it clearly covers the defendant's acts. The case is also covered by sect. 14 of the Waterworks Clauses Act 1847, but the words there are not stronger than those of the private Act. (2) It is settled law that an owner cannot prevent his neighbour from taking underground water by his workings when the water is merely percolating through the soil, but he can, if the water runs in a defined channel on or below the surface:

Grand Junction Canal Company v. *Shugar*, 24 L. T. Rep. 402; L. Rep. 6 Ch. 483.

In this case there was a defined channel for a short distance on the surface of the defendant's land and the defendant has interfered with it. (3) The defendant has given us a notice, which appears to be intended as a notice under the Waterworks Clauses Act 1847, s. 22, to work his minerals. But after such notice he is only entitled to work them "so that the mines be not worked in an unusual manner:" (Waterworks Clauses Act 1847, s. 23.) The manner of working shown on the plan is most unusual. The course of the proposed tunnel is unintelligible if it were intended only to unwater the defendant's quarries. Moreover, the evidence shows that there is no stone in the defendant's quarries of a merchantable quality, and if there were, a tunnel of this kind is unheard of as a means of draining quarries which have not even been properly tested. The whole thing is a mere attempt to make the corporation buy the defendant's land or compensate him, not a *bonâ fide* scheme for the working of his quarries. The defendant's notice is therefore bad:

Midland Railway Company v. *Robinson*, 62 L. T. Rep. 194; 15 App. Cas. 19.

And apart from the question of his notice the court will restrain him.

Everitt, Q.C., *Tindal Atkinson*, Q.C., and *J. G Butcher* for the defendant.—It is plain that the whole of Doll's Lane belongs to the defendant. His works are therefore well within his own boundary, and a landowner is entitled to dig as much as he likes on his own ground, and to take any water which is only percolating, even though it afterwards finds its way to a defined channel:

Chasemore v. *Richards*, 33 L. T. Rep. O. S. 350; 7 H. of L. Cas. 349.

Of course he cannot directly cut a defined channel. *Grand Junction Canal Company* v. *Shugar* (*ubi sup.*) does not apply, because, if there ever was any defined channel on the defendant's land, it was an artificial one. The plaintiffs could not have any common law right to water in an artificial channel:

Rawstron v. *Taylor*, 11 Ex. 369.

The same case is an authority that the motive of the defendant in doing what he has a right to do on his own land is wholly immaterial: (see Martin, B.'s judgment, 11 Ex. 384). The application for an injunction to protect the plaintiffs' common law rights is premature, for it is quite uncertain whether the defendant's works will affect the flow of water in any defined channel. As to the plaintiffs' statutory rights, the provisions of the Waterworks Clauses Act as to minerals within the forty yards limit have not been pleaded, and they only apply to minerals under the company's works. See

Holliday v. *The Mayor of Wakefield*, 59 L. T. Rep. 248; 64 L. T. Rep. 1; 20 Q. B. Div. 699; (1891) App. Cas. 81.

In *The Midland Railway Company* v. *Robinson* (*ubi sup.*) the only point decided was a question whether the provisions of the Railways Clauses Acts as to mines and minerals applied to open surface workings. As to the rights of the plaintiffs under their private Acts, such Acts must always be construed very strictly. *Primâ facie* they are not intended to affect the rights of any landowner in land which is not taken for the purposes of the undertaking, and where no means of compensation are provided there is an irresistible case against a construction which will affect any such rights:

Lamb v. *North London Railway Company*, 21 L. T. Rep. 98; L. Rep. 4 Ch. 522;
London and North-Western Railway Company v. *Evans*, 67 L. T. Rep. 630; (1893) 1 Ch. 16.

In the present case there is no provision in any of the Acts for compensation, and no power for the corporation to purchase any rights of water except in their own land. The only fair construction of sect. 234 of the Act of 1842 on which the plaintiffs relied is, that the exception "in any other manner than they may be legally entitled" extends to the whole section. It was intended to protect the corporation against persons deliberately or illegally interfering with water taken by or on the property of the corporation. There is not the faintest ground for attributing *mala fides* to the defendant, and except in the case of minerals within forty yards of the plaintiffs' reservoir or works, they can have no possible right to interfere with the defendant's working his minerals in any way he pleases, wise or unwise, and with any motive whatever. At the same time the defendant utterly repudiates the motive attributed to him by the plaintiffs.

Cozens-Hardy, Q.C. in reply.—Sect. 49 of the Act of 1854 expressly forbids the sinking of any well which affects the supply of water. My friend's construction of the Act requires that that should be construed to mean only that no one

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may trespass on the plaintiffs' land and sink a well there, which is absurd. There is nothing unnatural or unjust in the plaintiffs' construction of the Act, for it was not established until long after the date of this Act that an owner of land had any right at common law to divert underground water. *Chasemore* v. *Richards* (*ubi sup.*) was not decided until 1859. [NORTH, J.—*Acton* v. *Blundell* (12 M. & W. 324) was decided in 1843.] Even that was after the passing of this Act, and *Dickinson* v. *The Grand Junction Canal Company* (18 L. T. Rep. O. S. 258; 7 Ex. 282), which was overruled by *Chasemore* v. *Richards*, was decided in the other way in 1852. We ask your Lordship to find on the evidence that there is no flagstone proved to exist on the defendant's land, and that he is not making these works with a *bonâ fide* intention of working his stone. [NORTH, J.—I am not satisfied that I can go into his motive.] We submit that if the works are not made *bonâ fide* for the purpose of the beneficial enjoyment of the defendant's property it is not a legitimate use of his property. The maxim *Sic utere tuo ut alienum non lædas* applies. [NORTH, J.—Lord Wensleydale's judgment in *Chasemore* v. *Richards* (7 H. L. Cas. 388) seems to show that that maxim applies in the civil law, but not in ours.] He says that the question depends on "whether the defendant exercised his right of enjoying the subterraneous waters in a reasonable manner." But, even if that doctrine has not been adopted in the common law, the plaintiffs are protected by sect. 22 of the Waterworks Clauses Act 1847: (see Lord Herschell's judgment in *Midland Railway Company* v. *Robinson*. 62 L. T. Rep. 197; 15 App. Cas. 32). Then, on the point of common law right, the evidence shows that the water formerly flowed in a defined channel. The plaintiffs or their predecessors in title altered the course of such channel on their own land, but that cannot alter their rights. It is sufficient to show that the water once flowed in a defined channel, and is there diminished by the defendant's acts:

Bowen v. *Sandford*, 5 Times L. Rep. 570;
Dudden v. *The Guardians of Clutton Union*, 28 L. T. Rep. O. S. 258; 1 H. & N. 627.

NORTH, J. (after reading a statement of the facts, of which the above statement is an abridgment, and referring to the evidence, continued:)—The witnesses on both sides agree that no case can be produced in which a drift of any kind has been made to drain the water from stone before the stone has been proved or tested by actual working, much less a drift or tunnel of such an extent and cost as is proposed in this case, which, so far as the evidence goes, is quite an unprecedented operation for such a purpose. The result of the construction of such a drift as is proposed does not, I think, admit of any doubt. I am quite satisfied that the tunnel was deliberately planned to carry off the water which had previously issued from the Many Wells springs, and also that the desired result would have been successfully accomplished. These being the conclusions of fact at which I have arrived as the result of the evidence, it remains to be considered how far the defendant is interfering with the plaintiffs' legal rights. In my opinion, what the defendant is proposing to do is forbidden by sect. 234 of the Act of 1842, and by sect. 49 of the Act of 1854, which now takes the place of the former section. The defendant is doing an act or thing by which the water of the springs will be drawn off or diminished in quantity, and not merely diminished, but wholly abstracted. It is said that the defendant is only forbidden by that section from diverting, altering, or appropriating the water in question in any other manner than he is legally entitled to do, and that, as he is legally entitled to drain his own land in order to get his stone, diversion of the water for that purpose is not forbidden. But that argument ignores and deprives of meaning the subsequent part of the section, which goes on to make something unlawful which is not already forbidden—viz., sinking any well or pit or doing any act or thing whereby the waters of the spring may be drawn off or diminished in quantity, and if the words "in any other manner than they are by law legally entitled" are read as modifying all that follows, it makes the section enact that a man is not to do certain specified things except so far as he may lawfully do them, which is making nonsense of it. I do not think the section very happily expressed, but, in my opinion, the opening provision is intended to preserve against the waterworks company such rights over the waters in question as an upper riparian proprietor has against a lower riparian proprietor in an open stream, permitting a diversion or alteration, or even an appropriation to a limited extent, but not a diversion or appropriation of the whole. I cannot say that this construction gives a clear or satisfactory meaning to every phrase or word used in that section, but it seems to me preferable to a construction which says it is to be illegal to do certain things except so far as it is legal to do them; and perhaps it is not wholly immaterial to observe that when the Act of 1842 was passed the great case of *Acton* v. *Blundell* (*ubi sup.*) had not been decided, and the difference between the rights in water flowing in a defined channel and other waters was not so well ascertained as it has been since. Some reference was made to the provisions of the Waterworks Clauses Act; but I think the provisions of sect. 49 much stronger than anything to be found in that Act. Reference was also made to sects. 96 to 200 in the Act of 1842, and sects. 22 to 26 in the Waterworks Clauses Act 1847, and I believe that it was in consequence of those sections that No. 2 shaft was planted, as was believed, just over forty yards from the plaintiffs' works, and the notice of the 5th Dec. 1891, which was expressed to be given out of courtesy only, was in fact given to provide against the contingency of that shaft turning out to be within forty yards of those works, as turned out to be the case. But I do not think that those sections have any application. They deal with the case of possible interference by mining with the support to the necessary reservoirs, buildings, pipes, or other works for collecting the water, conveying it to Bradford, and distributing it there (none of which it is suggested that the defendant's tunnel will let down), but have no reference to the obstruction of the water by the defendant before it has entered the works at all. It was argued by the defendant's counsel, that it could not be the meaning of the Legislature that he should be restrained from utilising his stone in the way in which he could otherwise have lawfully done, when no provision is made for compensating him for the loss thus cast upon him, as this would amount to gross injustice. The

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observations of Bowen, L.J. in *London and North Western Railway Company* v. *Evans* (*ubi sup.*) were relied upon. There are many such decisions to be found in the books, and there was especially an important decision by Lord Esher to that effect not long ago which I have been unable to find reported. This is a very weighty argument. At the same time that result must follow if the Act says so, as I think it does in the present case. But I am not satisfied that this does produce any injustice to the defendant, as I do not see how this construction of the Act passed in 1842 does deprive him of anything which was of the slightest value. What appreciable value could possibly have been attributed at that time to the stone which the defendant says he is now prevented from working by such a construction of the section? Nay more, there is no evidence before me that at the present moment any person would pay anything for the right to get whatever stone may be found in defendant's land below the level of the Many Wells springs. [His Lordship referred in detail to the evidence as to the value of the stone, and continued:] I come to the conclusion that, if I had now to say what compensation should be awarded to the defendant in consequence of his not being allowed to make the tunnel, I should be unable to say there was any damage entitling him to compensation. But a second ground for relief was put forward by the plaintiffs, which gave rise to serious discussion. It was said that, assuming that the defendant could not be restrained from making the tunnel if it were *bonâ fide* done for the legitimate purpose of getting the stone under his land, notwithstanding that the result would be to drain the Many Wells springs, still he ought to be restrained, because his object is not to get his own minerals, but to injure the plaintiffs by carrying off the water or compelling them to buy him off. This argument was strenuously urged before me, and as the case may go further I feel bound to put on record my view of the facts. I have come to the conclusion upon the evidence that this charge against the defendant is well founded, and that his operations are intended to drain away the water, not in order that he may be enabled to work his stone, but in order that the plaintiffs may be driven to pay him not to work it. There are many things which lead me to this conclusion. [His Lordship referred fully to the evidence, laying special weight on the deviation of the tunnel from the direct and best course, with the result of bringing it close to the Many Wells springs, and continued:] It remains to consider whether, the facts being as I have just stated, the defendant can be restrained from making the tunnel proposed, on the ground that he is not acting *bonâ fide*. No case in their favour, directly or nearly in point, was cited to me by the plaintiffs' counsel, and I have not been able, after much research, to find one for myself. Indeed, there seems to be great dearth in the law of England of authority upon the point. Going back to the civil law, from which so much of our law as to servitudes and easements is derived, a passage often quoted with approval is much in point. In the Digest, Lib. xxxix., tit. 3, De Aquâ et aquæ pluviæ arcendæ, I find: "Denique Marcellus scribit 'Cum eo qui in suo fodieno vicini fontem avertit, nihil posse agi; nec de dolo actionem; et sane non debet habere, si non animo vicino nocendi, sed suum agrum meliorem faciendi, id fecit.'" That passage certainly does indicate that an action might lie, if the act damaging the neighbour was done, not for the improvement of the actor's own property, but for the purpose of levying blackmail upon the neighbour. In *Acton* v. *Blundell* (12 M. & W.) Maule, J. quotes that passage during the argument at page 336, saying: "It appears to me what Marcellus says is against you. The English of it I take to be this: 'If a man digs a well in his own field and thereby drains his neighbour's, he may do so, unless he does it maliciously,'" and the same passage in the Latin is quoted in full at p. 353 in the considered judgment of the Court of Exchequer Chamber in that case. This certainly is an approval and adoption of that passage as an authority; but it must be observed that in that case there was no suggestion that the defendant was acting maliciously in working his coal mine, and the citation and approval were with reference to the first part of the proposition as to what might lawfully be done, and not with reference to the suggestion what might be unlawful in a state of facts not before the court. I cannot find any case in the books in which the latter part of the statement has been affirmed or acted upon in this country; on the other hand, in *Rawstron* v. *Taylor* (*ubi sup.*) where counsel referred to a diversion of water as being for the *bonâ fide* purpose of drainage only, and not for profit, Martin, B. said (11 Ex. p. 378): "The proprietor of the soil has *primâ facie* the right to drain his land; and unless there is some express authority to show that his motive in so doing affects the question, in my opinion the motive is altogether immaterial," and no such authority having been produced, he repeated the same opinion in his judgment. Again, in *Chasemore* v. *Richards* (*ubi sup.*) Lord Wensleydale says: "The civil law deems an act, otherwise lawful in itself, illegal, if done with a malicious intent of injuring a neighbour *animo vicino nocendi*." The same principle is adopted in the law of Scotland where an otherwise lawful act is forbidden if done "*in æmulationem vicini*." Mr. Cozens-Hardy placed much reliance upon certain observations of Cotton, L.J. and Lord Herschell in the case of *The Midland Railway Company* v. *Robinson* (62 L. T. Rep. 197; 15 App. Cas. 32), but I do not think they help the plaintiffs. In that case questions arose as to a right depending upon the effect of a notice given by an "owner, lessee, or occupier . . . desirous of working mines and minerals under a railway," and the questions whether the person giving the notice really did desire to work or was actuated by some other motive went to the very root of the matter, whereas in the present case the motive of the defendant is according to the cases I have referred to, immaterial. Under the circumstances I come to the conclusion that the plaintiffs are not entitled to relief on this second ground. The plaintiffs also relied upon the case of *The Grand Junction Canal Company* v. *Shugar* (*ubi sup.*). But, as I read that case, it was one in which subterranean water had passed into a defined channel, and from which it was subsequently abstracted, and in that respect it greatly differs from the present case. Here the water has long flowed in a defined channel from the Many Wells proper, and from the watering-place, and I think

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that the plaintiffs' rights are just the same as those of the water company immediately after their purchase in 1843, for the fact that they intercept the springs at their fountain head is not material: (see *Dudden* v. *Guardians of Clutton Union*, 1 H. & N. 627; *Bower* v. *Sandford*, 5 Times L. Rep. 570.) But, as the effect of the defendant's acts would be not to take out of any defined channels water which had ever reached them, but to intercept the water before it has reached such channels, the case of *The Grand Junction Canal Company* v. *Shugar* does not govern the present. The plaintiffs also make it a great point that the defendant could have drained his stone, if that was his real object, as effectively and much more cheaply by a short drift to the watering-places or the Hewenden reservoir. But there are considerable difficulties about this view, and I am not satisfied that any conclusion can fairly be drawn from it as to want of good faith on the part of the defendant, and if I thought he was acting in good faith and within his rights, I could not restrain him from adopting the mode of drainage which he preferred merely because other persons considered some other method to be cheaper and more effectual. I must therefore grant an injunction to restrain the defendant, his servants, workmen, and agents, from making and continuing the drift or tunnel in the pleadings mentioned, and from constructing any other works, and from doing any other act, matter, or thing whereby the waters of the Many Wells springs, or of the stream flowing at the watering-places, may be drawn off or materially diminished in quantity or polluted. I add the word "materially," though it is not found in the Act, because I think the Act does recognise the possibility of some legal appropriation by the defendant of water supplying the springs. Moreover, the principle of *De minimis non curat lex* applies. The question of costs is a very serious matter. Of course, the plaintiffs are entitled to the general costs of the action; but a very considerable amount of time and money has been expended upon the question of the *bona fides* of the defendant, with respect to which the plaintiffs have failed; but the defendant has not been successful. It would be impossible for any taxing master to distinguish or appropriate the costs with any approach to accuracy, and I think, having heard the case, I can deal with them much better myself. I therefore take it upon myself to direct that the plaintiffs' costs shall be taxed, and order the defendant to pay half the plaintiffs' costs. If any authority for such order is required it will be found in *Willmott* v. *Barber* (45 L. T. Rep. 229; 17 Ch. Div. 772).

Solicitors: *Cann* and *Son*, agents for *W. T. McGowen*, Bradford: *Ullithorne*, *Currey*, and *Villiers*, agents for *W.* and *G. Burr* and *Co.*, Keighley.

July 26 *and* 31.

(Before STIRLING, J.)

HAMILTON v. VAUGHAN-SHERRIN ELECTRICAL ENGINEERING COMPANY LIMITED. (a)

Company—Winding-up — Shares — Member—Infant—Allotment of shares to—Executed contract — Repudiation — Rectification of register — Right to recover money paid—Failure of consideration.

An infant who has applied for shares in a company and paid money on their allotment to him may not only repudiate the shares, but may also recover the money so paid, provided that he has derived no benefit from holding such shares.

Corpe *v.* Overton (10 *Bing.* 252) *applied.*

Holmes *v.* Blogg (8 *Taunt.* 508) *and* Ex parte Taylor; Re Burrows (26 *L. T. Rep. O. S.* 266; 8 *De G. M. & G.* 254) *distinguished.*

ADJOURNED SUMMONS.

The defendant company was registered on the 16th Aug. 1890, under the Companies Act 1862. Its articles of association were those of Table A, and it issued a prospectus, on the faith of which the plaintiff, Miss Hamilton, applied for shares, and paid 20*l.* on such application. On the 6th Oct. twenty ordinary shares of 5*l.* each were allotted to her, and on the 18th Oct. she paid 40*l.*, the amount payable on allotment, and her name was placed on the register of shareholders accordingly. At that time the plaintiff was an infant of the age of eighteen, and on the 18th Nov. following she wrote a letter to the secretary of the company in which she required repayment of the money, amounting to 60*l.*, which she had paid to the company. Nothing was done after that for some time.

The plaintiff did not receive any dividends, nor attend any meetings of the company.

On the 19th May 1892 she, by her next friend, issued the writ in this action, by which she claimed (1) a declaration that the allotment of the twenty shares then standing in her name in the register of shareholders of the defendant company was void; (2) that the register of the defendant company might be ordered to be rectified by striking out the name of the plaintiff as a shareholder in respect of the said twenty shares; (3) that the defendant company might be ordered to repay to the plaintiff the sum of 60*l.* paid by her to the defendant company in respect of the said twenty shares, together with interest at 5 per cent.; (4) that the defendant company might be restrained by injunction from enforcing any call made or to be made on the plaintiff in respect of the said twenty shares.

On the 10th June following the issue of the writ the company went into voluntary liquidation, and on the 27th June the liquidator removed the plaintiff's name from the register of shareholders.

The action, pursuant to an agreement between the parties, now came on upon a summons for the purpose of deciding whether the plaintiff was entitled to the return of the 60*l.* paid by her to the company.

Reginald Hughes for the applicant.—The applicant repudiated the shares within six weeks of their allotment to her; no dividends were ever paid to her by the company; and the liquidator has removed her name from the register. There has therefore been a total failure of consideration, and the applicant is entitled to recover the amount paid by her for the shares:

Corpe v. *Overton*, 10 Bing. 252.

P. Wheeler for the liquidator.—"If an infant pays money with his own hand, without a valuable consideration for it, he cannot get it back again:" per Lord Mansfield in *Earl of Buckinghamshire* v. *Drury* (2 Eden. at p. 72). The case is covered

(a) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

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by *Holmes* v. *Blogg* (8 Taunt. 508) and *Ex parte Taylor; Re Burrows* (26 L. T. Rep. O. S. 266; 8 De G. M. & G. 254). Where therefore an infant has actually paid for shares, and they have been allotted to him, the contract being executed, he cannot recover back the amount paid: (Leake on Contracts, 3rd edit., pp. 476, 477.) *Corpe* v. *Overton* (*ubi sup.*) is distinguishable on the ground that the contract in that case was executory. Here, however, the infant received valuable consideration for the money paid by her, viz., shares in the company, which she might have sold, and in respect of which she was entitled to receive dividends. In *Valentini* v. *Canali* (61 L. T. Rep. 571; 24 Q. B. Div. 166), an infant, who had agreed to become tenant of a house, and to pay a certain sum for the furniture therein, and had paid part of the sum and occupied the house, and used the furniture during several months, was held not to be entitled under sect. 1 of the Infants' Relief Act 1874 to recover back the amount paid.

Hughes in reply.—The cases in which an infant has been held not entitled to recover have been cases in which there has been part performance and enjoyment of consideration by the infant. Here the consideration was illusory.

STIRLING, J. stated the facts and continued:—This case comes on in order that I may decide whether or not the plaintiff is entitled to a return of 60*l.* paid by her to the company. This is claimed on the ground that there has been a total failure of consideration. Three cases have been cited before me. The first is *Holmes* v. *Blogg* (*ubi sup.*). There the plaintiff brought an action to recover a sum paid by him during infancy to the defendant, who had leased certain premises to the plaintiff, and a person named Taylor, with whom the plaintiff was in partnership. The lease was granted to the plaintiff and Taylor, and the sum of 157*l.* was paid by the plaintiff as a premium, and the plaintiff and Taylor actually occupied the demised premises for three months. The plaintiff after he became of age avoided the lease, and brought his action to recover the premium. Gibbs, L.C.J. in delivering the judgment of the court, referred to an expression of opinion by Lord Mansfield in the House of Lords, that "If an infant pays money with his own hand without a valuable consideration for it, he cannot get it back again," and he held that the infant was not entitled to recover. The next case, *Ex parte Taylor* (*ubi sup.*), was of a similar character. There the infant entered into an agreement for a partnership, and paid a premium on entering. The partnership articles were dated the 31st July 1854, and after that date he devoted nearly all his time and attention to the business of the partnership, and received therefrom a weekly allowance up to the 28th July 1855 amounting altogether to 172*l.* 6*s.* 4*d.*, but received no share of the profits of the business, or derived any other advantage therefrom. Before he came of age he disaffirmed the contract. It was held that he could not prove in the bankruptcy of his late partners, on the ground that the contract had been part performed on each side, and the consideration had not wholly failed. The former of those two cases was considered in *Corpe* v. *Overton* (*ubi sup.*). There the plaintiff, while he was an infant, signed a written agreement for a partnership to commence, not at once, but at a future date, and he paid a deposit. Between the date of the agreement and the commencement of the partnership he revoked the agreement, and rescinded the contract, and brought an action to recover what he had paid. *Holmes* v. *Blogg* (*ubi sup.*) was relied upon in opposition to that claim, but the whole of the judges composing the court distinguished that case. Tindal, C.J. says, "In *Holmes* v. *Blogg* (*ubi sup.*), the infant had paid 157*l.* as his share of the consideration for a lease of premises in which he and his partner carried on the business of shoemaking. They occupied the premises from March till June, when the infant, coming of age, dissolved the partnership, relinquished the business, and sought to recover back the money he had paid the lessor for his lease. In that case, therefore, the sum of money sought to be recovered back, as having been paid without consideration, appeared to have been paid for something available, that is, for three months' enjoyment of the premises let to him and his partner; and the plaintiff could not put the lessor again into the same situation. And though several general expressions are dropped by the Chief Justice in delivering his judgment, yet, when he comes to apply them to the subject before the court, he gives them a less extensive latitude. After referring to the opinion of Lord Mansfield, he goes on: 'What is the point here? That an infant, having paid money on a valuable consideration, and having partially enjoyed the consideration, seeks to receive it back.' The ground, therefore, of the judgment in *Holmes* v. *Blogg* (*ubi sup.*) was, that the infant had received something of value for the money he had paid, and that he could not put the defendant in the same position as before." Then, after referring to the facts of the case before him, he adds: "As it is plain, therefore, that the infant had a right to rescind the contract, the only point we have to look to with reference to *Holmes* v. *Blogg* (*ubi sup.*) is, whether he had derived any intermediate advantage from it. Now the partnership was not entered into till Jan. 1833, and in the meanwhile the infant had derived no advantage whatever from the contract." Gaselee, J. shortly expressed his concurrence. Bosanquet, J., in referring to *Holmes* v. *Blogg* (*ubi sup.*), says: "There, the infant had paid a sum of money as part of the consideration for a lease of premises in which he carried on business with a partner. The premises were, in fact, occupied for twelve weeks; but if they had been occupied for any other period, there would have been no difference in principle, and the plaintiff could not recover back sums from the outlay of which he had derived no advantage. There is no reason, therefore, for finding fault with that decision. It is, however, a general rule, that, upon an entire failure of consideration, a party is entitled to recover back money paid, and it cannot be said that in this respect an infant is in a worse situation than others." Alderson, J. says: "Before the contract is performed, one of the parties revokes it, and remits the other to the same situation as if the contract had never been made. There is no ground, therefore, on which he can claim to retain the money for the purpose of enforcing the execution of a contract which the law says an infant shall not enter into. In this the case is clearly distinguishable from *Holmes* v. *Blogg* (*ubi sup.*). Here the infant has had no en-

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joyment of any advantage from the contract: in *Holmes* v. *Blogg* (*ubi sup.*) he had enjoyment, for a period, of the premises demised to him; and so far was in the same situation as if he had paid for expensive clothes or other articles not necessary, and after wearing them had brought an action for the price. In such an action he could not be allowed to recover, although the tradesman, if unpaid, could not have enforced payment." It is to be observed that all the learned judges who deal with the case distinguish it from *Holmes* v. *Blogg* (*ubi sup.*), on the ground that in the latter case there had been actual enjoyment under the lease. They did not say that a mere demise would have been sufficient, and it seems to me that the rule to be drawn from the case is to consider whether the infant has derived any advantage under the contract. Here no dividend was declared, and the plaintiff took no part in the management of the company and attended no meetings. The only advantage she got was the allotment of the shares, and the fact that for a certain period her name remained on the register. It seems to me that that was not an advantage within the meaning of the judgments in *Corpe* v *Overton* (*ubi sup.*). I think that here the consideration has totally failed, and that the infant is entitled to recover, *i.e.*, to prove for the amount in the liquidation.

Solicitors: *Hughes* and *Masterman*; *J. B. Purchase.*

June 15 *and* 16.

(Before KEKEWICH, J.)

Re PARKER; MORGAN *v.* HILL. (*a*)

Principal and surety—Co-sureties—Contribution—Bankruptcy of one co-surety—Payment of whole debt by and assignment thereof to other co-surety—Proof for whole debt—Mercantile Law Amendment Act (19 & 20 *Vict. c.* 97), *s.* 5.

A surety who has paid off the whole debt and taken an assignment thereof from the creditor, is entitled to prove in the bankruptcy of his co-surety for the full amount of the debt, but cannot receive more than the proportion of the whole debt which his co-surety is bound to contribute.

One of three co-sureties executed a deed of assignment in favour of his creditors. The principal debtor, a company, went into liquidation, and the creditor sent in a claim against the estate of the bankrupt surety. The two other co-sureties paid off the principal creditor, and took an assignment of the whole debt and the benefit of the creditor's claim against the bankrupt co-surety, and then sought to prove against his estate for the whole amount of the debt.

Held, that the co-sureties were entitled to prove for the whole debt, but not to receive dividends beyond 6s. 8d. in the pound out of the bankrupt's estate.

ADJOURNED SUMMONS.

By an indenture of mortgage of the 12th March 1892, made between the Norwich and Norfolk Investment Corporation Limited (the mortgagors) of the first part, Messrs. J. C. Parker, R. Holmes, L. Tall, G. Yallup, and R. H. Court (sureties for the mortgagors) of the second part, and Messrs. Cozens-Hardy and Jewson (the mortgagees) of the third part, the sureties for the mortgagors jointly and severally covenanted to pay to the mortgagees the sum secured by the mortgage deed, and that the sureties should, as between themselves and the mortgagees, be taken to be principal debtors.

R. Holmes and L. Tall became bankrupt, and no assets, or practically none, were available to satisfy their liability under the above covenant.

On the 18th Feb. 1893 J. C. Parker executed a deed of assignment in favour of his creditors.

Messrs. Cozens-Hardy and Jewson sent in a claim to the trustee of the said deed of assignment for the total amount then due under their mortgage, but the trustee did not admit their claim or pay anything in respect thereof.

The Norwich and Norfolk Investment Corporation went into voluntary liquidation; and the mortgagees claimed from the sureties, Messrs. Yallup and Court, payment of the amount due under the mortgage, which was accordingly paid to them.

Upon payment of the mortgage debt, the mortgagees transferred the same and the securities therefor, and the benefit of all claims against the estate of J. C. Parker, to M. A. Morgan and J. W. Jewson, as trustees for Messrs. Yallup and Court.

M. A. Morgan and J. W. Jewson now claimed to be entitled to the benefit of the claim of Messrs. Cozens-Hardy and Jewson, the mortgagees, against the estate of J. C. Parker for the full sum of principal, interest, and costs properly due under the said mortgage deed, and to receive a dividend on the whole of the said sum, but admitted that the amount to be actually received by them ought not to exceed one-third of the total amount of the claim, that being the proportion in which, as between the three co-sureties, Parker, Yallup, and Court, Parker was liable. This was a summons by M. A. Morgan and J. W. Jewson, as trustees for Yallup and Court, to enforce their said claim.

Sect. 5 of the Mercantile Law Amendment Act, after enacting that a surety paying a debt shall be entitled to have assigned to him the security held by the creditor, and to stand in the place of the creditor, provides that "no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor by the means aforesaid, more than the just proportion to which, as between these parties themselves, such last-mentioned person shall be justly liable."

Hadley for the summons.—Sureties who have paid the debt, are entitled to stand in all respects in the place of the creditor. He referred to

Ex parte Stokes and Goodman, De Gex Cases in Bankruptcy, 618.

T. B. Napier for the trustee of the deed of assignment of J. C. Parker.—The estate of the co-surety is only liable to payment of one-third of the whole debt, and proofs can only be admitted to that extent:

Ex parte Snowdon, 44 L. T. Rep. 830; 17 Ch. Div. 44;

Wolmershausen v. *Gullick*, 68 L. T. Rep. 753; (1893) 2 Ch. 514;

Re Sir J. J. Ennis; Coles v. *Peyton*, 69 L. T. Rep. 738; (1893) 3 Ch. 238;

Mercantile Law Amendment Act (19 & 20 Vict. c. 77), s. 5.

(*a*) Reported by J. H. BAKEWELL, Esq., Barrister-at-Law.

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KEKEWICH, J.—In disposing of this case it seems to me best to entirely dismiss any idea of bankruptcy from my mind, and to consider this question purely as one of right of action. Here we have three sureties, two of whom have paid off the whole debt, and they are therefore entitled to stand in the shoes of the creditor. This seems to me to be but natural justice, and at any rate it is in strict accordance with the words of the Mercantile Law Amendment Act. The original creditors have a right to sue any surety for the whole debt, and why should that right be restricted in the case of sureties who have paid off the debt, and who therefore stand in the position of the original creditors? I see no reason, and the Act certainly says nothing of the sort. Mr. Napier argues that the words "shall not recover" mean "shall not bring an action for"; but what the Act says is, that the surety, notwithstanding his right to stand in the creditor's shoes, shall not "recover," *i.e.*, bring into his own pocket, more than the just proportion to which he is entitled. That would be an idle proviso, had he not the right to sue for the whole debt. The declaration, therefore, must be that the applicants are entitled to prove for the whole debt, but not to receive dividends beyond 6*s.* 8*d.* in the pound out of the trust estate.

Solicitors: *Oldman, Clabburn,* and *Co.*, agents for *D. Havers,* Norwich; *Sharpe, Parker,* and *Co.*

Thursday, June 28.

(Before WRIGHT, J., sitting as an additional Judge of the Chancery Division.)

Re BREWERY ASSETS CORPORATION LIMITED; TRUMAN'S CASE. (*a*)

Company—Winding-up—Contributory—Application for shares—Verbal withdrawal—Authority of clerk at registered office to receive withdrawal—Stoppage of cheque for application money—Notice to company.

An application for shares in a company may be verbally withdrawn before allotment.

A. signed an application form for shares in a company, and handed the same to a clerk at the registered office of the company with a cheque for the amount of the allotment money. On the same day A. called at the office and told the clerk that he withdrew his application, and asked him to return the cheque. The clerk declined to do so, on the ground that the secretary was out. A. thereupon stopped his cheque. The company subsequently allotted the shares to A.

Held, that, in the absence of evidence to the contrary, it must be inferred that the clerk was so far in charge as, in the absence of others, to have authority to receive A.'s statement, which must, therefore, be taken to have been communicated to the company before allotment.

Directors, who allot shares on the basis of payments to their bankers, ought to make inquiries as to such payments before allotting the shares.

SUMMONS.

On the 4th Nov. 1890 J. C. Truman called at the office of the Brewery Assets Corporation, and there filled up a printed form of application for ten ordinary shares in the company of 10*l.* each, and handed the same to a clerk of the company with a cheque for 30*l.*, being the aggregate amount of the application and allotment moneys. On the same day, Truman called at the office, and told the clerk that he withdrew his application for shares, and asked him to return the cheque. The clerk said he could not, as the secretary was out. Truman called again the same day, but found the office closed. The following morning he instructed his bankers to stop the payment of the cheque, and this was done.

On the 7th Nov. the directors allotted the shares to Truman, and on the following day he received from the company a form of allotment letter, with a blank banker's receipt for payment of the allotment money, both of which he immediately returned to the company.

It did not appear from the evidence that at the time the directors allotted the shares to Truman they were aware that the cheque had not been paid. The company's pass-book, however, showed that the cheque was paid into the company's account on the 4th Nov. 1890, and that the company was debited with the amount of the cheque on the 5th Nov. In the company's allotment book, which was written up by a clerk to the auditors of the company in Jan. 1891 from a list of applicants for shares, there appeared the entry "cheque returned" against Truman's name. The list was not now in existence.

On the 11th Nov. 1890 the secretary of the company wrote to Truman, inclosing the letter of allotment which had been returned, and referring to the fact that his cheque had been returned marked "refer to drawer."

The company entered Truman's name in the register of shareholders and credited him with the 30*l.* cash paid by him on the 4th Nov. 1890, and debited him with 30*l.* for his returned cheque, and also for the amount of the first call, which was made in Jan. 1891.

The company never attempted to enforce payment of the money due on the application for or the allotment of shares, or for the first call.

In Nov. 1892 the company passed resolutions for voluntary winding-up, and the liquidator put Truman's name on the list of contributories of the company in respect of ten shares not fully paid.

This was a summons taken out by Truman in the winding-up, asking that the list of contributories might be rectified by striking out his name as a contributory in respect of such shares.

Tanner for the summons.—The applicant withdrew his application for shares before allotment, and although he did so verbally, that is sufficient:

Re Natal Investment Company; Wilson's case, 20 L. T. Rep. 962.

The notice of withdrawal was given at the company's office, which, under sect. 39 of the Companies Act 1862, was the proper place to give such notice. Further, it was given to a clerk at the office, who, under the circumstances of this case, must be taken to have been the proper person to receive such notice. Sufficient notice of the applicant's intention to withdraw his application must therefore be imputed to the company. The applicant's name ought therefore to be removed from the list of contributories.

A. J. Chitty for the liquidator.—Proper notice of withdrawal was not given. In order to make

(*a*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

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such notice effectual it ought to have been in writing and addressed to the company. A mere statement to a clerk in the employment of a company of an intention to withdraw an application for shares is not sufficient to enable the person making it to escape liability:

Pennell v. *Stephens*, 7 C. B. 987.

In order to affect the company with notice the applicant must show that such notice reached the company, and this he has not done. Further, the stoppage of his cheque was not sufficient to affect the company with notice of his withdrawal, as the applicant has not shown that at the date of allotment the directors were aware of such stoppage. The name, therefore, of the applicant having been entered in the register of shareholders, he is, under sects. 23 and 37 of the Companies Act 1862, *primâ facie* a member of the company, and having taken no steps to have it removed, it is now too late for him to do so.

Tanner replied.

WRIGHT, J.—This case is one as to which I have felt some considerable doubt, but I think I ought to draw the inference that, in the absence of evidence to the contrary, the clerk who was at the office when the applicant called, and referred to the absence of the secretary, was so far the clerk in charge of the premises that it must be imputed to the company that the statement which was made to him in office hours was made to him in the absence of other persons who had authority to receive it, and that he had such authority. The case is on the line, but the applicant did change his mind as to taking the shares, and I think that, according to the facts as I read them, he made a communication to the company of his change of mind before the shares were allotted to him. Then as to the other point. He stopped his cheque, and the fact of his having done so was placed on record in books which were before the directors. It is not shown that they read the entry, but I am inclined to think that, when directors are making allotments of shares, based upon payments by the allottees to their bankers, they ought to make inquiry, and if they find that one of the cheques has been stopped, that is sufficient to put them on their guard. At the time when the company made this allotment to the applicant, it had, I think, no authority to do so. He repudiated the allotment at once, and he is, I think, entitled to be relieved of his shares.

Solicitors: *Jerome* and *Co.*; *Nash, Field*, and *Co.*

Feb. 1, *June* 28, *and July* 5.

(Before WRIGHT, J., sitting as an additional Judge of the Chancery Division.)

Re MIDLAND COAL, COKE, AND IRON COMPANY LIMITED; CRAIG'S CASE. (*a*)

Company—Winding-up—Scheme of arrangement—Transfer of assets and liabilities to new company—Proof of debt—Contingent liability—Joint Stock Companies Arrangement Act 1870 (33 *&* 34 *Vict. c.* 104), *s.* 2.

C, the lessee of certain mines, assigned his lease to a company, the company covenanting to indemnify him against all claims in respect of rent or breach of any of the covenants contained in the lease. The company went into liquidation, and subsequently the Court sanctioned a scheme under the Joint Stock Companies Arrangement Act 1870 *under which a new company was formed to take over the assets and liabilities of the old company. C. claimed to prove in the winding-up of the old company in respect of his contingent liability under the lease.*

Held, that C. was a creditor within the meaning of sect. 2 *of the Act of* 1870, *and therefore was bound by the scheme, and that his remedy was to call upon the new company to indemnify him as from time to time he might be required to pay under the lease.*

SUMMONS.

Under an indenture of lease, dated the 31st Dec. 1881, W. Y. Craig became the lessee of certain coal mines and premises for a term of forty years from the 31st Dec. 1881, subject to the payment of the rents and royalties thereby reserved.

By an indenture, dated the 19th June 1890, Craig assigned the lease to the Midland Coal, Coke, and Iron Company for valuable consideration, and the company thereby covenanted to indemnify him against all claims by reason of the nonpayment of the rents and royalties reserved by the lease, or the breach of any of the covenants therein contained.

On the 26th May 1893 the company went into voluntary liquidation, which, by an order dated the 21st June 1893, was continued under the supervision of the court, and joint liquidators were appointed.

In Aug. 1893 the Court directed separate meetings to be convened of (1) the unsecured creditors, (2) the debenture-holders, and (3) the contributories of the company, for the purpose of considering, and, if thought fit, approving of a scheme under the Joint Stock Companies Arrangement Act 1870. The statutory majorities at the meeting approved of the scheme, and on the 12th Oct. 1893 the Court made an order sanctioning the scheme, and declaring it binding on all the creditors, contributories, and liquidators of the company.

The scheme provided (clause 2) that the new company which was to be formed should "take over all the assets and business of the existing company, and undertake all its liabilities, including the costs of the winding-up," in consideration of shares in such new company to be allotted to the shareholders in the existing company. By clause 4 an agreement for the transfer of the assets and business, the allotment of shares, and for giving effect to the scheme, was to be entered into between the liquidators and the new company. By clause 8 the new company was to pay in cash or satisfy within three months of the court's approval of the scheme, (*a*) certain debentures of the company, (*b*) "the unsecured creditors of the existing company, (*c*) the costs of the winding-up of the existing company, including the liquidators' remuneration, and all costs, charges, expenses, and claims in connection with the negotiating and carrying into effect of the scheme." By clause 10, upon payment or satisfaction of the debentures, debts, costs, charges, and expenses mentioned in clause 8, the existing company was to be wound-up and dissolved.

(*a*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

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The new company was incorporated in Nov. 1893.

In pursuance of clause 4 of the scheme, an agreement, dated the 5th Dec. 1893, was entered into between the old company and its liquidators and the new company, for taking over the assets and liabilities of the old company. This agreement varied certain of the provisions of the scheme, but did not contain anything material for the purposes of this report.

This was a summons taken out by Craig in the winding-up of the old company, asking that his claim for 45,787*l.* 14*s.* 8*d.* might be fully admitted.

The applicant alleged that he had been called upon to pay and had paid the lessor under the terms of the lease 321*l.* 14*s.* 8*d.* for the quarter's rent due on the 1st April 1893; that he estimated the rents for which he was liable and entitled to be indemnified against under the indenture of the 19th June 1890 at 1460*l.*, and the yearly royalties for which he was liable and entitled to indemnity at 3200*l.*, and he claimed to prove for the amount paid for rent, and in respect of his contingent liability under the lease, and to have the latter claim properly secured, the amount necessary to secure which he estimated at 45,451*l.*

The liquidators admitted the applicant's claim for 336*l.* 14*s.* 8*d.* (being the 321*l.* 14*s.* 8*d.* paid for rent with interest), but refused his proof for the 45,451*l.*, on the ground that under the scheme as sanctioned by the court the new company had undertaken all the liabilities of the old company.

The new company was not made a party to the proceedings.

Kenyon Parker for the summons.—The applicant is entitled to prove in the winding-up in respect of his contingent debt. The former practice rested on sect. 158 of the Companies Act 1862:

Re Haytor Granite Company, 13 L. T. Rep. 515; L. Rep. 1 Ch. 77.

That practice was, however, altered by sect. 10 of the Judicature Act 1873, which imported into the winding-up of companies the practice for the time being in bankruptcy with reference to the proof and valuation of contingent liabilities:

Bankruptcy Act, 1883, s. 37;
Palmer's Winding-up Forms, 2nd edit., p. 329.

Here the applicant is under a contingent liability on a lease, against which the company has agreed to indemnify him. He is therefore entitled, according to the bankruptcy practice, to have his contingent liability estimated, and to prove for it against the company, and unless he is allowed to do so at once he will lose his right by reason of the dissolution of the company:

Hardy v. *Fothergill*, 59 L. T. Rep. 273; 13 App. Cas. 351.

The applicant has no right to prove against the new company:

Re British Provident Life and Fire Assurance Company; Anglo-Austrian Company's case, 10 L. T. Rep. 326; 4 New Rep. 48.

[WRIGHT, J.—The only question before me is as to the construction of this scheme.] There is no other method of ascertaining the liabilities of the old company, which the new company has agreed under the scheme to take over, but by allowing proof for them against the old company. Under clause 10 of the scheme the old company is to be wound-up and dissolved after payment of the debts, &c., mentioned in clause 8. If the applicant is bound by the scheme, he is also surely entitled to the benefit of it, and to say that he shall not be allowed to prove against the old company for his contingent liability is to deprive him of that benefit. There is nothing to show that the applicant has waived any of his rights against the old company. [WRIGHT, J.—Is not the scheme in substance a novation?] I submit not:

Re British Provident Life and Fire Assurance Company; Anglo-Austrian Company's case (ubi sup.).

[WRIGHT, J.—*Primâ facie* that case is not applicable, because there there was no statutory sale.] Here there is a mere contract between the old and the new companies, which can only be enforced through the medium of the old company. Under the scheme the old company is not to be extinguished until all its liabilities have been provided for. A solvent company is not entitled to part with its assets until it has provided for its contingent liabilities:

Lord Elphinstone v. *Monkland Iron and Coal Company*, 11 App. Cas. 332;
Gooch v. *London Banking Association*, 32 Ch. Div. 41.

The old company must be treated as solvent, inasmuch as it is selling itself for shares in the new company, which are to be distributed amongst the shareholders of the old company. If, however, the applicant is an unsecured creditor, he is entitled to be paid at once in cash under clause 8 of the scheme. He also referred to

Companies Act 1862, ss. 142, 143;
Buckley on the Companies Acts, 6th edit., p. 330.

Kirby for the liquidators.—The applicant is not a creditor of the old company except in respect of the rent actually paid by him. A distinction must be drawn between debts and liabilities. The old company having transferred all its assets to the new company, the applicant's only remedy is against the new company:

Re European Assurance Society; Hort's case; Grain's case; 33 L. T. Rep. 766; 1 Ch. Div. 307.

[WRIGHT, J.—In that case there was a clear agreement between Hort and the new company.] Lord Cairns disregards that fact in his judgment. Here there is, I submit, an unsecured debt, and an undertaking to indemnify the applicant against the covenants in the lease. [WRIGHT, J.—I cannot help thinking that I ought to have the new company here.] My first objection to this claim is that the applicant was a party to and is bound by the scheme which was entered into under sect. 2 of the Joint Stock Companies Arrangement Act 1870. His claim, therefore, against the old company is gone by the scheme. The sanction of the court to the handing over to the new company of the assets of the old company precludes the idea that the old company was to remain liable for contingent liabilities, and the scheme itself is inconsistent with the payment of such contingent liabilities.

WRIGHT, J.—This is a very puzzling case. On the whole, however, I am of opinion that sect. 2 of the Joint-Stock Companies' Act 1870 was intended to apply to any person who can be treated as a creditor of any sort, whether secured or unsecured, certain or contingent, as otherwise a scheme of

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arrangement would be deceptive. The applicant, being some sort of a creditor, so that he could be bound by the scheme, was either bound by it when it was sanctioned by the court, or had some means of obtaining the protection of his interests. I must take it that he is to be regarded as a party to and bound by the scheme. Then what does the scheme mean? [His Lordship referred to clause 2 of the scheme and continued:] That clause means that the creditors have agreed that the new company shall in effect be a continuation of the old one, and that all liabilities of the old company shall be liabilities of the new company. There is nothing in the clause to limit those liabilities. Accruing liabilities of the old company are to be accruing liabilities of the new one. Clause 8 of the scheme adds to the difficulty. [His Lordship referred to the clause and continued:] If Craig is a creditor at all, he is an unsecured creditor. It looks at first sight as if he were to be paid in full. That cannot be so. "Unsecured creditors" within the meaning of that clause means creditors for moneys actually due and payable, not those having merely contingent claims. If that be so, it follows that Craig has agreed that his remedy shall be to call on the new company to indemnify him as from time to time he may be required to pay under the lease. The new company cannot resist that, because it is a party to the agreement and to the scheme. It may be that Craig might from time to time bring an action in his own name. I think the present application fails, but I cannot declare the applicant's rights against the new company, as the new company is not a party to these proceedings. The summons must therefore be refused. The costs will be costs in the winding-up.

Solicitors: *Bircham* and *Co.*; *Ashurst, Morris, Crisp*, and *Co.*

May 4 and 28.

(Before WILLIAMS, J., sitting as an additional Judge of the Chancery Division.)

Re ANGLO-AUSTRIAN PRINTING AND PUBLISHING UNION LIMITED. (*a*)

Company — Winding-up — Costs — Taxation — Official receiver's report—Misfeasance summons —Adjournment into court — Oral evidence— Instructions for brief—Three counsel—Consultations — Refreshers — Companies (Winding-up) Rules 1890, *r.* 78—*R. S. C.* 1883, *Order LXV., r.* 27, *sub-rules* 30, 39, 40, 48; *App. N., no.* 81.

The official receiver's special report under rule 78 *of the Companies (Winding-up) Rules* 1890, *is neither a pleading nor equivalent to a pleading, nor an affidavit, nor within Order LXV., r.* 27; *but a statement of facts for which the only charges which can be made are for drawing at* 8*d. a folio, and copying at* 4*d. a folio.*

The hearing of an adjourned misfeasance summons under sect. 10 *of the Companies (Winding-up) Act* 1890 *is not "the hearing or trial of action upon notice of trial, or notice for judgment given" (R. S. C.* 1883; *App. N., no.* 81), *and therefore charges for instructions for brief cannot be allowed, but only for drawing and copying all the necessary proofs and statements of the witnesses and observations at the rate of* 1*s. for drawing and* 4*d. for each copy for counsel.*

On the hearing of such a summons upon affidavit and oral evidence the fees and costs of three counsel may be allowed where it is essential to justice, having regard to the issues raised and the probable and actual length of the hearing, that the services of three counsel should be retained.

Fees to counsel for consultation (after the first one) during the hearing disallowed.

The registrar has power to allow refreshers on such an adjourned summons where oral evidence is adduced, such a case being a matter within Order LXV., r. 27, *sub-rule* 48, *and sect.* 100 *of the Judicature Act* 1873.

SUMMONS to review taxation.

The Anglo-Austrian Printing and Publishing Union Limited was ordered to be wound-up on the 2nd May 1891.

On the 21st July 1892 a misfeasance summons was taken out by the official receiver and liquidator under sect. 10 of the Companies (Winding-up) Act 1890 against J. T. Agg-Gardner, Sir H. Isaacs, Sir R. Lethbridge, C. Kegan Paul, and H. Bottomley for the payment by them of certain sums therein mentioned. The summons was adjourned into court and was ultimately dismissed as against Bottomley.

The hearing of the summons, on which witnesses were orally examined, occupied several days. The papers were very voluminous.

On the 3rd Aug. 1893 Williams, J. made an order (by consent) that Agg-Gardner should pay to the applicant a certain sum of money in satisfaction of all claims set forth in the summons, and that the costs of the applicant of and consequent upon the application (except such costs as related only to the respondents other than Agg-Gardner) should be taxed and paid by Agg-Gardner to the applicant.

On the 10th Feb. 1894 an order was made on the summons that Isaacs, Lethbridge, and Kegan Paul should pay the sums claimed by the summons and the taxed costs of the application, except so far as the same had been incurred by adding Bottomley as a respondent, and excepting that the applicant was to give credit for what he should have received from Agg-Gardner in respect of the costs directed to be taxed and paid by him under the order of the 3rd Aug. 1893.

In the bill of costs carried in for taxation by the official receiver and liquidator there appeared (*inter alia*) the following items:

1. Instructions for special report of official receiver under rule 78 (of the Companies Winding-up Rules 1890) involving perusals of all the correspondence (partly written in German and many thousands of folios), the agreements (over fifty in number), depositions (1500 folios), and all other books and documents of the company, setting out the facts and information on which the official receiver intended to proceed, derived from the documents and correspondence of the company in his possession, and the depositions of the directors and others, and involving the arrangement and selection of those documents which were material to the case, and the rejection of a very large part of the correspondence and documents amounting to thousands of folios, estimated to have taken clerk and self ninety-eight hours, 66*l.*

[Note. All copies sent to counsel charged with briefs].

(*a*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

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2. Drawing report, folios 332, less folios appendices 168, net folios 164, 8*l.* 4*s.*
3. Copy draft report for printer (332 folios), 5*l.* 10*s.* 8*d.*
4. Instructions for brief on hearing, involving numerous attendances on the official receiver, the late secretary and solicitor of the company, perusals of numerous documents, and the books of the company and the correspondence, 52*l.* 10*s.*

5. [Certain items relating to the brief of the third counsel who appeared for the official receiver at the hearing of the summons, his fee, and the one set of observations, copies of documents, consultation fees and refreshers, incidental to the employment of such third counsel.]

6. [Several items relating to fees paid to counsel for consultations during the hearing of the summons, and beyond the first consultation fees, and also relating to attendances in connection with such further consultations.]

7. [Four refresher fees paid to each of the applicant's counsel on the hearing of the summons.]

The registrar on taxation disallowed or reduced all these items. The official receiver and liquidator thereupon carried in objections to such disallowances and reductions. These objections and the reasons of the registrar for the disallowance or reduction of the items were the following:

Objections 1, 2, and 3:

The applicant objects to the disallowance of the items 66*l.* and 5*l.* 10*s.* 8*d.*, and of the part disallowance of the item 8*l.* 4*s.*, on the grounds that the application under sect. 10 (whereunder this proceeding was brought) is in the nature of an action, and that, under rule 78 of the Companies Winding-up Rules 1890, the official receiver may make a report, but any other person is to proceed by affidavit; that such affidavit, evidence, or report is in the nature of and equivalent to a pleading in an action; that the same amount of careful drafting is required. That, as regards the amount charged for instructions, the preparation of the report involved minute and careful investigation, and perusal of several thousands of letters (a large number written in German and French), the perusal of a large number of books and documents formerly in the possession of the company and of Horatio Bottomley, and the mere investigation with the object of rejecting those of immateriality involved many hours' careful investigation.

Registrar's reasons for disallowance:

Objections 1, 2, and 3 are to the principle upon which I have dealt with the report made by the official receiver to the court under rule 78. The application is a summons in the winding-up, adjourned into court, accompanied with a "statement of facts," which is called a report. I have dealt with it as a "statement of facts," and therefore allowed drawing at 8*d.* and copy at 4*d.* a folio respectively (see Appendix N. of R. S. C. 1883), and disallowed "instructions."

Objection 4:

The applicant objects to the disallowance of this item (52*l.* 10*s.*) on the ground that the hearing of this summons is an original hearing, and in the nature of or equivalent to an action involving large sums of money and difficult questions of law. As to the amount, the magnitude of the correspondence and documents, and the length of time over which the transactions were carried, and the difficulty of obtaining the evidence from witnesses who were antagonistic to the applicant, involved much labour and time, and the arrangement of the correspondence with a view to reducing the cost of copies also entailed considerable labour.

Registrar's reasons for disallowance:

Objection 4 to the disallowance of instructions for brief. This application is not the "hearing or trial of an action upon notice of trial or notice of judgment given;" therefore instructions for brief cannot be allowed. Such instructions are not even allowed on the hearing of an originating summons, on the same grounds: (see Appendix N. of R. S. C. 1883, "Instructions.") I have allowed for drawing and copying all the necessary proofs and statements of the witnesses and observations at the rate of 1*s.* for drawing, and 4*d.* for each copy for counsel.

Objection 5:

The applicant objects to the disallowance of the fee paid to third counsel on the hearing of the summons, and the consequent disallowance of one set of the observations and copies of documents accompanying the brief, and consultation fees and refreshers, on the ground that, having regard to the large sums of money involved, the commercial importance of the case, the legal points involved, and also the extent and number of the documents and accounts accompanying (over 12,000 folios), and to the probable duration of the trial, the applicant could not, with ordinary prudence, have ventured into court with less aid than that of three counsel.

Registrar's reasons for disallowance:

Objection 5, to the disallowance of a third counsel. A discretionary item. A third counsel can, under very special circumstances, be allowed on the trial of an action; but has never been allowed on an adjourned summons as far as I can ascertain; and, as a general rule, "it requires a very strong case to induce the court to sanction the fees of more than two counsel on a taxation as between party and party:" (Malins, V.C. in *Smith* v. *Buller*, 31 L. T. Rep. 873; L. Rep. 19 Eq. 473.) In *Pearce* v. *Lindsay* (2 L. T. Rep. 169: 1 De G. F. & J. 573) Turner, L.J. said: "It should, in each case, be clearly shown to have been essentially necessary for the purpose of doing justice between the parties at the hearing of the cause that three counsel should be employed." Pearson, J. cited this case in *Le May* v. *Welch* (W. N. 1885, p. 180). There are many other cases where a third counsel has been allowed or disallowed. In *Parish* v. *Pool* (34 W. R. 365) the judge supported the taxing master's discretion. *Kirkwood* v. *Webster* (9 Ch. Div. 239) lays down the principle on which three counsel can be allowed.

Objections 6 and 7:

The applicant objects to the disallowance of the items for consultation. The trial of the action was continued from day to day for four days in June, and only one consultation fee has been allowed. For the reasons set opposite the item preceding, the applicant submits that as the trial proceeded it was proper and necessary that he should confer with his counsel thereon. The applicant objects to the disallowance of the refresher fees to counsel on the ground that this was an original proceeding in the nature of an action and of the magnitude and commercial importance before set forth.

Registrar's reasons for disallowance:

Objections 6 and 7. This not being the trial of an action, consultations day by day and refreshers cannot be allowed, at all events as between party and party. No fresh issue was raised during the hearing of the summons, and the mere fact of it taking more than one day is no reason for having consultations day by day. I have no power to allow fees as "refreshers" on a summons adjourned into court; but I have, in the exercise of my discretion, allowed such fees on the brief as I think proper, looking at the necessary papers and the time taken in the hearing.

This was a summons taken out by the official receiver and liquidator, asking that his objections to the taxation might be allowed, and that it might be referred back to the registrar to vary his certificate accordingly.

Muir Mackenzie for the summons.—As to ob-

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jections 1 to 3. By the Companies (Winding-up) Act 1890, s. 10, the official receiver is empowered to take proceeding in respect of misfeasance. The Companies (Winding-up) Rules 1890, r. 78, provides that where the application is made by the official receiver or liquidator, he may make a report to the court stating any facts and information on which he proceeds, and which are verified by affidavit, or derived from sworn evidence in the matter, and that where the application is made by any other person, it is to be supported by affidavit. Upon that I submit that the report ought to be treated as a pleading, or as an affidavit, and paid for accordingly. The only reason given by the registrar for disallowing the costs of the report is that it is not expressly provided for by the scale set out in App. N. to the R. S. C. 1883, but under Order LXV., r. 27, "special allowances" may be made. [WILLIAMS, J. referred to rule 333 of the Bankruptcy Rules 1886, under which the report of the official receiver is made *primâ facie* evidence. In bankruptcy the costs of such report would not be allowed.] Instructions for an affidavit would be allowed. [WILLIAMS, J.—How can I order a litigant to pay for a report which is made for the information of the court.] He referred to

Re Bull, 2 Mor. 59.

As to objection 4. The registrar was wrong in disallowing the fee for instructions for brief. He relied upon item 81 of App. N. to the R. S. C. 1888, which is as follows: "Instructions for brief on hearing or trial of action upon notice of trial or notice of judgment given, whether such trial be before a judge, with or without a jury, or before an official or special referee, or on a trial of an issue of fact before a judge, commissioner, or referee, or on assessment of damages;" and held that the only proceeding for which such a fee ought to be allowed was an action. But a misfeasance summons is an originating summons, and is therefore an action:

Jud. Act. 1873, s. 100;
Re Fawcitt; Galland v. *Burton*, 53 L. T. Rep. 271; 30 Ch. Div. 231.

And by the Companies (Winding-up) Act, 1893, an order made on such a summons is made a final judgment within sect. 4 sub-sect. 1 (*g*) of the Bankruptcy Act 1883. No notice of the hearing was given, as the court itself fixed the day. As to objection 5, the question whether the fees incidental to employment of a third counsel ought to be allowed must depend in each case upon the circumstances, *e.g.*, the amount of the money issue involved and the commercial importance of the case:

London, Chatham, and Dover Railway Company v. *South-Eastern Railway Company*, 60 L. T. Rep. 753.

Here I submit, having regard to the number of papers, the large amount involved, and the length of time occupied in the examination of the witnesses, that the fees of a third counsel ought to be allowed. As to objections 6 and 7, the summons being clearly a cause or matter within Order LXV., r. 27, sub-rule 48, the fees for consultations and for refreshers ought to have been allowed.

C. E. E. Jenkins for the respondent Agg-Gardner.—With regard to objections 1 to 3, the applicant is bound by his objection that the report is in the nature of a pleading, and cannot now contend that the report is an affidavit: (Order LXV., r. 27, sub-rules 39, 40.) The registrar has no jurisdiction to allow the costs of the report as between party and party. It is only by inference from rule 78 of the Rules of 1890 that it can be considered evidence against anybody. The report is made for the information of the court by the official receiver in pursuance of his duties as an officer of the court, and a litigant cannot be ordered to pay for it. In the absence of any provision in the Act or Rules as to the power to order the payment of such costs, the court has no discretion:

Walker v. *Crystal Palace District Gas Company*, 65 L. T. Rep. 86; (1891) 2 Q. B. 300.

App. N. to the R. S. C. 1883 contains no provisions as to the payment of these costs. Rule 27, sub-rule (30) of Order XLV. provides that, "as to any work and labour properly performed and not herein provided for, and in respect of which fees have heretofore been allowed, the same or similar fees are to be allowed for such work or labour as have hitherto been allowed. This report is a novelty introduced by the Act of 1890. [*Muir Mackenzie* referred to the Judicature Act 1890, sect. 5.] That only provides as to who is to pay the costs. [WILLIAMS, J. referred to the order as to fees of the 17th Dec. 1891, Table B., part 4, "Legal and other reasonable expenses of official receiver, the amount disbursed:" Palmer's Winding-Up Forms, 2nd edit., p. 745.] That order has no reference to the costs as between party and party. It refers only to fees chargeable in the winding-up. As to objection 4, the costs for instructions for brief can only be allowed where notice of trial or judgment is given: (R. S. C. 1883, App. N., title, "Instructions.") Here no such notice was given. The procedure under sect. 10 of the Act of 1890 was intended to be a cheap and summary form of action, and if the official receiver takes the benefit of it he must take it *cum onere*. As to objection 5, the question whether the fees and costs caused by employing a third counsel ought to be allowed is a matter entirely within the discretion of the registrar. Here the registrar has exercised his discretion by disallowing them, and the court ought not to interfere. It would be a great hardship upon the respondent if he were ordered to pay the costs of three counsel. As to whether fees to counsel for consultation ought to be allowed (objection 6), the matter is also absolutely within the discretion of the registrar and the court will not interfere:

Re Harrison, 55 L. T. Rep. 72; 33 Ch. Div. 52; Order LXV. r. 27, sub-rule 48.

And the same is the case as regards refreshers to counsel (objection 7). *Cur. adv. vult.*

May 28.—WILLIAMS, J.—In this case several objections have been taken to the registrar's taxation. As to objections 1, 2, and 3, I think that the registrar rightly refused to treat the report as a pleading, or equivalent to a pleading, The report, of course, is not an affidavit, and does not come within Order LXV., r. 27. I think that the registrar rightly disallowed the items for instructions. The next matter to be dealt with is objection 4. I say as to that, that the registrar was right, for the reasons which he has given; but I think that the rule ought to be altered so as

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to include instructions for brief on a summons for misfeasance under sect. 10 of the Companies (Winding-up) Act 1890. As to objection 5, I say that, having regard to the issues raised, and the probable length and actual length of hearing, I think it was essential to justice that three counsel should be allowed. As regards objections 6 and 7, I think the registrar was right in disallowing the consultations. He seems, notwithstanding the first three lines of his reasons, to have exercised his discretion, and I think he exercised it rightly. As to the refreshers, I think he might have allowed them if he had thought it right to do so, for I think that the summons adjourned for hearing, on oral evidence, in court was a matter within Order LXV., r. 27, sub-rule 48, and sect. 100 of the Judicature Act 1873. I do not mean to say that the registrar should have allowed the refreshers at all, but I think it is more proper that he should exercise his discretion as to that, so that the matter must go back to him on this point. But it must be distinctly understood that I do not express any opinion that the refreshers ought to be allowed. All that I say is, that I think there is the power to allow them in this case if the registrar thinks it right to do so, the proceeding being a "matter."

C. E. E. Jenkins.—When the point as to refreshers goes back to the registrar, it should be open to him to review the fees which he has allowed on the briefs.

Williams, J.—Certainly, I intended that, because it is quite obvious that the registrar allowed larger fees on the briefs than he otherwise would have done, because he thought he had no power to allow refreshers. That is one of the reasons which has led me to the conclusion that I ought not to deal with the question whether refreshers ought to be allowed, but send it back to the registrar.

Solicitors: for the applicant, *Gush, Phillips, Walters*, and *Williams*; for the respondent, *Maddisons*.

July 19 *and* 20.

(Before Williams, J., sitting as an additional Judge of the Chancery Division.)

Re South American and Mexican Company, Limited; *Ex parte* Bank of England. (*a*)

Company—Winding-up—Estoppel—Judgment by consent.

A judgment, although by consent, and upon which the court has not exercised a judicial mind, creates an estoppel between the parties to the action, in just the same way as if it were a judgment arrived at after the case had been fought out.

Under an agreement the S. Company became liable to a bank for the debt of another company. The debt was payable in instalments, and the first instalment was duly paid by the S. Company. The S. Company failed to pay the second instalment, and the bank thereupon brought an action against the company for the amount of such instalment. The S. Company denied the agreement to pay the debt, and counter-claimed for a return of the first instalment already paid by the company. At the trial a compromise was arrived at under which a judgment, by consent, was taken by the bank for the amount of the second instalment. The S. Company subsequently went into liquidation, and in the liquidation the bank claimed to prove for the amount of the debt remaining unsatisfied, on the basis of the agreement. The official receiver and liquidator rejected the proof. On an application by the bank that the decision of the official receiver and liquidator might be reversed, and that the proof of the bank might be admitted:

Held, that the judgment, although by consent, estopped the official receiver and liquidator from disputing that there was in existence an agreement binding on the company to pay the debt, and that the proof of the bank must therefore be admitted.

Summons.

In April 1891 Murrietta and Co. owed the Bank of England a sum of about 585,000*l.*

In June 1891 negotiations took place between Murrietta and Co. and the South American and Mexican Company Limited, which resulted, as the bank alleged, in an arrangement under which the South American and Mexican Company became liable for the debt which Murrietta and Co. owed to the Bank of England. The debt was payable by instalments.

The first instalment of 100,000*l.* was paid by the South American and Mexican Company in the early part of March 1892.

In July 1892 the bank sued the company for the second instalment which, as they alleged, became due on the 19th June 1892. The company denied the agreement, and counter-claimed for a return of the instalment already paid.

At the trial before Kennedy, J. a compromise was arrived at, under which, by consent, a judgment was taken in the following terms:

"This action having . . . been tried before Kennedy, J. without a jury (by consent) . . . and the said Kennedy, J. having by consent ordered that judgment should be entered for the plaintiffs on the claim for 100,000*l.* and costs, and dismissed the counter-claim with costs, and the said judge having also ordered by consent that execution should be stayed except as to costs, and that if within three weeks from the . . . 30th June 1893 the sum of 60,000*l.* was paid to the plaintiffs" (or secured as therein mentioned) "the plaintiffs should accept it . . . in full discharge of all claims on the defendants. . . . It is this day adjudged that the plaintiffs recover from the defendants 100,000*l.* and costs to be taxed, and that the defendants' counter-claim be dismissed with costs to be taxed."

The 60,000*l.* was not paid within the time limited by the judgment.

On the 2nd Aug. 1893 the company was ordered to be wound-up.

The bank alleged that the company was indebted to the bank at the date of the winding-up order in a sum of 402,111*l.* 16*s.* 2*d.*, and was still indebted in a sum of 401,595*l.* 5*s.* 5*d.* (the sum of 519*l.* 10*s.* 9*d.* having subsequently to the winding-up order been received from interest of securities held and applied in reduction of the debt), with interest from the 9th Jan. 1892 at the bank rate from time to time, but not under 4 per cent. The bank estimated the value of the securities held against the debt at 170,000*l.*

(*a*) Reported by W. Ivimey Cook, Esq., Barrister-at-Law.

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In the winding-up the bank claimed to prove for the balance of their debt.

The official receiver and liquidator rejected the proof.

This was a summons taken out by the bank asking that the decision of the official receiver and liquidator might be reversed, and that the proof of the bank might be admitted.

Finlay, Q.C., *H. D. Greene*, Q.C., *R. Bray*, and *Howard Wright* for the Bank of England.—The question raised by this summons is whether the judgment of Kennedy, J., being by consent, estops the official receiver and liquidator from denying that there was in existence an agreement binding on the company to pay the bank the balance of their debt, and we submit that it does:

Flitters v. *Allfrey*, 31 L. T. Rep. 878; L. Rep. 10 C. P. 29, 39.

[They were stopped.]

Moulton, Q.C. and *G. P. C. Lawrence* for the official receiver and liquidator.—We contend that the judgment of Kennedy, J. constituted a bargain between the plaintiffs and the defendants, and that it is for the court to determine what that bargain was. [WILLIAMS, J. referred to *Newington* v. *Levy* (23 L. T. Rep. 595; L. Rep. 6 C. P. 180) as showing that there may be an estoppel by judgment, although the mind of the court has not been addressed to the matter.] It was one of the terms of the bargain in this case that there should be judgment for 100,000*l.* and costs. There was no admission of a debt of 100,000*l.* [WILLIAMS, J.—I think the judgment was for the 100,000*l.* and costs.] The bargain was, we submit, that 60,000*l.* should be paid within three weeks of the date fixed by the judgment, and in default judgment was to go for 100,000*l.* The theory of estoppel is, that if the court has once judicially decided a matter its decision is binding on all parties. [WILLIAMS, J.—Estoppel arises on a judgment given or by default where no judicial mind is exercised on the matter.] A decree obtained by arrangement between the contending parties, the court bestowing no judicial examination on the merits of the question, can never be *res judicata*:

Jenkins v. *Robertson*, L. Rep. 1 Sc. App. 117.

[WILLIAMS, J.—What Lord Romilly was considering in that case was what made a matter *res judicata* so as to bind the public.] Where the court has, as in this case, simply registered a compromise there is no such thing as *res judicata*. [WILLIAMS, J.—In Bullen and Leake's Precedents of Pleadings (3rd edit., at p. 575, note (*a*)) it is stated on the authority of *Howlett* v. *Tarte* (10 C. B. N. S. 813) that "a judgment against the defendant by default estops him from disputing any traversable allegation in the declaration against him at the suit of the same plaintiff; but he is not estopped from pleading a defence which is not inconsistent with any traversable allegation in the declaration in the former action, though it might have been pleaded as a defence to the former action." What do you say to that?] *Res judicata* does not apply to bargains, but only to judicial decisions. Further you must find from the judgment itself the facts which the judgment establishes:

Re Bank of Hindustan, China, and Japan; Alison's case, 29 L. T. Rep. 524; L. Rep. 9 Ch. 1, 25.

Here the judgment leaves undecided what facts were established by it. In *Carter* v. *James* (3 L. T. Rep. O. S. 183; 13 M. & W. 137) Alderson, B., lays it down that in order to make out a good estoppel "the plea ought to show that the plea intended to be relied on as a defence was, in the former proceeding, decided against the plaintiff." They also referred to

Reg. v. *Hutchings*, 44 L. T. Rep. 364; 6 Q. B. Div. 304.

Finlay, Q.C., in reply.—*Jenkins* v. *Robertson* (*ubi sup.*) does not apply to the present case. All that that case shows is, that according to the law of Scotland any member of the public may bring an action with regard to an alleged public right of way, and that if he does so he is taken as representing the public, and that if the action is properly fought out the judgment in the action is *in rem*. If, however, he compromises the action, and especially if he does so in consideration of some benefit to himself, the matter is not *res judicata*. He also referred to the statement in 2 Sm. L. C., 9th edit., p. 847, as to *Newington* v. *Levy* (*ubi sup.*).

WILLIAMS, J.—I am of opinion that my decision must be given in favour of the Bank of England and against the official receiver. The reason why I have had any doubts has been that I could see so little reason for doubt in the matter that I was afraid that I must be overlooking something. I must now give judgment according to my own view of the matter. There are two questions which arise in this case. One question is, What would be the effect of the judgment if it had been arrived at in the ordinary way instead of being by consent? The second question is, whether it makes any difference in this case that the judgment was by consent. I will deal with the second point first. On this question I am of opinion that the fact that the judgment was by consent makes no difference whatever. It is quite true that the judgment by consent was based upon an agreement between the parties, and that if it is not drawn up in accordance with that agreement it should be altered so as to accord with it. The ordinary course would be a proceeding to reform the judgment if it was not in accordance with the agreement. I do not know whether, in an action between the official receiver and the Bank of England, I should think it necessary to compel the official receiver to resort to such a roundabout method. It seems to me the proper course would be, as the official receiver represents the creditors, to allow him to go behind the judgment if its terms differed from those of the agreement which is the basis of the judgment. But I have not to decide that point, because it is not suggested that the judgment was drawn up otherwise than according to the agreement between the parties. In fact, it could not be so suggested, as I have before me the original agreement signed by Sir Horace Davey and Mr. Finlay, the counsel for the respective parties. Under these circumstances it seems to me that the only question left for me to decide is, whether a judgment by consent, upon which the court has not exercised its mind, can or cannot create an estoppel between parties. I am of opinion that it can. I have never heard it suggested that it could not. It has always been the law that a judgment obtained by consent raises an estoppel just as

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much as a case in which the court has exercised a judicial discretion in the matter after hearing an argument. The basis of the law of estoppel in these cases is that, when once the parties have litigated a matter, the judgment should put an end to the litigation; and if the parties agree on a judgment, that raises an estoppel just as much as if all the questions raised had been fought out. One of the authorities cited to me was *Jenkins* v. *Robertson* (*ubi sup.*). That, however, is not a decision on the general law. It was an action in which, according to the law of Scotland, one person is allowed to represent the public, the result of it binding the public at large. All that the House of Lords decided was that the decision in such an action would not bind the public if the result was arrived at by consent, and, *à fortiori*, if it was arrived at by a purchased consent. That does not touch this matter at all. Under these circumstances I have come to the conclusion that I must treat this judgment, although by consent, as being binding upon the parties to the action in just the same way as if it were a judgment arrived at after the case had been fought out. That being so, the other question which I have to consider is the matters as to which it is conclusive. The action was for 100,000*l.*, which was an instalment of a debt of 514,300*l.* alleged by the statement of claim to have been agreed to be paid by the defendants to the plaintiffs at certain specified dates, the identity being established by the particulars delivered with the statement of claim. It seems to me impossible that the plaintiffs could have recovered in that action without establishing that agreement. Then, what is the judgment? It is this: [His Lordship referred to the terms of the judgment and continued:] It seems to me that that is a judgment for the 100,000*l.* claimed in the statement of claim. I should have had no doubt even if there had been no counter-claim, but the counter-claim makes it to me all the more clear that the 100,000*l.* mentioned in the judgment is the 100,000*l.* claimed under the same agreement, the non-existence of which was the basis of the counter-claim. I think it is plain what was done in the action. The plaintiffs alleged the existence of an agreement, and claimed 100,000*l.* as due under it. The defendants said that no such agreement existed, and the plaintiffs ought to pay them back the money. That being so, it seems plain to me that the effect of the judgment was that there was such an agreement, and therefore that judgment for 100,000*l.* must be entered for the plaintiffs, and the counter-claim for the return of the first 100,000*l.*, which was based on the non-existence of the agreement, must be dismissed. Under these circumstances it is abundantly clear that the existence of this particular agreement was of the essence of the plaintiffs' claim in the action. It would have been impossible that the plaintiffs should have recovered the 100,000*l.* in the action unless they had established that the agreement existed. It was suggested that it was a mere coincidence that the amount for which judgment was taken by consent was the same as the amount which was claimed in the action, and that there was no judgment on the claim itself, but that it was only intended that that amount should be paid, but not under the claim, or in respect of it, and that the existing action was only used as machinery for securing the amount. If that was the intention there was a very simple mode of carrying it out, and that mode was not followed. The judgment on the claim and counter-claim affirms the existence of the agreement, and under these circumstances the official receiver cannot be allowed to question the claim of the applicants. I give judgment accordingly in the terms of the summons. The applicants must have their costs.

Solicitors: *Freshfields*; *Hollams, Son, Coward*, and *Hawkesley*.

July 20, 21, *and* 23.

(Before WILLIAMS, J., sitting as an additional Judge of the Chancery Division.)

DAVIES *v.* R. BOLTON AND CO. LIMITED. (*a*)

Company — Articles of association—Debenture—Irregularities in issue—Validity—Transferee for value without notice.

By one of the articles of association of a company it was provided that any debenture bearing the seal of the company and issued for valuable consideration should be binding on the company, notwithstanding any irregularity touching the authority of the directors or officers or servants of the company to issue the same.

The company issued a debenture sealed with the seal of the company, and signed by a director and countersigned by the secretary of the company, as required by the articles. It appeared, however, that, contrary to the provisions of the articles, the seal had been affixed to the debenture on the sole authority of one of the directors, in whose favour it purported to be made; that no other director was present or voted in favour of the affixing of the seal; that no meeting had been convened for the purpose; and that the moneys purported to be secured by it were not moneys which the directors had power to secure.

Held, that, as against a transferee who took without notice, the irregularities in the issue of the debenture were covered by the article, and that the debenture was therefore valid.

TRIAL OF ACTION.

Under an agreement dated the 15th June 1892, G. L. Davies entered into partnership with R. Bolton, and paid 1000*l.* into the business.

In 1893, Davies having become dissatisfied with the way in which Bolton conducted the business of the partnership, entered into an agreement with him, dated the 31st Jan. 1893, under which all the assets of the partnership business became the property of Bolton, he agreeing to pay out on or before the 15th April 1893 the sum of 856*l.* to Davies, and to transfer to him certain shares held by Bolton in various companies. The 856*l.* was subsequently reduced to 849*l.* 1*s.* 3*d.* by an allowance made by Davies in respect of certain of the stock-in-trade of the partnership business.

Bolton having failed to pay the 849*l.* 1*s.* 3*d.* within the stipulated period, Davies brought an action against him and obtained judgment for the amount.

On the 24th April 1893 Bolton paid 200*l.* on account, thereby reducing the debt to 649*l.* 1*s.* 3*d.*

In the same month Bolton sold his business to the defendant company which was incorporated on the 22nd April 1893, for the purpose of taking over such business. The signatories to the

(*a*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

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memorandum of association were Bolton and his friends, one of whom was G. Millington.

The articles of association of the company provided (art. 55) that the directors might, from time to time, at their discretion, borrow any sum or sums of money for the purposes of the company; but so that the moneys at any time owing should not, without the sanction of a general meeting, exceed the nominal amount of the capital of the company; (art. 56) that the directors might borrow or raise, or secure repayment of such moneys, in such manner and upon such terms as they thought fit, and in particular by mortgage of or by issue of debentures or debenture stock of the company, perpetual or otherwise, with or without a trust deed, charged upon all or any part of the property and rights of the company (both present and future), including its uncalled or unpaid capital for the time being; (art. 89) that the first managing director should be Bolton, and that Bolton and the remaining six subscribers to the articles should be the first directors until such time as the latter or a majority of them should nominate by an instrument in writing under their hands another director or directors to act with Bolton in place of the remaining six subscribers; (art. 95) that no director should vote in respect of any contract in which he was interested, and if he did so his vote should not be counted; (art. 104) that one director should form a quorum.

Art. 115 provided that:

Any mortgage, bond, debenture, trust deed, or other security bearing the common seal of the company, and issued for valuable consideration shall be binding on the company, notwithstanding any irregularity touching the authority of the directors, or officers, or servants of the company to issue the same, and no person taking any such security shall be bound to ascertain that the limit prescribed by art. 55 has not been exceeded.

Art. 118 provided that:

The common seal of the company shall be deposited at the office of the company, and shall never be affixed to any document, except in the presence of two directors or of one director and the secretary, and in pursuance of a resolution of the directors, or a committee of the directors duly authorised by the directors.

Throughout May, June, and July 1893 Davies was pressing Bolton for payment of his debt, and ultimately Bolton agreed that the 649*l.* 1*s.* 3*d.* should be secured by a debenture granted by the defendant company to Bolton and transferred by him to Davies to secure the amount. Before the issue of the debenture Messrs. Druces and Attlee, the then solicitors of Davies, were furnished with a print of the company's memorandum and articles of association.

Under the agreement between Bolton and the defendant company for the sale of the business to the company more than the amount of Davies's debt was due from the company to Bolton, but was to be paid by instalments which had not become due at the date of the debenture, and interest was paid on instalments unpaid at the rate of 6 per cent.

On the 31st July 1893 the debenture was issued to Bolton to secure the 649*l.* 1*s.* 3*d.* with interest thereon at the rate of 5 per cent., and at the same time bills for 250*l.*, 250*l.*, and 149*l.* 1*s.* 3*d.*, falling due on the 29th Sept., the 24th Dec. 1893, and the 23rd March 1894 respectively, and amounting in the whole to 649*l.* 1*s.* 3*d.*, were handed to Bolton. The debenture was sealed with the company's seal and signed by Bolton as managing director, and G. Millington as secretary *pro tem.*, and by the conditions thereto attached it was provided that in the event of failure to pay any of the bills the whole amount secured by the debenture should thereupon become payable.

In Aug. 1893 Bolton, by deed, transferred the debenture to Davies, and at the same time handed over to him the bills.

The writ in the present action was issued on the 5th Dec. 1893 by Davies to enforce his debenture.

On the 30th Jan. 1894 Davies transferred his debenture to C. Fane, who, on the 16th Feb. 1894, obtained the leave of the court to continue the proceedings.

On the 31st Jan. 1894 an order was made for the compulsory winding-up of the company, and the action was defended in the name of the company by the official receiver and liquidator.

The company delivered a statement of defence, by paragraph 2 of which it pleaded that it did not admit the issue of the debenture, and denied that the debenture was the deed of the company. The plaintiff thereupon obtained from Williams, J. at chambers an order, dated the 23rd May 1894, for particulars, in pursuance of which the following were delivered:

(*a.*) The seal of the company was never affixed to such instrument, nor was the same sealed or delivered with the authority of, or so as to bind, the company.

(*b.*) Article 118 of the articles of association provides that the seal of the company shall never be affixed to any document except in pursuance of a resolution of the directors or a committee of the directors duly authorised by the directors. No such resolution was ever passed.

(*c.*) No meeting of the directors was convened or held at which any such resolution could have been passed.

(*d.*) The seal of the company was affixed to the said instrument by the sole authority of Reginald Bolton. the person in whose favour the said instrument purported to be made. No other director of the company was present or voted in favour of the said affixing of the said seal, and no meeting of directors had been convened for the purpose or in fact.

(*e.*) Even if a meeting of the directors had been duly convened article 95 of the said articles prohibited the said R. Bolton from passing any such resolution as was required by article 118 of the said articles.

(*f.*) The moneys purported to be secured by the said instrument were not moneys which the directors had power to secure within the meaning of articles 55 and 56 of the said articles of association.

H. Reed, Q.C. and *Eastwick* for the plaintiff.—When a debenture is issued by a company in accordance with its articles of association the person to whom it is issued is entitled, in the absence of express notice, to assume that it is properly issued:

> *The Romford Canal Company; Pocock's Claim; Tricket's Claim; Carew's Claim*, 49 L. T. Rep. 118; 24 Ch. Div. 85.

Here the debenture was sealed with the company's seal and signed by the managing director and countersigned by the secretary of the company as required by the articles. Both Davies and Fane acted throughout in good faith, and received no notice of any irregularities in the issue of the debenture, and gave valuable consideration for it. Fane, therefore, as the last transferee, is entitled to judgment in the ordinary form. Assuming, however, that there were any irregularities in the issue of the debenture to

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Bolton, they are, we submit, entirely cured by art. 115. We admit that as regards Fane he cannot stand in a better position than Davies.

O. Leigh Clare for the official receiver and liquidator.—Art. 118 requires that the seal of the company shall be affixed to the debenture in the presence of two directors and in pursuance of a resolution. Here Bolton was the only director present when the issue of the debenture was authorised, and there was no such resolution. To enable the plaintiff to obtain the benefit of art. 115 he must prove two things, viz., (1) that the seal affixed to the debenture is the seal of the company; and (2) that the debenture was given for valuable consideration, neither of which I submit he has done. The debenture was given to secure the bills, and by Bolton to himself. A person, therefore, taking the bills under the circumstances would take them with notice of the transaction. Further, a person, who has obtained a security for an antecedent debt without giving further consideration, is not a purchaser for value. Valuable consideration means a fresh consideration which has passed from the person who takes to the person who gives. Here there was no such fresh consideration. Again, the directors had no power under arts. 55 and 56 to issue this debenture. Bolton could not have availed himself of it, and his assignees cannot therefore be in any better position. If the debenture had been given to discharge a liability the case would have been different. Here it was only given by way of collateral security. He referred to Lindley on Companies, 5th edit. p. 192.

Reed, Q.C. in reply.—The power given by the memorandum of association to raise money on debentures implies the power to issue debentures to secure an existing debt.

WILLIAMS, J.—The question raised in this action is as to the validity of a debenture issued by the company. The case is one which has caused me a great deal of doubt and anxiety, not so much as to this particular case, but because it raises a question of some general and public importance. The practice of insolvent traders turning themselves into limited companies and then issuing debentures in favour of some or all the creditors of the particular trader—debentures which secure really the price that is payable by the company to the vendor—has of late years become extremely frequent. I am quite clear that in many cases the whole operation is a mere fraud. It involves conduct which, if it was that of an individual trader, no one would hesitate to describe as a fraud on his creditors. It seems to me that the court ought not easily to permit a man, by taking the benefit of the device of turning himself into a limited company, to perpetrate a fraud upon his creditors. My only motive for saying this is because I am led by the practice of translating a trader into a company to scrutinise every step in such a transaction with jealousy, and to take care, if any slip is made in carrying it out, that the law shall not be strained in favour of the parties to such a transaction. I am glad, however, to say that the present case is not a bad or flagrant instance of the user of this practice. Bolton is not present, and I do not, therefore, wish to say anything against him. He has apparently absconded. So far as I understand the facts of this case they are these: Bolton seems to have entered into partnership with Davies, and I am not surprised that it turned out unsatisfactorily, and that Davies was glad to get out of it at a sacrifice. After such sacrifice had been made there was still a considerable sum due from Bolton to Davies. After this Bolton turned himself into a company, not with a view to benefiting Davies, but rather in a spirit of hostility to him. Thereupon Davies put the matter into the hands of his then solicitors, who pressed Bolton for payment. Bolton was unable to pay the amount due, but said the company had to pay him for the purchase of the business, and anticipated that the sum would come in from the shareholders, but that, if Davies pushed matters very far, Bolton might become bankrupt, and that would be a loss to the creditors. By "the creditors" I suppose that Bolton meant his own creditors, and perhaps also those of the company. It was suggested that Davies should take security from Bolton, and that, as the company owed money to Bolton for the purchase of the business by instalments not yet payable, the company might give a debenture to Bolton, who would transfer it to Davies. That was agreed to, and during the negotiations the then solicitors of Davies wrote to Bolton and got him to send to them the company's memorandum and articles of association, apparently with a view to seeing whether the debenture could be validly given by the company. The debenture in question in the present action was given, and it is my duty to consider the various objections which have been raised to it. The first objection taken was, (*a*) that the seal of the company was never affixed to such instrument, nor was the same sealed or delivered with the authority of or so as to bind the company. I have arrived at the conclusion that the seal was affixed to the debenture so as to bind the company. Bolton was a director, and certain clerks and friends were the other directors, but Bolton was the beginning, the middle, and the end of the company. But it seems to me that this debenture was sealed in the presence of Millington, the secretary of the company, and of Bolton, and was then handed to someone acting on Davies's behalf. The second objection was, (*b*) that art. 118 of the articles of association provides that the seal of the company shall never be affixed to any document except in pursuance of a resolution of the directors or a committee of the directors duly authorised by the directors, and that no such resolution was ever passed. On the facts it is plain that there was a meeting of Bolton and of the secretary, and that all that was done was done by the two of them. It is said that this was not enough to satisfy the requirements of art. 95, which provides, among other things, that no director shall vote in respect of any contract in which he was interested, and that, if he does so vote, his vote shall not be counted. There is no doubt to my mind that the only director present was Bolton. It is suggested that Millington was also a director, but I do not think he was. He was one of the signatories of the memorandum and articles of association, and art. 89 provides that Bolton and the remaining six subscribers to the articles should be the first directors until such time as the latter, or a majority of them, shall nominate by an instrument in writing under their hands another director or directors to act with Bolton in place of the remaining six subscribers.

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memorandum in writing was signed by the majority of the subscribers and purported to appoint Millington as director to act with Bolton in place of the six subscribers other than Bolton; but Millington never signed this memorandum or consented to act as a director under it or otherwise. I doubt, therefore, whether there was a compliance with the articles, because such articles require the presence not only of Millington but of another director who is not interested in the contract. But assuming, as I do, that the presence of Bolton was not a compliance with art. 95, I think that art. 115 applies so as to cure the irregularity. This article is as follows: His Lordship read the article and continued:] The further objections taken were as follows: His Lordship read objections (c) (d) (e) and (f) and continued:] The objections headed (b) to (f) are, according to my view, made in respect of matters which are mere irregularities. They relate principally to the internal management of the company's affairs, and when once the court is satisfied that the seal of the company has been affixed to the debenture in the course of business by those who have the management and control of the company, non-compliance in the manner pointed out seems to come within the terms of and to be cured by art. 115. Then it is said that, although the debenture was so issued, it was not given for a valuable consideration because the sum to secure which it was given was not then actually due and payable by the company to Bolton, and therefore it was only given for his accommodation. I think that, if there had been no other circumstances beyond the fact of the debenture having been issued for the sum due but not payable, the debenture would, nevertheless, have been issued for value. But the question does not arise for decision, because under the agreement between Bolton and the company 6 per cent. interest was payable by the company, whereas under the debenture only 5 per cent. interest was payable; and that change was a sufficient consideration to support the debenture. A further point taken was, that Davies had notice of the infirmities of the debenture, and took subject to the equities affecting it; and it has been very properly conceded that Fane stood in no better position in this respect than Davies. Davies had no personal knowledge of the infirmities, but I have had some doubt whether his solicitors, who sent for the articles, had such knowledge as would affect him with notice. If there had been anything on the face of the debenture which showed a non-compliance with the articles, I should have considered the case not to be covered by art. 115. But the debenture was signed by Bolton and the secretary, and all that art. 118 requires is that the seal of the company should be deposited at the office of the company, "and never be affixed to any document except in the presence of two directors, or of one director and the secretary." This debenture is *ex facie* signed by one director in the presence of the secretary. It was urged that this was not sufficient because Bolton, being an interested party, was not a director who had authority to sign, having regard to art. 95. That is quite true, but an examination of the articles would not tell the solicitors of this defect. They could not tell whether Millington was a director, or, if he was not, whether there were other directors present, for art. 118 only requires the presence of directors, and the mere fact that the debenture was signed by the director in whose favour it was issued would not of itself show that there had been a violation of the articles. The debenture must be held valid, and the plaintiff is entitled to have it enforced.

Solicitors: *Deacon, Gibson,* and *Medcalf; Firth* and *Co.*

QUEEN'S BENCH DIVISION.

May 10, *June* 2 *and* 25.

(Before BRUCE, J.)

SHENSTONE AND CO. v. HILTON. (a)

Sale of goods—Hiring agreement—Delivery by hirer to auctioneer for sale—Receipt in good faith and without notice—"Delivery under any agreement for sale"—"An agreement for sale, pledge, or other disposition thereof"—Factors Act 1889 (52 & 53 *Vict. c.* 45), *s.* 9.

N. obtained possession, under a hiring agreement, of a piano the property of the plaintiffs. The agreement provided that on the payment by N. to the plaintiffs of a certain sum by monthly instalments, the piano was to become the property of N. After paying some of the monthly instalments, but before the whole sum had been paid, N. delivered the piano to the defendant, an auctioneer, for sale by auction. The defendant sold the piano, and paid the purchase money, less commission, to N. In an action by the plaintiffs against the defendant for wrongful conversion of the piano, the jury found that the defendant had received the piano in good faith, and without notice of any lien or other right of the plaintiffs in respect of it.

Held, on further consideration, that N. had agreed to buy and had obtained possession of the piano within the meaning of sect. 9 *of the Factors Act* 1889; *that the word "person" in sect.* 9 *was not limited to a mercantile agent, but applied to any person who, having bought or agreed to buy goods, and having obtained possession with the consent of the owner, made such a delivery thereof as is mentioned in the section; that the words "agreement for sale, pledge, or other disposition," included a delivery of goods to be sold by the person receiving for the benefit of the person delivering, and that the defendant was therefore not liable to the plaintiffs for conversion.*

FURTHER CONSIDERATION.

The action was brought to recover damages from the defendant for the wrongful conversion of a piano the property of the plaintiffs. The piano had been let by the plaintiffs to one Nye on a hiring agreement, which provided that Nye hired the piano from the plaintiffs upon the terms and conditions following:—

1. To pay to the plaintiffs, at their place of business, without any demand whatever being made for the same, the sum of 15s. 6d. per month for the hire of the piano, such sum to become due and payable in advance, and all expenses of carriage.

2. To keep the piano at his residence, and not to remove or cause to be removed the same without the knowledge or consent of the plaintiffs.

3. To keep the piano in good order (reasonable wear excepted), and at all times to allow the plaintiffs or their agent or servant to enter the premises wherein the same

(a) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

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shall be, for the purpose of inspecting the same, and to allow the same to be inspected.

4. Not to remove any label, or deface the name or numbers on or in the piano.

5. That the plaintiffs might, in case Nye should make any default in the punctual payment of this monthly sum of 15s. 6d., or any part thereof, or should assign or underlet, or seek to assign or underlet the piano, or should be served with any legal process in bankruptcy or otherwise, or should negotiate or seek to negotiate with his creditors or any of them for liquidation of his affairs (of which service or negotiations Nye undertook to give the plaintiffs immediate notice), or in case he should do or suffer to be done any other act or thing repugnant to any of the terms or conditions on his part above contained or referred to, without prejudice to the plaintiffs' right to recover arrears of hire and damages for breach of this agreement, immediately, and without giving any previous notice, terminate the hiring and retake possession of the piano without hindrance by Nye or his authority, and for that purpose might enter any messuage or place wherein the same might be.

6. In case the piano should be damaged or destroyed by fire or otherwise, so long as this agreement was in force, Nye undertook to be responsible for the loss thereof.

Note: If 32 guineas is paid as hire for this pianoforte herein by monthly instalments as per this agreement, the said pianoforte is then to become the property of the hirer. (Signed by the plaintiffs.)

In pursuance of this agreement, possession of the piano was given to Nye. After paying some, but not all, of the monthly instalments, Nye delivered the piano to the defendant, an auctioneer, for sale by auction. The piano was sold by auction, and the defendant paid the purchase money, less commission, to Nye.

The defendant, by his defence, relied on the Factors Act 1889, s. 9.

The action was tried before Bruce, J. and a common jury. The jury found that the defendant received the piano in good faith, and without notice of any lien or other right of the plaintiffs in respect of the piano.

The Factors' Act 1889 provides:

Sect. 1. For the purposes of this Act—(1) The expression "mercantile agent" shall mean a mercantile agent having, in the customary course of his business as such agent, authority either to sell the goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.

Sect. 2. (1.) Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same, provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

Sect. 9. Where a person having bought, or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for any sale, pledge, or other disposition thereof, to any person receiving the same in good faith, and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner.

McCall, Q.C. and *Ritter* for the plaintiffs.—The defendant is liable, in spite of the finding of the jury that he received the piano in good faith, and without notice, for sect. 9 of the Factors Act 1889, which is relied on by the defendant as affording him protection, only applies where the delivery or transfer is made by a mercantile agent. In this case, Nye, the hirer of the piano, was not a mercantile agent:

Hastings Limited v. *Pearson*; 67 L. T. Rep. 553; (1893) 1 Q. B. 62.

Secondly, the delivery of the piano to the defendant for sale by auction, was not a delivery "under any sale, pledge, or other disposition." These words only include cases where the goods are sold or otherwise disposed to the person to whom they are delivered. This piano was delivered to the defendant, not for sale to him but for sale by him. There was, therefore, no such delivery as is contemplated by sect. 9:

Taylor v. *Kymer*, 3 B. & Ad. 320.

W. Willis, Q.C. and *P. T. Blackwell* for the defendant.—A delivery of goods by a mercantile agent is dealt with by sect. 2, and *Hastings* v. *Pearson* (*ubi sup.*) was decided under that section, the question there being whether a person employed to sell goods on commission who pawned the goods was a mercantile agent acting in the ordinary course of business of a mercantile agent. That case is no authority for the present case which comes under sect. 9, for that section applies to cases where the delivery is made by any person who has obtained possession of goods under a sale or agreement for sale. As to the second point there is nothing in sect. 9 to show that the section is limited in the manner suggested by the plaintiffs. *Taylor* v. *Kymer* (*ubi sup.*) was decided under 6 Geo. 4, c. 94, s. 2, the words of which "sale or disposition," were not so wide as the words "sale, pledge, or other disposition," in sect. 9. They also referred to

Barker v. *Furlong*, 64 L. T. Rep. 411; (1891) 2 Ch. 172;

Consolidated Company v. *Curtis* and *Son*, (1892) 1 Q. B. 495;

Helby v. *Matthews*, 70 L. T. Rep. 837; (1894) 2 Q. B. 262.

Cur. adv. vult.

June 25.—BRUCE, J.—This is an action brought by the plaintiffs against the defendant for the conversion by the defendant to his own use of a piano of the plaintiffs. The plaintiffs entered into an agreement with one Nye by which they agreed that if 32 guineas was paid by Nye as hire for a piano, by monthly instalments, the piano was to become the property of Nye. Nye obtained possession of the piano on the terms of this agreement. It is not necessary for me to refer at length to the terms of this agreement. It is enough to say that I cannot distinguish the agreement from the agreement in *Helby* v. *Matthews* (*ubi sup.*), and in accordance with the decision of the Court of Appeal in that case I consider that I must hold that Nye had agreed to buy, and had obtained, with the consent of the seller, possession of the piano within the meaning of sect. 9 of the Factors' Act 1889. Nye paid certain of the instalments pursuant to the agreement, amounting to about 8*l.* 2*s.*, and on the 20th April 1893 he

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delivered the piano to the defendant, who is an auctioneer, to be sold by auction. The defendant sold the piano by auction for 13*l.* to a person who gave the name of Neaps, and the defendant paid over the purchase-money, less 1*l.* commission, to Nye. Neaps cannot now be found, and the question arises whether the defendant can claim the protection of the 9th section of the Factors Act 1889. The jury have found that the defendant received the piano in good faith, and without notice of any lien or other right of the plaintiffs in the piano. It was contended before me by counsel for the plaintiffs, that notwithstanding the finding of the jury, the 9th section of the Act has no application to the case. It was contended that the protection granted by the 9th section only applied to cases where the delivery or transfer was made by a mercantile agent. I am of opinion that no such limitation can be placed upon the word "person" in the 9th section. I think that the meaning of the section is that where any person who has agreed to buy goods and obtains, with the consent of the seller, the possession of the goods, and makes a delivery or transfer of the goods such as is mentioned in the section, that the delivery or transfer so made by him shall be valid, whether he is a mercantile agent or not. The case of *Hastings* v. *Pearson* (*ubi sup.*), which is cited by the plaintiffs' counsel, seems to me to have no application to the present case. The point there raised related solely to the construction to be put upon the 2nd section of the Act. The other point contended for by the plaintiffs' counsel was that the delivery or transfer of the piano by Nye to the defendant was not a delivery or transfer to the defendant under any sale, pledge, or other disposition thereof within the meaning of the section. If Nye had pledged the piano, or sold it to the defendant, the transaction would have been protected, but it is contended that because Nye merely delivered the piano to the defendant for sale that did not constitute a delivery under an agreement for sale. It seems to me that it would be to restrict the natural meaning of the words "delivery under any agreement for sale," to hold that they apply only to cases where the goods are delivered to the person who receives them pursuant to a sale of the goods by the person who delivers them to the person who receives them. The case of *Taylor* v. *Kymer* (*ubi sup.*) was cited on this point as an authority in favour of the plaintiffs. That case does not seem to me to govern the present. It was a decision upon the words of the 2nd section of the Factors Act (6 Geo. 4, c. 94). The words there are "any contract . . . for the sale or disposition" of goods. The Court held that the word "disposition" in that section must mean "something in the nature of a sale." The phrase "any agreement for sale, pledge, or other disposition," is, I think, wider in its scope than the phrase "any contract for sale or disposition," but even if I were to adopt the interpretation of the old Act as applicable to the words of the Act of 1889, I should be prepared to hold that a delivery of goods on the terms that they should be sold by the person to whom they were delivered for the benefit of the person delivering them, was "a disposition somewhat in the nature of a sale." I have come to the conclusion that I should enter judgment for the defendant, with costs.

Judgment for the defendant.

Solicitors for plaintiffs, *H. A. Lovett* and *Co.*
Solicitor for defendant, *S. Myers.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

July 18, 19, *and* 20.

(Before the President (Sir Francis Jeune), assisted by Trinity Masters.)

The Juno. (*a*)

Collison—Steamship dredging up to dock entrance —Stern light — Look-out — Whistle — Thames Rules.

A steamer dropping up the Thames stern first on a dark night for the purpose of going into dock and exhibiting only her stern light to down-coming vessels is bound to keep a look-out up river, and ought, when she sees a vessel coming down, to give such sufficient signal as will enable the down-coming steamer to avoid her.

Semble, *a proper signal under such circumstances would be a prolonged blast of the steam-whistle of not less than five seconds' duration.*

This was a collision action *in rem* brought by the owners of the steamship *Stockholm* against the owners of the steamship *Juno* to recover damages for a collision between the two vessels in the river Thames. The defendants counter-claimed.

The collision occurred about 8 p.m. on the 17th March 1894 off the Millwall Dock entrance in Limehouse Reach. At the time of the collision the *Stockholm*, a screw-steamship of 727 tons gross, was on a voyage from Stettin to London. Having shipped a pilot at Gravesend she proceeded up the river bound for the Millwall Docks. As she approached the entrance to the docks she gave four blasts with her whistle, swung round, and dredged up with the force of the tide with her stern light alone visible to vessels coming down the river. The *Stockholm* gave no further signal. About this time the *Juno*, a steamship of 1302 tons gross register, was coming down Limehouse Reach in the course of a voyage from London to Newcastle. There was a light fog, but lights could be seen at a distance of 300 yards. Both vessels were well to the north of mid channel. In these circumstances those on the *Juno* saw a white light a little on her starboard bow and at a distance, as they alleged, of 300 or 400 yards. Shortly afterwards it was seen to be the stern light of a steamship, which proved to be the *Stockholm*, and, although the *Juno's* engines were reversed, she came into collision with the *Stockholm*, the stern of the former striking the *Stockholm's* port side. The defendants charged the plaintiffs (*inter alia*) with not keeping a good look-out, and alleged that those on board the *Stockholm* improperly failed to sound her whistle for fog, or to ring her bell, or to take the requisite means to warn the *Juno* of her presence and manœuvres.

The Rules and Bye-laws for the Navigation of the River Thames provide:

Art. 18. When a vessel is turning round, or for any reason is not under command, and cannot get out of the way of an approaching vessel, or when it is unsafe or impracticable for a steam vessel to keep out of the way

(*a*) Reported by Butler Aspinall, Esq., Barrister-at-Law.

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of a sailing vessel, she shall signify the same by four or more blasts of the steam whistle in rapid succession, the blasts to be of about three seconds' duration.

Art. 19. The signals by whistle mentioned in the preceding rules shall not be used on any occasion or for any purpose except those mentioned in the rules; and no other signal by whistle shall be made by any steam vessel, unless it be by a prolonged blast of not less than five seconds' duration.

Sir *Walter Phillimore* (with him *Sims Williams*) for the plaintiffs.—The *Juno* is alone to blame. The *Stockholm* did all that was required by the regulations. There was no fog, and therefore she was under no obligation to blow her whistle or sound a bell. She gave sufficient notice of her presence and manœuvres by the exhibition of a stern light. The steam-whistle signals referred to in art. 17 of the Thames Rules are optional. None of the rules as to whistle signals apply to the circumstances of this case.

J. P. Aspinall, Q.C. (with him *Butler Aspinall*), for the defendants, *contrà*.—The *Stockholm* is alone to blame. There was no look-out aft on her. She should have taken the requisite means to warn the *Juno* of her presence and her manœuvres. She was bound to give some notice:

The Queen Victoria, 64 L. T. Rep. 520; 7 Asp. Mar. Law Cas. 9.

A vessel in such a position should give such signal as will give due warning. The whistle signal to be blown seems to be indicated by art. 19 of the Thames Navigation Rules.

The PRESIDENT (Sir Francis Jeune), having found the *Juno* to blame for not keeping a proper look out, proceeded:—Then we come to the case of the *Stockholm*. That again, to my mind, rests upon a very narrow point. Mr. Aspinall has relied upon the case of *The Queen Victoria* (*ubi sup.*), but I agree with the criticisms of Sir Walter Phillimore as to that. That case does not carry us very much further than this, that, under the circumstances of the *Queen Victoria*, it becomes the duty of a vessel to give some signal to other vessels which are approaching her in a position which she sees, or ought to have seen, is one of difficulty for them. I quite agree also that you ought not to compare too closely the facts of one case with another. If you do, I think you are very liable to get hampered with a mass of decisions. The facts of this case appear to me to be certainly clear. The *Stockholm* undoubtedly gave a four-blast signal, if she never gave any other. It is said that is enough. It certainly appears the case that the *Juno* never heard that four-blast signal, and I am not sure that she ought to have heard it. On the other hand, if the *Juno* was herself whistling, it does not appear that the *Stockholm* heard her. It may be the case that the *Juno* ought to have heard the four-blast signal, but I am not sure that she ought. If she had, I am not sure that it would clearly indicate what the circumstances of case the were. After the *Stockholm* began to drift up the river, perhaps angling across to some extent, although not so much as the angle of four points which has been suggested, and gradually straightening down as she came towards the dock, I cannot help thinking that it became her duty first to see under those circumstances whether there was any vessel coming down with whose course she might be in difficulty; and secondly, if there was, to give such a signal of some kind as would give notice to that approaching vessel. I think there was failure of duty on the part of the *Stockholm* in these respects. I am very anxious not to lay any unnecessary burden on vessels going into dock; but in this case, when the vessel turned round it was night—it was, I will not say foggy, but it was certainly night when you could not see at any great distance. The *Stockholm* was dropping up the river in a position in which she could be exhibiting only her stern light, and she was in a position where that stern light would sometimes be moving and sometimes almost stationary. Therefore it was a light which might not unnaturally be mistaken by vessels coming down. I think a vessel in that position ought to keep a look-out up the river as to what might be coming down upon her, and ought, if she sees anything coming down, to give a signal to her in order to avoid the possibility of her making a mistake. She certainly did not do so, and, what actually lies at the root of the thing, beyond all doubt she kept no look-out whatever. The man on the bows, I think, saw the light first when it could only be just upon them, and it is not disputed that she was keeping no look-out whatever in that direction. If she had kept a look-out what would she have seen? She would have seen the *Juno* coming down in a way which unless she altered her course, made a collision inevitable. She would have seen the *Juno* approaching not at all fast, but slowly coming on towards her, and I cannot help thinking in these circumstances that she ought to have given some signal to her to get out of the way. Sir Walter Phillimore has pressed very much the fact that there is no particular signal indicated. I am not quite so sure of that. The Trinity Masters tell me that they think it would have been the proper thing to have resorted to the five seconds' signal. I cannot help thinking that that would have been a very proper signal, but it is unnecessary to say what particular signal was requisite. Any signal would have done which was not misleading, but there ought to have been some signal and some indication to the *Juno*. Therefore I think the result must be that both vessels must be held to blame.

Solicitors for the plaintiffs, *Rehders* and *Higgs*.
Solicitors for the defendants, *Thomas Cooper* and *Co.*

Wednesday, July 4.

(Before BRUCE, J.)

THE TERESA. (a)

Jurisdiction—Prohibition—Injunction—Restraint of proceedings in inferior court.

Salvage services were rendered by a Liverpool tug to a Spanish vessel of the value of 30,000l., and a sum of 3500l. was awarded.

The mate of the tug brought an action in the Liverpool Court of Passage for apportionment of the salvage award.

On motion by the owners of the tug, who were plaintiffs in a salvage action in the High Court of Admiralty, to restrain the proceedings in the Court of Passage:

Held, that a judge of the Admiralty Division has power to grant a prohibition with reference to a

(a) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

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matter pending before an inferior court, and that he has power to issue an injunction to a party proceeding in an inferior court to restrain him from going on with such proceedings.

Hedley *v.* Bates (42 *L. T. Rep.* 41; 13 *Ch. Div.* 498) *followed.*

MOTION for an injunction.

This was an application arising out of a salvage action instituted on behalf of the owners, master, and crew of the steam-tug *Brilliant Star*, against the owners of the steamship *Teresa*, her cargo and freight, for salvage services.

The *Brilliant Star* was a paddle steam-tug, belonging to the port of Liverpool, and was built for salvage service. She was of fifty-two tons net register, with engines of 180 h.p. nom., working up to 1000 h.p. actual, and at the time of the services she had nine out of a crew of seven hands on board.

On the 19th Nov. 1893, at 9.30 a.m., while sheltering from the severe weather at Holyhead, the *Brilliant Star* observed the vessel *Teresa* showing signals of distress about six miles N.N.W. of Holyhead. She went to her assistance with the lifeboat in tow, and after towing her from about 1 p.m. to 8.30 p.m. in a very heavy sea, brought her safely to anchor. Next morning she brought the *Teresa* into a place of greater safety close under the quay, and remained in attendance on her throughout the day.

The *Teresa* was a Spanish steamship belonging to the port of Bilbao, of 661 tons net register, with engines of 120 h.p. nom., and she was bound from Liverpool to Corunna with a general cargo.

The value of the *Teresa* was 5000*l.*, of her cargo 3,000*l.*, and her freight at risk 500*l.*

The value of the tug was 9000*l.*

The action was tried before Barnes, J. and Trinity Masters, on the 18th Jan. 1894, and judgment was given for the plaintiffs for 3500*l.* and costs. Of this only 2000*l.* and costs had been paid at the time of this motion. Those of the crew, however, who took part in the service, had been settled with excepting the master.

On the 27th June Edward Johnson, the mate of the *Brilliant Star*, commenced an action in the Liverpool Court of Passage, against the *Brilliant Star*, for apportionment of salvage, but the owners of the *Brilliant Star* denied his right to any share on the ground that he was not on board at the time the services were rendered.

The court was now moved to restrain the proceedings in the Court of Passage.

Butler Aspinall, for the owners of the *Brilliant Star*, in support of the motion.—According to the decision in *The Glannibanta* (36 L. T. Rep. 27; 8 Asp. Mar. Law Cas. 339; 2 P. Div. 45) the Court of Passage has no jurisdiction to entertain this case at all, as it has only power to apportion salvage where the amount does not exceed 300*l.* Hedley v. *Bates* (13 Ch. Div. 498) is sufficient authority for your Lordship to grant an injunction. Where the court had power to grant a prohibition, it can now grant an injunction:

The Recepta, 69 L. T. Rep. 252; 7 Asp. Mar. Law Cas. 359; (1893) P. 255.

BRUCE, J.—I think I ought to grant the order. I had some doubt about it, but I think Mr. Aspinall has shown me that a judge of this division has power to grant a prohibition with reference to a matter pending before an inferior court, and I think the case of *Hedley* v. *Bates* (*ubi sup.*) establishes that he has power to issue an injunction to a party proceeding in an inferior court to prevent him going on with proceedings. Beyond all question it would be exceedingly inconvenient that proceedings should take place in the Court of Passage, because the substantial matter was determined in this court. It is obviously convenient that any question arising in reference to the distribution of the money awarded for salvage should be determined in this court, and not in the inferior court. But, apart from the question of convenience, the Court of Passage has no jurisdiction, because the amount of salvage award to be distributed exceeds the sum of 300*l.* The doubt I entertained about the matter was because the Act giving jurisdiction to County Courts and the Court of Passage provides powers by which the judge of the Court of Passage may send any case before him to this court, and the judge of this court has power to transfer any Admiralty action to the Court of Passage. But I yield to the argument of Mr. Aspinall that an injunction would be the cheaper course, and I grant the application with costs.

Solicitors: *Rowcliffes, Rawle*, and *Co.*, for *Hill, Dickinson, Dickinson*, and *Hill*, Liverpool.

July 9, 10, *and* 30.

(Before the PRESIDENT (Sir F. Jeune.)

THE ORIENTA. (*a*)

Necessaries—Master's liability—Maritime lien on ship—Merchant Shipping Act 1889 (52 & 53 *Vict. c.* 46), *s.* 1.

Disbursements and liabilities of the master of a vessel which give rise to a maritime lien are those for which, by virtue of his general authority and without express authority, a master can pledge his owners' credit; and a liability cannot be created in the master, within the meaning of sect. 1 *of the Merchant Shipping Act* 1889, *for the purpose of attaching a lien to the vessel in priority to existing mortgages.*

ACTION *in rem.*

This was an action to recover 668*l.*, the amount of a bill of exchange given by the master of the steamship *Orienta*, in part payment of 1215 tons of bunker coal, and also for costs which it was alleged had been incurred in another action brought in respect of the bill. The facts and arguments are sufficiently stated in the judgment.

By sect. 1 of the Merchant Shipping Act 1889:

Every master of a ship, and every person lawfully acting as master of a ship by reason of the decease or incapacity from illness of the master of the ship, shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of disbursements properly made by him on account of the ship, as a master of a ship now has for the recovery of his wages: and if in any proceeding in any court of Admiralty or Vice-Admiralty, or in any County Court having Admiralty jurisdiction, touching the claim of a master or any person lawfully acting as master to wages or such disbursements or liabilities as aforesaid, any right of set-off or counter-claim is set up, it shall be lawful for the court to enter into and adjudicate upon all questions, and

(*a*) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

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settle all accounts then arising or outstanding and unsettled between the parties to the proceeding, and to direct payment of any balance which is found to be due.

Aspinall, Q.C. and *Dawson Miller* for the plaintiff.

Sir *Walter Phillimore* and *Laing* for the interveners.

Judgment was reserved and delivered on July 30.

The PRESIDENT.—In this case the question raised is whether Messrs. Phillips and Walton, the vendors of certain coal to the Orienta Steam Yachting Association Limited, by whom the steamship *Orienta* is owned, are entitled to a maritime lien on the vessel in respect of such part of the price of the coal as is the subject of the action. The Yorkshire Trust Limited and the Securities Insurance Company Limited appear as interveners in order to assert the prior right of a mortgage on the ship in their favour. The question arises in the following way: Edmund Elliott, the plaintiff, is the master of the *Orienta*. By two letters, dated the 15th and 16th July respectively, which passed between Messrs. Phillips and Walton and the Orienta Company, after some negotiations conducted by a Mr. W. J. Adamson, Messrs. Phillips and Walton agreed to bunker the steamship *Orienta* (her name then being the *La Plata*) in the East India Dock, with 1200 tons of Cardiff steam coal. The terms of payment stipulated for by Messrs. Phillips and Walton, as expressed in their letter, and agreed to by the Orienta Company, are "payment by captain's draft in our favour upon you, and accepted by you, payable as to one half of the amount of invoice three days after sailing, and the other half at sixty days from date of shipment, these documents to be handed us when our steamer with the coal is just alongside of steamship *La Plata*." Accordingly for these coals two bills of exchange were given by E. Elliott, drawn upon the Orienta Company, of which one was favoured, and the other forms the subject of this action, having been accepted but not paid by the Orienta Company. Some question was raised at the trial whether the whole of the coals supplied were for the use of the ship, the fact being that after the lighter was alongside it was found that some ballast in one of the bunkers prevented that bunker being used for coal, and accordingly about 300 tons of coal were never taken by the *Orienta*. It is clear, however, that but for this circumstance the *Orienta* would have taken them, and that they were necessary for her voyage, as a further supply of coals to the extent of 500 tons had to be procured in the Mediterranean; and, further, the Orienta Company also may allocate the payment they have made to the coals not in fact shipped. This matter may therefore be put aside; as may also all question of liability of the company, who do not defend the action, to the plaintiff, including the question of such liability extending to the ship after satisfaction of the interveners' claim. It was stated with perfect candour on behalf of Messrs. Phillips and Walton, the real plaintiffs, that their object in stipulating for payment by master's draft was to entitle themselves to a maritime lien by virtue of sect. 1 of the Merchant Shipping Act 1889, and there can be no doubt that the Orienta Company intended by agreeing, to confer such lien, if they could, and the master gave the bills by arrangement with his owners for that purpose. Mr. Phillips, a partner in the firm of Phillips and Walton, said that they were informed by Adamson, in answer to inquiry, that the company was entirely satisfactory; and that no further inquiry was made as to the solvency of the company, or as to any existing mortgage on the ship. In fact, the company, although considerable sums were due to it, had at the time only 30*l.* to their credit at their bankers, and they subsequently became insolvent. It is clear that the owners could not directly have given to Messrs. Phillips and Walton a maritime lien for the price of the coals purchased from them, and the question is whether they can effect this object, and bring the matter within the words of sect. 1 of the Merchant Shipping Act 1889, by employing the instrumentality of their master. There can be no doubt that the main object of that section was to give to the master a maritime lien for disbursements, and perhaps for liabilities, and it was no doubt in consequence of a series of decisions on the effect of the 10th section of the Admiralty Court Act 1861, before the case of *The Sara* (61 L. T. Rep. 26; 6 Asp. Mar. Law Cas. 413; 14 App. Cas. 209), that the master believed that he had such a lien. The words of the section express the lien to be for "disbursements properly made by him on account of the ship, and for liabilities properly incurred by him on account of the ship." It appears to me further that the section was intended to give a lien only in such cases as before *The Sara* it was considered to exist. I should infer this from the history of the Act which was referred to in *The Castlegate* (68 L. T. Rep. 99; 7 Asp. Mar. Law Cas. 284; (1893) App. Cas. 38), and I think that the use of the words "properly" and "on account of the ship," and perhaps also the previous words "so far as the case admits," is designed to confine the lien conferred within these limits. I can imagine no reason why Parliament should have thought it desirable, in prejudice of the rights of mortgagees, to permit the creation of a maritime lien, except in the cases where for many years it was believed to exist. What was held before the decision in *The Sara* was, that the master had a lien for his disbursements. I omit reference to his liabilities, as in that period it was not settled whether liabilities and disbursements stood on the same footing—(see *The Feronia* (17 L. T. Rep. 619; 3 Mar. Law Cas. 54; L. Rep. 2 A. & E. 65)—a distinction now rendered immaterial by the words of the Act. But the question is, what were the disbursements for which it was believed the master could create a maritime lien? It appears to me impossible to believe that in all cases where a master expended money in a purchase for the ship, or pledged his liability for it, a maritime lien was, or could ever have been supposed to be, created. Such law would, I think, be inconsistent with the jurisprudence which recognised no maritime lien for necessaries, and no right in the owner to create such a lien in respect of his expenditure on his ship. It would also make the position of a mortgagee of a ship altogether different from that of any other mortgagee, and indeed render it almost illusory. But if all disbursements and liabilities of the master for the ship cannot be supposed to give rise to a maritime lien, what is the criterion of those which have this operation? The test suggestion by Sir Walter Phillimore in argument for the inter-

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veners is, that such disbursements were those for which by virtue of his general authority and without express authority a master could pledge his owner's credit, or, in other words, those which he made strictly as master, a test which probably expresses the same thing as was intended by Lord Macnaghten by the words at the commencement of his judgment in *The Sara* (*ubi sup.*), "disbursements made by the master of the ship in the ordinary course of his employment." I think that this test is correct. Of course, under what circumstances, in foreign or home ports, respectively, and for what purposes a captain may, without express authority, pledge his owner's credit, has been often considered. For example, in the cases of *Mitcheson* v. *Oliver* (5 E. & B. 419) and *Gunn* v. *Roberts* (30 L. T. Rep. 424; 2 Asp. Mar. Law Cas. 250; L. Rep. 9 C. P. 331). Of course, also, when there is express authority the owner is liable to the captain and to those with whom the captain dealt, and probably in some of such cases the ship may be made liable on the principles indicated by Fry, L.J., in *The Heinrich Bjorn* (52 L. T. Rep. 560; 5 Asp. Mar. Law Cas. 391; 10 P. Div. 44). But I am not aware of any authority which shows that the captain was ever supposed to be able to create a maritime lien on the ship, except when within the general scope of his authority he could have pledged his owner's credit. The distinction between disbursements which were and were not believed to give rise to a maritime lien has not, so far as I know, been the subject of much authority; but it was clearly decided as long ago as 1726 by Sir Joseph Jekyll, in the case of *Walkiner* v. *Bernardiston*. In that case the master had disbursed moneys abroad for the use of the ship, and had also at the direction of the owners become liable for and paid sums of money for provisions and materials for the ship while lying in the Thames. He had also paid seamen's wages, and had a claim for wages due to himself. In a question between the respective rights of the master and of a mortgagee, it was held that for the demands of the master in respect of what was done for the ship in the Thames there was no lien, but that there was a lien for the sums disbursed abroad, as also for the wages. It is, I think, clear, when the words of the master's report, the declaration of the Master of the Rolls, and the words of the reporter of the case are read together, that what the learned judge held was that for disbursements in a home port, where recourse could be had to the owners, the master had no lien in priority to a mortgagee, but that he had such a lien in respect of his disbursements when on his voyage, made by reason of necessity. This decision was no doubt erroneous, according to subsequent decisions before the Merchant Shipping Act of 1861, and would have been erroneous, as we now know, if given after that Act, in holding that disbursements or liabilities of the master abroad (apart from bottomry), or a claim for his own wages, would create a lien; but I refer to it because it shows that it was not even at that time supposed that a master making disbursements for the ship by authority of the owners, and for which he could pledge their credit, as by such authority, could create a lien on the ship, and shows that the reason for this was that creditors could and should resort to the owners for payment. In the case of *The Chieftain* (Br. & L. 104) Dr. Lushington held that a maritime lien existed in respect of a small sum laid out apparently without express authority for the ship, by a person whom he held in fact was acting as master and receiving wages as such, but he declined to allow such a lien in respect of a large sum for necessaries for which the master rendered himself liable. It is true that Dr. Lushington appears to base his judgment on the distinction between disbursements and liabilities, but it is remarkable that, in a comment on that case in his report on *The Red Rose* (2 A. & E. 80), Mr. Rothery suggests that the real ground of the decision may have been that the transaction as to the purchase of these necessaries "had taken place in this country, with the cognisance, and, no doubt, under the directions of the owners, and the court may very well have thought that this was merely an attempt to shift the burden of these charges from the shoulders of the owners to those of the mortgagees." If Mr. Rothery's view of the case be correct, in a case very like the present, the claim for a lien was disallowed; and certainly, in his opinion—and no one probably was more cognisant of the current practice of the Admiralty Court—a purchase even of necessaries by a captain in this country, by express authority of his owners, did not create a maritime lien in the captain's favour. In the case of *The Great Eastern* (17 L. T. Rep. 667; 3 Mar. Law Cas. 58; L. Rep. 2 A. & E. 88), it appears to me clear that Sir Robert Phillimore had the same distinction before his mind. That was an action for necessaries for the *Great Eastern*, ordered by the master, Sir James Anderson, in Liverpool. The learned judge held that the owners rendered themselves liable by holding out Sir James Anderson as their master to the vendors of the necessaries, but he abstained expressly from saying whether the master had authority to pledge the credit of his owners in a home port, or whether a maritime lien on the ship was created. If the present case were treated as one of the purchase of coals by the master, I think it is one in which he could not, under the circumstances of the supply being in the place where the owners carried on business, and at the beginning of a new voyage, have made his owners liable to the vendor without express authority. There had been many decisions on the Admiralty Court Act of 1861 before the case of *The Sara* (*ubi sup.*), but I cannot find that in any of the cases a maritime lien has ever been held to be created where it appears that the captain pledged his owner's credit otherwise than by virtue of his general authority to do so. The only instance which counsel in argument could refer me to was *The Feronia* (*ubi sup.*), in which it was said that items 21 and 22 were items of expenditure in a home port, and therefore not within the general authority of the master to make. But apart from the questions whether such expenditure might not be within a master's general authority, even in a home port, it is I think clear that these items were treated as allowed deductions from freight, and as such sanctioned by the case of *Bristowe* v. *Whitmore* (4 L. T. Rep. 622; 1 Mar. Law Cas. 95; 9 H. of L. Cas. 391). But it is to be observed that the present case is not even that of a liability incurred by a master in a purchase by him, by express authority, for the ship. There was no purchase by the master at all. The owner made a contract himself with the vendors of the coals, and, as a term of

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it, agreed to his master's liability being pledged by his giving bills. Evidence was given before me that this was entirely unusual. But apart from such evidence, it seems to me impossible to say that the master in thus, at the request of his owner, lending his name was doing anything within the course of his employment as master. The whole proceeding was avowedly an ingenious device to create a liability in the master within the meaning of sect. 1 of the Act of 1889, for the purpose of attaching a lien to the vessel in priority to existing mortgages, but I think that it fails, because the Act did not mean, and does not say, that a lien can be so created. The interveners are entitled to their costs.

Laing.—If there is no maritime lien, as your Lordship has held, the master has no right of action, this being an action *in rem.*

The PRESIDENT.—What I will do is this: I give judgment for the interveners, with costs, and I leave the plaintiff to move for such judgment as he may be advised.

Solicitors for the plaintiffs, *Botterell* and *Roche.*
Solicitors for the interveners, *Ince, Colt,* and *Ince.*

House of Lords.

March 19, 20 *and June* 22.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, ASHBOURNE, MACNAGHTEN, and MORRIS.)

ARROW SHIPPING COMPANY LIMITED *v.* TYNE IMPROVEMENT COMMISSIONERS.

THE CRYSTAL. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Ship—Wreck—Obstruction to harbour—Owner—Harbours Act 1847 (10 & 11 *Vict. c.* 27), *s.* 56—*Removal of Wrecks Act* 1877 (40 & 41 *Vict. c.* 16), *s.* 4—*Liability for expenses of removal.*

By sect. 56 *of the Harbours, Docks, and Piers Clauses Act* 1847 "*the harbour master may remove any wreck or other obstruction to the harbour . . . and the expense of removing any such wreck . . . shall be repaid by the owner of the same.*"

A ship of the appellants became a total loss, and was abandoned by the owners. There was no evidence that the loss was caused by their default. The wreck lay in such a position as to be an obstruction to the harbour of the respondents, and was removed by them. They then brought an action against the appellants to recover the expenses of such removal.

Held (*reversing the judgment of the court below*), *that the appellants were not liable, for that sect.* 56 *of the Act of* 1847 *points to ownership at the time that the expense of removing the obstruction was incurred, not to ownership at the time that the obstruction was created.*

Earl of Eglinton *v.* Norman (36 *L. T. Rep.* 888; 46 *L. J.* 557 *Ex.*) *and* The Edith (11 *L. Rep. Ir.* 270) *disapproved.*

THIS was an appeal from a judgment of the Court of Appeal (Lindley, Smith, and Davey, L.JJ.), who had affirmed a judgment of Barnes, J. in favour of the respondents, the plaintiffs below.

The action was brought to recover the sum of 796*l.* 6*s.* 5*d.*, the balance of the cost of removing the wreck of the steamship *Crystal*, which was formerly the property of the appellants, and was sunk by collision in such a position as to occasion a dangerous obstruction to the approaches to the river and harbour of the Tyne, of which the respondents were owners.

The respondents removed the wreck under the powers conferred by the Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27) and the Removal of Wrecks Act 1877 (40 & 41 Vict. c. 16) and sought to recover the expenses of such removal from the owners under sect. 56 of the former Act, which was incorporated in their private Act.

The appellants, who had abandoned the wreck to the underwriters, disputed their liability.

The facts are more fully stated in the judgment of the Lord Chancellor.

The courts below held that the case was governed by the decision of the Court of Appeal in *The Earl of Eglington* v. *Norman* (36 L. T. Rep. 888; 46 L. J. 557, Ex.) and gave judgment for the plaintiffs.

Finlay, Q.C. and *Scrutton*, for the appellants, argued that sect. 56 of the Act of 1847 imposes no personal liability on the owner, and was not intended to alter the substantive law. The language of sect. 57 is in marked contrast to that of sect. 56, and gives an express power to recover from the owner, which the former section does not. It was not intended to impose such a serious liability upon an innocent owner who had abandoned the ship. If he continued his ownership after the wreck, the liability might continue, but not where he abandoned it. There are no facts in dispute in the case. The wreck was abandoned to the underwriters on the day after the loss, as soon as the news arrived. The principle which governs the case was laid down in this House by Lord Cairns, L.C. in *River Wear Commissioners* v. *Adamson* (37 L. T. Rep. 543; 2 App. Cas. 743). In the courts below the case was held to be governed by *The Earl of Eglinton* v. *Norman* (36 L. T. 888; 46 L. J. 557 Ex.) which we contend is distinguishable, or, if not, was wrongly decided. In that case the owner had not abandoned. The Irish case *The Edith* (11 L. Rep. Ir. 270), raised the question whether the liability was personal or only against the ship, and we contend should be followed in the present case. The statute only imposes a liability where there was a common law liability before, and does not extend that liability. The judgment of Bramwell, L.J. in *Eglinton* v. *Norman* is in favour of our view where there has been an abandonment. The cases are summed up in *The Utopia* (70 L. T. Rep. 47; (1893) A. C. 492). The cases of *White* v. *Crisp* (10 Ex. 312), *Brown* v. *Mallett* (5 C. B. 599), and *The Douglas* (47 L. T. Rep. 502; 7 P. Div. 151), there cited, show that the only case in which an owner who has abandoned can be made liable is where he has abandoned under such circumstances as amount to negligence. The section only confers a lien, and the wording is not such as to lead to the conclusion contended for by the respondents. Their construction of the Act involves a change by the Act of 1847 of the existing common law

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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liability of an owner who has abandoned, which was never intended. The contention of the respondents might involve very great hardship upon a perfectly innocent owner whose ship had been wrecked. Similar cases have arisen on questions of poor rates, which are collected in Maxwell on Statutes, 2nd edit. p. 496, showing that payment can only be enforced in the manner prescribed by the statute, not by action. Sects. 44 and 45 and 74 and 75 of the Act of 1847, when compared with sect. 56, show that there is no such remedy under that section as the respondents assert. The principle is illustrated by the cases of

Underhill v. *Ellicombe*, McClell. & Younge, 450;
Stevens v. *Evans*, 2 Burr. 1157;
Shepherd v. *Hills*, 11 Ex. 55.

Further, if the appellants are liable, the respondents, who claim an absolute discretion in disposing of the salvage, have not given credit for a sufficient amount in respect of it.

Sir *W. Phillimore* and *Butler Aspinall*, for the respondents, contended that the judgment of the court below was right. This is the third attack that has been made on the construction of sect. 56 of the Act of 1847, for which we contend. In *Eglinton* v. *Norman* (*ubi sup.*) it was argued that it did not extend the common law liability, but was a question of procedure only; but as to this, see the judgments of Lord Blackburn and Lord Gordon in *River Wear Commissioners* v. *Adamson* (*ubi sup.*). In *The Edith* (*ubi sup.*) it was argued that the section was only intended to create an easily enforceable lien, which did not exist before. The appellants' construction virtually strikes the words "the expense of removing such wreck shall be repaid by the owner of the same" out of the section. The argument from hardship is based on a fallacy. Before the Act, if the "owner" could not be found nothing could be done, and, if the owner at the time of the removal and sale is intended, the respondents are no better off, as the difficulty of finding him would be insuperable; but the owner at the time of the loss can always be found. Work had actually begun on this ship before the abandonment to the underwriters, and there are cases which say that possession by salvors is possession by the owner. [The LORD CHANCELLOR referred to *Randal* v. *Cockran* 1 Ves. sen. 97.] At the most it can only be said that we are suing the wrong person; but an underwriter is not bound to take over a *damnosa hereditas*, and, having already paid as for a total loss, cannot be made liable for anything further. This case is provided for in policies of insurance. See

The North Britain, 70 L. T. Rep. 210; (1894) P. 77.

The Thames Conservancy have special provisions which came before the courts in *Prehn* v. *Bailey*; *The Ettrick* (45 L. T. Rep. 399; 6 P. Div. 127), though they were not necessary for the actual decision in that case.

Scrutton was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

June 22.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell).—My Lords: The question raised by this appeal is one of considerable importance. The facts are few and not in dispute. The vessel *Crystal*, of which the appellants were registered owners, was on the 7th Jan. 1892, sunk in the German Ocean below low-water mark, 400 yards east of the end of the South Pier at the mouth of the river Tyne. The disaster was the result of a collision, but there is no evidence how this was caused, or that any blame was to be attributed to the owners of the *Crystal* or their servants. On the morning of the 8th Jan. Mr. Dent, the managing owner of the *Crystal*, gave notice to Mr. Scorfield, the representative of an association in which the vessel was largely insured, that he would have to take possession of her as the ship was past redemption; to which Mr. Scorfield seems to have made no objection. The vessel, in the position in which she lay, was both an obstruction to the approaches to the port and harbour of Newcastle-upon-Tyne and a danger to the navigation thereof. The Tyne Commissioners accordingly gave notice to the appellants that they would remove the obstruction, destroying it if necessary, and in the meantime would buoy and light it. The Commissioners acted upon this notice and destroyed and dispersed the obstruction by means of explosives. The present action was then brought to recover the expenses thus incurred beyond what was recouped by the sale of the materials. The respondent's claim, in so far as it relates to the expense of removing the wreck, is based on sect. 56 of the Harbours, Docks, and Piers Clauses Act 1847, which is in these terms: "The harbour master may remove any wreck or other obstruction to the harbour, dock, or pier, or the approaches to the same, and also any floating timber which impedes the navigation thereof, and the expense of removing any such wreck, obstruction, or floating timber shall be repaid by the owner of the same, and the harbour master may detain any such wreck or floating timber for securing the expenses, and on nonpayment of such expenses, on demand may sell such wreck or floating timber, and out of the proceeds of such sale pay such expenses, rendering the overplus, if any, to the owner on demand." The courts below have followed the decision of the Court of Appeal in the case of *The Earl of Eglinton* v. *Norman* (36 L. T. Rep. 888; 46 L. J. 557, Ex.), where it was held that the section I have just quoted casts upon the persons who were the owners of the vessel at the time she became a wreck and impeded the navigation a personal liability to pay the costs of removing the obstruction. I quite agree with them that there is no substantial distinction between that case and the present. It is contended, however, on behalf of the appellants, that a judgment of this House in the case of the *River Wear Commissioners* v. *Adamson* (37 L. T. Rep. 543; L. Rep. 2 App. Cas. 743) delivered after the date of the decision of the Court of Appeal in the case of *The Earl of Eglinton* v. *Norman*, has thrown doubt on that decision, and indicated that the section ought not to be so construed as to cast upon the owners of a vessel under such circumstances a liability unknown to the common law. The case of the *River Wear Commissioners* v. *Adamson* turned upon another section of the same Act, namely, sect. 74, which makes the owner of every vessel or float of timber answerable to the undertakers for any damage done by such vessel or float of timber, or by any person em-

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ployed about the same, to the harbour, dock, or pier. In that case damage was done by the respondent's vessel to the appellants' pier without any fault upon the part of the respondent. The Court of Appeal had held that the respondent was not liable, mainly on the ground that the damage was caused by the act of God. Although the judgment was affirmed in this House, the noble and learned lords who heard the case did not rest their opinions on this ground. Lord Cairns, L. C. came to the conclusion that the section was not intended to create a right to recover damages in cases where before the Act there was not a right to recover damages from some one; that it was intended only to provide a ready and simple procedure for recovering damages where a right to damages existed at common law. He thought that the section relieved the undertakers from the investigation whether the fault had been the fault of the owner or of the charterers or of the persons in charge, and taking the owner as the person who is always discoverable by means of the register, declared that he should be the person answerable, leaving him to recover over against the person liable. Lord Hatherley, after expressing the very great doubt and difficulty which he had felt as to the proper interpretation of the clause, said that, as it was the opinion of the majority of their Lordships that the case was not one that could be regarded as struck at by this clause, whether the ground to be assigned for it was the view expressed by Lord Cairns, or whether any view might be adopted similar to that taken in the court below, he should not pause to inquire, but that he was unwilling to do anything further than to say that he could not concur in the opinion expressed by the Lord Chancellor otherwise than with extreme doubt and hesitation. Lord O'Hagan thought that the section pointed to something done by the act of man, or to the act of the person in charge. Lord Blackburn stated that he had very great doubt and hesitation in the case, that he could not see anything in the language of the Act to justify the view adopted by Lord O'Hagan that it was confined to cases in which some one was in charge of the ship; but that, after much hesitation and doubt, he was not prepared to say that the judgment should be reversed, and that the words "damage done by such ship" necessarily included all expenses occasioned by misfortunes in which the ship was involved in common with the piers. After referring to the fact that Mellish, L.J. in the court below seemed to have thought that the words might bear the more restricted sense of *injuria cum damno* he concluded thus: "The declared object of the enactment is the protection of the piers, &c., 'from injury,' which renders this construction a little less violent than if the object had been expressed to be to protect the harbour authorities from 'loss.' If they can bear that sense, we ought to construe them so; and though I have had and have great doubt whether this is not too violent a construction, I am not prepared to reverse the judgment based on it, and consequently I agree that the appeal should be dismissed with costs." Lord Gordon dissented from the judgment pronounced, and thought that the appellants were entitled to succeed. I think a review of the opinions thus pronounced is sufficient to show that no principle can be extracted from the judgments in that case which can be applied to the construction of other sections of the Act. Although I am of opinion that in the present case, there being no evidence that the disaster was due to the negligence either of the appellants or their servants, they would be under no liability at common law for damage caused by the obstruction as for the expenses incurred in removing it, yet I am unable to find any valid ground on which the operation of sect. 56, which casts upon the owner the liability to pay for the expenses of removing the obstruction, can be limited to cases in which such liability would exist at common law. I am fully alive to the force of the argument, and feel much impressed by it, that the obstruction is removed for the benefit of the public at large, and that where the owner of the vessel which has met with a disaster has not been to blame, it is hard that the loss of his vessel should entail on him the further burden of bearing expenses incurred not for his benefit but for that of the public. But a sense of the possible injustice of legislation ought not to induce your Lordships to do violence to well settled rules of construction, though it may properly lead to the selection of one rather than the other of two possible interpretations of the enactment. In the present case, however, I am unable to see that there are two alternative constructions. The harbour master may remove "any wreck," and the expense of removing "any such wreck" is to be "repaid by the owner of the same." Where is there any ground for restricting this to cases where the owner of the wreck is himself, if not bound to remove it, at least subject to liability for damage caused by its presence, if he does not take that course? I can find none. The appellants further contended that if a new statutory liability was imposed by the section, same enactment provided the remedy, and that those who desired to enforce the liability were limited to the remedy thus provided. It was urged that the section conferred the remedy of detaining and selling the wreck and satisfying the expenses out of the proceeds; that it did not provide any other mode of recovering the expenses, and that the harbour authority was therefore restricted to this remedy. This argument found favour with the Irish Court of Appeal in the case of *The Edith* (11 L. Rep. Ir. 270), and they gave effect to it by their judgment in that case, when the construction of a similar provision came before them for determination. I confess I have approached the consideration of the terms of the statute with no indisposition to arrive at the same conclusion, but I am unable to do so. In the first place, the terms are express that the expense of removing the wreck "shall be repaid by the owner of the same." The construction contended for appears to me to give no effect to these precise words. If all that was intended was that the expenses were to be paid out of the proceeds of the wreck, why were these words inserted, followed as they are by the words, "and the harbour master may detain and sell;" moreover, this power is expressed to be for "securing expenses," and the power to sell is on "nonpayment on demand." The truth is, that the contention of the appellants makes the latter words of the section alone operative, and gives no more effect to the words "shall be repaid by the owner" than if they had been omitted from the enactment. But this is not all; the latter part of the enact-

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ment, which it is said provides the only remedy, is not co-extensive with the earlier provisions. Authority is given to remove any wreck "or other obstruction," and also any floating timber which impedes the navigation. The expense of removing any such wreck, obstruction, or floating timber is to be repaid by the owner of the same; but power is only given to detain and sell such "wreck or floating timber." The word "obstruction" is omitted. Why the power was not extended to other obstructions than wrecks and floating timber is matter of speculation. It may have been a mere slip, but it would scarcely be legitimate to construe the enactment on the assumption that it was so. There can be no doubt that it is just as explicitly enacted in the case of any other obstruction as in the case of a wreck, that the expense shall be repaid by the owner, and yet if the construction contended for by the appellants were to prevail the conclusion must either be that no means were provided for enforcing the liability in terms imposed, or that because no remedy was provided a personal debt was created in the case of an obstruction other than a wreck, but not in the case of a wreck; although the language as to repayment is identical in the two cases. I do not say that this is conclusive, but it adds to the difficulty of acceding to the interpretation insisted upon by the appellants. For the reasons I have given I do not see any my to differ from the courts below in holding that the terms of sect. 56 do create a debt in respect of which an action may be maintained against the owner. But then arises the question, who is the owner within the meaning of the statute? The Court of Appeal, in the case of *The Earl of Eglinton* v. *Norman*, held that it was the person who was the owner at the time the obstruction occurred, and the right of the harbour master, therefore, to remove it accrued. They considered that, although the right of the harbour master to remove it was only inchoate, the rights of all parties were then irrevocably fixed, and that it mattered not what change afterwards took place in the ownership of a wreck. The words of the section do not expressly point out who is the owner referred to, and if the section had been held to apply only to cases where the obstruction came about by the default of the owner there would be much to be said for the view thus adopted. But, inasmuch as the section *ex hypothesi* applies even where there is no such default, I do not see any *à priori* reason for holding that the rights of the parties are then fixed. It is obvious that some time might elapse before the removal of the wreck which became an obstruction was determined on by the harbour master, and that a change of ownership might occur in the interval. When I examine the language of the section it appears to me to point not to ownership at the time the obstruction is created but to ownership at the time the expense of removing it is incurred. The expenses are to be repaid by the owner. The harbour master may sell the wreck on nonpayment of such expenses on demand. And lastly, if the wreck is sold, and the proceeds exceeds the expenses, the overplus is to be returned to the owner on demand. This can scarcely mean the person who was the owner at the time the obstruction was caused, but must surely be intended to refer to the person whose wreck was disposed of and removed. In the present case it seems clear that before the time when the expenses were incurred by the respondents, the appellants had abandoned the vessel as derelict on the high seas, without any intention of resuming possession or ownership. They had also given notice of abandonment to the underwriters. It is unnecessary to determine whether the underwriters are to be treated as the owners within the meaning of the statute; it is enough to say that I do not think the appellants can on its true construction be regarded as having, at the time the expenses were incurred, been owners and liable to repay them. I have, like some of the noble and learned lords who took part in the decision of the case of *The River Wear Commissioners* v. *Adamson*, felt the greatest doubt and difficulty as to the proper mode of dealing with this case. The history of the statute (of which the section in question forms part) is pointed out by Lord Blackburn in that case. Many of the clauses probably had their origin in the desire of the authorities who promoted Harbour Acts to secure adequate protections for their undertakings, and may have been adopted by the Legislature without sufficiently careful consideration of the interests of other persons, and the liability which might with justice be imposed upon them. I cannot profess that the conclusion at which I have arrived is completely satisfactory to my own mind; but I think it is better to adhere in such a case as closely as one can to settled rules of construction, leaving any necessary changes in the law to be effected by the Legislature rather than to attempt by a strained and violent construction to arrive at what, after all, may be very halting justice. A subordinate point was raised in this case. The respondents incurred certain expenses in lighting and watching the wreck under the Removal of Wrecks Act 1877. They applied the proceeds derived from the sale of the wreck towards the expenses incurred by them, both under the Act of 1847, and the later statute. They then sued for the balance of the expenses. It was contended that they were bound to apply the moneys received *pro rata* to the expenses incurred under the two statutes. This contention was repelled by the courts below, and I see no reason to differ from the views expressed on this point. For the reasons I have given, I think the judgment appealed from ought to be reversed, and judgment entered for the defendants, with costs. The respondents must pay the costs here and in the courts below.

Lord WATSON.—My Lords: This appeal depends upon the construction of a single section in the Harbours, Docks, and Piers Clauses Act 1847. The respondents, in exercise of the powers conferred upon them by the Act of 1847 and by the Removal of Wrecks Act 1877, between the 15th Jan. and the 4th June 1892 spent 1128*l.* 3*s.* 4*d.* in removing or dispersing the wreck of the steamship *Crystal*, which had been sunk by a collision on the 7th Jan. within the approaches to the river and harbour of Tyne, and constituted a dangerous obstruction of vessels using the port. Their outlay was recouped to the extent of 331*l.* 16*s.* 11*d.* by sales of cargo taken from the wreck, the amount of their expenditure being thus reduced to 796*l.* 6*s* 5*d.* The appellants were owners of the *Crystal* at the time when she was wrecked. On the 8th Jan. they gave notice of her abandonment as a total constructive loss to their under-

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writers, who subsequently paid them the full amount of their insurances upon that footing. On the 8th Jan. they received a notice that they would be held liable for the expenses which the respondents were about to incur, in reply to which they intimated that they had already abandoned the vessel as a wreck in the open sea. The respondents now claim payment of the balance of 796*l.* 6*s.* 5*d.* from the appellants as being the owners of the wreck of the *Crystal*, and they have obtained judgment in their favour both in the Admiralty Division and in the Court of Appeal. The claim thus made and sustained has admittedly no warrant in the Act of 1877. It is based exclusively upon sect. 56 of the Act of 1847, which provides that "the harbour master may remove any wreck or other obstruction to the harbour, dock, or pier, or the approaches to the same, and also any floating timber which impedes the navigation thereof; and the expense of removing any such wreck, obstruction, or floating timber shall be repaid by the owner of the same, and the harbour master may detain such wreck or floating timber for securing the expenses, and on nonpayment of such expenses on demand, may sell such wreck or floating timber, and out of the proceeds of such sale pay such expenses, rendering the overplus, if any, to the owner on demand." The argument of the appellants was directed to these two points only. They maintained, in the first place, that the clause does not attach to the owner any personal liability for expenses, and in the second place that, if it does, they neither are, nor were at any time, the owners of the wreck of the *Crystal* within the meaning of the clause. It does not admit of doubt that, if the appellants can establish either of these propositions, the judgments appealed from must be reversed. I do not find it necessary to enter upon the consideration of the first of these points, because I am satisfied that the argument of the appellants upon the second of them ought to prevail. Had it been necessary to decide the first point, I could not, as at present advised, have differed from the opinion expressed by the Lord Chancellor. I cannot agree with the able judgment of the Irish court in the case of *The Edith* (11 L. Rep. Ir. 270), and I am unable to appreciate the bearing of *River Wear Commissioners* v. *Adamson* (2 App. Cas. 743) upon the facts of the present case. I agree with the Lord Chancellor in thinking that their abandonment of the sunken ship in the open sea *sine animo recuperandi* had divested the appellants of all proprietary interest in the wreck before the respondents commenced operations with a view to its removal. That state of the facts necessarily gives rise to the question, whether the expression "the owner" of the wreck, as it occurs in sect. 56, is meant to designate the owner of the ship at the time when she goes to the bottom of the sea or the owner of the wreck at and during the time of its removal. Barnes, J. and the learned judges of the Appeal Court accepted as binding upon this point the decision of the Court of Appeal in *Earl of Eglinton* v. *Norman* (*ubi sup.*). In that case it was laid down by the present Master of the Rolls, with the concurrence of Lord Coleridge, and a very hesitating assent by Lord Bramwell, that when a ship sinks in such a position as to cause obstruction to a harbour or its approaches, a right to remove it at the expense of the then owner at once accrues to the harbour authorities, and cannot be affected by any subsequent change or loss of ownership. I do not think it is reasonably possible to arrive at that conclusion except by holding that the Legislature, in using the words "owner of the wreck," meant thereby to designate the owner of the ship at the time when she became a wreck. If that had been the intention of the Legislature, nothing could have been easier than to give it expression. But the intention of the Legislature can only be gathered from the language actually employed, and I am of opinion that the construction adopted by the learned judges of the Appeal Court, in *Earl of Eglinton* v. *Norman*, is inadmissible. The only thing which the harbour master under the clause in question has authority to deal with is the wreck, and not the ship; and the only charges which, in any view, he can have a right to recover are those which may be duly incurred by him for the purpose and in the course of its removal. It is clear, to my mind, that *primâ facie* the owner of the wreck must be the person to whom the wreck belongs during the time when the harbour master chooses to exercise his statutory powers. That appears to me to be the primary and natural meaning of the words. It may, of course, be displaced by force of the context. But I can find nothing in the context to suggest that the words were intended to have any other than their natural meaning. On the contrary, the direction in the end of the clause to the effect that the harbour master, after selling the materials of the wreck in order to pay the expenses which he has incurred, shall account to the owner for any overplus, clearly indicates that the owner is the person to whom these materials belonged. Being of opinion that the respondents have failed to show that the appellants were owners of the wreck of the *Crystal* within the meaning of the clause, I concur in the judgment which has been proposed by the Lord Chancellor.

Lord Ashbourne.—My Lords: The decision of this appeal depends on the construction to be given to the 56th section of the Harbours, Docks, and Piers Act 1847, the terms of which have been stated by my noble and learned friends who have preceded me. The contention of the appellants substantially raises two questions upon this section. They insist (1) that no personal liability is cast upon "the owner" for the expenses claimed; and (2) that, no matter how that may be, they are not the "owners" who are chargeable. The statute above mentioned does not apply to all harbours, docks, and piers; for the first section enacts that it shall "extend only to such harbours, docks, and piers as shall be authorised by any Act of Parliament hereafter to be passed, which shall declare that this Act be incorporated therewith." The statute was so incorporated by the Tyne Improvement Acts, and thus the questions are raised. Had the wreck occurred in or near any harbour where such incorporation had not taken place, it is not suggested that the appellants could have been made liable. It is admitted that they could not be responsible at common law, and therefore the whole case turns upon the construction of this clause which creates this new responsibility. There should be clear words to create any such liability, and in construing the section the rule must be borne in mind that where the liability is a liability not existing at common law, but for the

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first time imposed by the statute, then if the remedy is also prescribed by the statute the party must pursue that remedy. Before taking the words of the section it is well to consider the nature and character of this personal liability sought under this section for the first time to be imputed to an "owner." It is asserted that, although he be not negligent, although his master and crew may have shown the most splendid seamanship and the most heroic courage, he is personally liable for the expense of the removal of the wreck of his ship, if it causes an obstruction to the harbour or navigation. The wreck may be caused by the act of God, by the default of the pilot he is compelled by law to employ, by the absence of the very buoys and lighthouses which the harbour authority is itself bound to provide, but no qualification of the owner's liability is suggested. Smugglers or mutineers may have wrecked the ship and made it an obstruction, but the possibility of an exception is not admitted. It is asserted that this personal liability is unlimited in amount, and that no matter how small the value of the vessel, or how worthless the cargo, the "owner" must answer to his last farthing for these expenses. The cost of removal might be twenty times the value of the ship, and the payment of that cost might drive the "owner" into bankruptcy; but that is not a consideration to be noted. It may be even asserted that the liability is not guarded by any limit of time or space, that the wreck might sink, causing no obstruction outside a harbour, yet years after it might by the action of storms, or wind, or tide be shifted to a position where it became an obstruction, when this liability would attach. In fact it is contended that under all circumstances, no matter what the conduct, or what the amount involved, "the owner" is personally liable, and that he is so made for the first time under this section. It is not too much to expect that a section imposing such a tremendous liability should be in clear terms. The section is not clear; its interpretation is difficult, its language is infelicitous, but it can be made to work smoothly and without difficulty if the contention of the respondents is rejected and that of the appellants adopted. In my opinion no personal liability is created by the section. The first object of the section was to give power to the harbour master to remove the wreck or obstruction. Then if the owner repays the expenses he may take away his property. If he does not repay the expenses the harbour master is given his remedy, the power of detaining the wreck with the further power of selling on non-payment of the expenses after demand. Then it is finally provided that, after payment of the expenses out of the proceeds, the surplus, if any, is to be rendered to the owner "on demand." The words "the expense . . . shall be repaid by the owner" cannot be taken alone. The whole section must be read together. The ship and its proceeds on sale were, as far as they went, to provide the fund for the expense; and accordingly whilst the section provides for handing over the surplus to the owner, there are no words saying that he is to make good the deficiency. It is not suggested that there is anything in the subsequent Removal of Wrecks Act 1877 to support the respondents' construction of this sect. 56. Yet if that construction is correct, we should expect to find the same liability in sect. 4 of the later Act. These Acts deal with the same subject-matter, and it may well be that the Act of 1877 may supply some interpretation of this earlier provision. It is at all events worthy of note that the common law antecedent to the Act of 1847, and the statute law subsequent to that date, impose no personal liability of any kind for this expense. The learned judges in the courts below followed the decision of the Court of Appeal in the case of *The Earl of Eglinton* v. *Norman*. Only one of the judges of the Court of Appeal in this case said that he would have decided the same way, and Davey, L.J. said that, whenever the case was reconsidered, Mr. Finlay's argument was worthy of the greatest consideration. On this point, therefore, one cannot decide in favour of the appellants without impeaching the authority of *The Earl of Eglinton* v. *Norman*. I should infer from the report of that case that several of the arguments by which your Lordships have been aided had not been brought prominently before the court, and this is noted expressly in his judgment by Smith, L.J. That case, however, decides on this section that a personal liability was attached to the "owner," and for the reasons I have already stated, I have arrived at an opposite conclusion, and with great deference to the learned judges who took part in that decision, and to the Lord Chancellor, I do not think it can be supported. The case of *The Edith* (11 L. Rep. Ir. 272), decided on similar words in another statute, is entirely opposed to the construction which would impose any personal responsibility on the owner, and Palles, C.B. there strongly relied upon the argument that, when a new right is created by a section, and there is a remedy given in that section, that is the only remedy which is given at all. The case of the *River Wear Commissioners* v. *Adamson* (37 L. T. Rep. 543; 2 App. Cas. 743) has also been relied upon by the appellants as shaking the authority of the case of *The Earl of Eglinton* v. *Norman*. It cannot be relied upon as a direct authority, being upon a different section of the statute; but I think it has a bearing upon the case, and can be usefully considered in connection with some of the arguments addressed to your Lordships. That case turns upon sect. 74 of the Act of 1874, which says that "the owner of every vessel or float of timber shall be answerable to the undertakers for any damage done by such vessel or float of timber to the harbour, dock or pier, or the quays or works connected therewith." These words would appear to be clear and unqualified, and are certainly far more clear and unqualified than those of sect. 56. But when an owner who had been in no default was sought to be made liable under its terms a large majority of this house declined to recognise his liability. I concur with the Lord Chancellor that no very clear principle can be extracted from the judgments, but I, at all events, gather this, that, although one noble and learned lord was unable to see any way of escape from the apparently clear words of the section, the other noble and learned lords decided that the clause must be held to refer to something in which man was concerned, and not the casualties brought about by the act of God. The judgment of Lord Blackburn shows in every word the doubt and difficulty he felt in arriving at this conclusion. He points out that "the shipowner, if liable at all under this statute, is liable to his last farthing for the whole damage, however great, and

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however small may be the value of the ship;" and, again, "before deciding that the construction of the statute is such as to work this hardship we ought to be sure that such is the construction, more particularly when the hardship affects not only one individual but a whole class;" and he adds, "after much hesitation and doubt I am not prepared to say that this judgment should be reversed." I am disposed to think that, if the noble and learned lords who decided the case of *The River Wear Commissioners* v. *Adamson* had also been called upon to decide the present case, they would have held that a shipowner was no more personally liable under sect. 56 than under sect. 74. It would have been difficult for them to hold an owner personally liable under the rather cumbrous words of sect. 56, when they had just exonerated him from such liability under the much clearer and more absolute words of sect. 74. In so holding, a consistent and workable construction is given to both sections, and none of the startling consequences, to which I have adverted at an earlier stage of my remarks, would have resulted. On the second question, as to who is the owner under the statute, I might possibly have felt some difficulty if I had come to a different conclusion on the first point. If the owner was personally liable, an attempt might be made to argue against a construction under which he would be allowed to evade his liability, after the wreck and after the obstruction, by a mere assignment. The arguments and judgments in the case of *The Earl of Eglinton* v. *Norman* are largely conversant with this question of the owner, and I think there may have been possibly some difference of opinion as to the time when he was to be ascertained with a view to the suggested liability. Sir H. James, for the plaintiff, argued that the owner at the time of the casualty was the owner under the statute, and this view was accepted by Lord Coleridge, C.J., and Bramwell, L.J. and the Master of the Rolls held that the owner was the owner at the time the wreck became an obstruction; but it is not easy to know whether there was any real difference of opinion between them and the Chief Justice. I agree with my noble and learned friends who have preceded me that the owner referred to in the section is the owner at the time the harbour master incurred the expense; and, concurring as I do generally in the arguments they have expressed in support of this conclusion, I see no good purpose in repeating or attempting to add to them. In my opinion also the judgment should be reversed.

Lord Macnaghten.—My Lords: Apart from the provisions of sect. 56 of the Harbours, Docks, and Piers Clauses Act 1847, it seems to be clear that, according to English law the owner of a shipwrecked and sunken vessel which has become an obstruction to navigation through no fault on the owner's part, and of which he has lost or relinquished the possession, management, and control, is not under any obligation to remove it, or under any liability to pay or contribute to the payment of the expenses of its removal. The subject was much discussed in an elaborate judgment by Maule, J. in the Common Pleas (*Brown* v. *Mallett*, 5 C. B. 599). The principles laid down in that judgment were approved in the Exchequer in *White* v. *Crisp* (10 Ex. 312), and those two authorities have been followed in a recent case in the Privy Council (*The Utopia*, 70 L. T. Rep. 47; (1893) A. C. 492). Maule, J. says: "Where the navigation . . . has become obstructed by a vessel which has sunk and been lost to the owner without any fault of his, the public inconvenience of the obstruction is one in respect of which the owner differs from the rest of the public only in having sustained a private calamity in addition to his share of a public inconvenience, and this difference does not appear to be any reason for throwing on him the cost of remedying or mitigating the evil. In the case of *Rex* v. *Watts* (2 Esp. N. P. C. 675) Lord Kenyon held that the owner of a ship sunk in the Thames by accident or misfortune, without his default or misconduct, was not liable to an indictment for not removing the obstruction. It was contended for the prosecution in that case, that although the defendant was not punishable for causing the nuisance, it having arisen from accident, it was his duty to remove it; but the learned judge answered that perhaps the expense of removal might have amounted to more than the whole value of the property. The same reason would apply in the case of an indictment for not giving notice by signal, or taking other means to prevent damage from a sunken vessel; the expense of doing so might, and probably would, be greater than any private benefit which the owner might derive from it; and whether it were greater or not, the reason seems to be the same for not throwing on the owner any special share in the consequence of a public misfortune with which he had no particular concern, except that it arose out of a private disaster which he had innocently suffered." Then he adds that, in the case of such impediments to navigation arising out of unavoidable accidents, "the proper rule seems to be that the expense of removing or diminishing the danger arising from them should be defrayed by those who would be benefited by such a measure." It seems to me that legislation contravening the principles and reversing the rule laid down by Maule, J. would be legislation that might be described, not inaptly, as barbarous. At the same time there would be nothing unreasonable in making the owner, whose private misfortune has caused a public nuisance pay or contribute to the expense of its removal, if and so far as he derives a benefit from the operation. With these general remarks I approach the consideration of sect. 56. The question seems to me to be this: Does that section throw upon the owner of a vessel which has become a wreck, and as such is an obstruction to navigation, the whole expense of its removal in every event and under all circumstances, or does it only throw the expense upon him if and so far as he is specially benefited by the removal? The result of the one construction, if it be admissible, would be fair and reasonable; the result of the other would be repugnant to justice, and in many cases, as Lord Ashbourne has pointed out, cruel and unreasonable in the extreme. The first observation that occurs to one is, that this section is found in a collection or group of clauses which are headed with the words: "And with respect to the appointment of harbour masters, dock masters, and pier masters, and their duties, be it enacted as follows:" "An Act so penned," says Lord Wensleydale, speaking of the Lands Clauses Consolidation Act 1845, which is framed in a similar manner, "cannot be read as a continuous enactment would be: various clauses relating to

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each separate subject are collected under various heads with an appropriate heading to each class, which must apply to the whole of that class of which it is the heading;" and he adds that the effect is the same as if the heading had been repeated at the head of each section: (*Eastern Counties, &c., Company* v. *Marriage*, 9 H. L. Cas. 32, 69.) The section, therefore must be read in connection with the general heading. So read, it purports to be concerned primarily with the duties of harbour masters, dock masters, and pier masters. That is the scope of the section, and its proper province. The general heading supplies the key to the enactment. There is no indication that the enactment was intended to effect a serious alteration in the law to the prejudice and detriment of individuals. It rather seems to be indicated that nothing more was intended than to confer upon the harbour master, acting in the public interest, power to do on behalf of the owner that which might be done by the owner himself in his own interest, with less regard, perhaps, to the interest of the public. Then the section says that the expense of removing the wreck "shall be repaid by the owner of the same." The word "repaid" again rather looks as if the framers of the enactment had in their minds repayment by one on whose behalf the operation was conducted. But that is a very slight indication of intention, because it may perhaps point to the circumstance that in the majority of cases the work would be done, not by the harbour master himself and his servants, but by persons whose trade and business it is to do such work, whom he would have to pay in the first instance. The words "shall be repaid by the owner" are the great difficulty in the case. I am unable to construe the section as confining the right of the harbour master in respect of repayment to payment out of the proceeds of the wreck: (1) Because that construction in reality gives no effect whatever to the words, "shall be repaid by the owner;" and (2) because such a construction would give an unfair advantage to the owner. An owner with a keen eye to his own interest would never think of offering repayment unless the value of the wreck greatly exceeded the cost of removal. He would wait until the harbour master puts the wreck up for sale, and then he would probably have the opportunity of buying it for an old song; at the outside the only risk he would run would be the risk of having to bear the expenses of the sale. I do not question the rule that where a new right is created and a remedy given by one and the same enactment, that remedy is the only remedy to be pursued. But I do not see how that rule can be applied to sect. 56 so as to limit the reimbursement of the harbour master to the proceeds of the sale of the wreck, because it seems to me that according to the true construction of the section, the harbour master has two remedies—a personal remedy against the owner as well as a remedy against the proceeds of the sale. I am therefore of opinion that the section does impose upon the owner of a wreck removed by the harbour master under the powers thereby conferred, the duty of paying the expenses of removal. But this does not settle the question between the parties to this litigation. In order to make anyone liable the wreck must be "removed" within the meaning of that word as used in the section; and after all the only person who can be made liable is the owner of the wreck. In the present case I do not think that there has been a removal for which anybody can be made liable; and I am further of opinion that the owners of the *Crystal* before she was wrecked are not the owners of the wreck within the meaning of sect. 56. It seems to me that the removal contemplated by sect. 56 is removal in the interest and on behalf of the owner as well as in the interest and for the benefit of the public. To entitle the harbour master to repayment under sect. 56, it is I think incumbent upon him to remove the obstruction in such a manner that at the conclusion of the operation it is substantially in the same plight and condition as it was at the commencement, or at any rate with some regard to the interest of the owner, whose interest I think the enactment meant to be regarded. What has the harbour master done here? He has "dispersed the wreck by explosives." That no doubt is a very complete and effectual sort of removal, but it is not, I think, the sort of removal which is contemplated by the section. It is to be observed that under this section the harbour master is not given power to destroy. Another statute was passed to give that power. Here there was not removal, but total destruction. Not one scrap or atom of the wreck was salved; not a single penny is brought into the account as the produce of the sale of any part of the wreck. It sounds to me like a grim joke to ask the owner, where there is an owner, to pay for the expense of annihilating his own property because he is chargeable by statute—and fairly chargeable, with the cost of its removal. Then comes the question: Are the persons who were the owners of the *Crystal* at the time of the accident which caused the wreck the owners of the wreck within the meaning of the section? I lay out of consideration what took place between the owners and the underwriters. I will deal only with what took place between the harbour authority and the owners. On the 8th Jan. 1892 the Tyne Improvement Commissioners gave notice to the owners of the *Crystal* that the vessel, which was then lying sunk at the harbour entrance, was an obstruction to navigation, and that if the obstruction was allowed to continue, they would on the expiration of seven days proceed to take possession of, remove, and, if necessary, destroy the whole of the vessel. On the 12th Jan., before the expiration of the seven days, the owners replied by letter that, the steamer being a wreck in the open sea, they had abandoned her as such, and the commissioners must look to the savings or the wreck for any outlay they might have. It appears to me, that by that letter the owners declared that they had abandoned all rights of property and given up all interest in the vessel. Thereupon I think they ceased to be owners within the meaning of sect. 56. They had lost possession of the vessel already; all that remained to them was the property in the vessel, that is to say, the right to retake or resume possession of her. This right they abandoned as plainly and unequivocally as it was possible for them to do, and they abandoned it before the commissioners began their operations or even took possession. They disowned the wreck. For the purposes of sect. 56 it is not, I think, necessary to inquire whether goods designedly abandoned by their owner under such circumstances that no wrong is done to anybody by the abandonment

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become thereupon *bona vacantia* and "derelict" in the proper sense of the word, or whether, as the author of Doctor and Student asserts, the property still remains in the owner notwithstanding the abandonment. The Commissioners appear to be in a dilemma. They have destroyed the wreck. Sect. 56 does not authorise destruction. If they take their stand on the Removal of Wrecks Act 1877, they cannot under it charge the owner with their expenses. If they do not rely on the powers of that Act their action must be attributed to the license or authority which the notice of abandonment conferred, and then their action would have the effect of divesting the owner of the *Crystal* of the property (if any) which still remained in them after their notice of abandonment. If the view which I venture to present be correct, sect. 56 is a reasonable enactment. Where the owner of the vessel which is wrecked gives the harbour authority to understand that he retains his right of property in the wreck, and they remove it so as to be in a position to return it to him substantially in the same condition in which it was when they commenced operations, they can charge him, I think, with the cost of removal, though the cost may exceed the value of the thing removed. Where he tells them plainly that he has abandoned the wreck, they may deal with it as they please, without regard to him; but they cannot make him liable for their expenditure. The defects, such as they were, in sect. 56 are remedied by the Removal of Wrecks Act 1877. Under that Act the harbour authorities may destroy the wreck if they think fit, although there be an owner claiming an interest in it, and they may do the work of destruction without regard to the owner's interest. I am unable to agree with the decision of the Court of Appeal in the *Earl of Eglinton* v. *Norman*, and I am of opinion that the judgment of the Court of Appeal which is founded upon it should be reversed, and the action dismissed with costs.

Lord MORRIS,—My Lords: I concur in the judgment proposed. The facts of this case have been so fully stated by your Lordships who have preceded me, that it is quite unnecessary that I should repeat them. The defendants are under no common law liability of any kind. Their liability is the subject of express enactment: 10 & 11 Vic. c. 27, s. 56. enacts: [reads it:] Does that enactment make the defendants liable for the expenses of removing the wreck under the circumstances of this case? I am of opinion that it does not. It appears to me that it is only in the case of an owner—that is, of a person remaining in the position of owner, and in possession of the wreck—that any personal liability would attach to him; that if he abandon the wreck, or if the harbour authority take possession of the wreck and sell, the person who had been owner remains so no longer, except for the purpose of getting any surplus over the expenses out of the proceeds of the sale by the harbour authority, and incurs no personal liability. If the harbour authority did not arrest and detain the offending obstruction (in this case the wreck), and supposing that the owner remains owner, it may be that he would be liable, as he chooses to keep the offending obstruction; and consequently should be held liable to pay the expense of the removal of what he keeps as his property; but when he has informed the harbour authority that he disclaimed any property in the wreck, the only remedy for the harbour authority is to sell the wreck. The ordinary relation of debtor and creditor, from which an obligation to pay on request would be implied, is not created. The owner is in no default by himself or his servants; he abandons the property in the wreck, whereupon it becomes the subject which is to pay for the expense of its removal. The final clause of the section, while providing for the return of overplus, if any, does not proceed to say that any deficiency is to be made up by the owner. Where an action is intended, or distress intended to be empowered, the action or distress is directly given, as in sects. 43, 44, and 45.

Judgment appealed from reversed, and judgment entered for the defendants with costs.

Solicitors for the appellants, *T. Cooper* and *Co.*

Solicitors for the respondent, *Maples, Teesdale*, and *Co.*, for *Lietch, Dodd, Bramwell*, and *Bell*, Newcastle-on-Tyne.

Judicial Committee of the Privy Council.

July 13 *and* 28.

(Present: The Right Hons. Lords WATSON, HOBHOUSE, MACNAGHTEN, MORRIS, AND SHAND, and Sir R. COUCH.)

DÉCHÈNE v. CITY OF MONTREAL. (a)

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA.

Law of Lower Canada—Procedure—Non-judicial day—Expiration of time—Code of Civil Procedure, art. 3—49 *&* 50 *Vict. c.* 95 (*Quebec*), *s.* 20—42 *&* 43 *Vict. c.* 53 (*Quebec*), *s.* 12.

By the Canadian Code of Civil Procedure, art. 3. *it is provided that, "if the day on which anything is to be done in pursuance of the law is a non-judicial day, such thing may be done with like effect on the following day."*

By the Declaratory Act 49 *&* 50 *Vict. c.* 95 (*Quebec*) *sect.* 20, *"If the day fixed for any proceedings, or for the doing of anything, expires on a non-juridical day, such delay is prolonged till the next following juridical day.*

Held, that these provisions relate to matters of procedure only, and to things which the law directs to be done by either of the parties in the course of a suit, and not to the title or want of title in the plaintiff to institute and maintain it: and therefore where a statute (42 *&* 43 *Vict. c.* 53 (*Quebec*) *sect.* 12) *provided that proceedings of the respondent corporation might be questioned on the ground of illegality by a petition presented to the superior court within three months, and the last day of the three months was a non-judicial day, the time for presenting such petition was not extended to the following day.*

Judgment of the court below affirmed.

Semble, *that, though an incompetent resolution must be illegal, it does not follow that an illegal resolution is necessarily incompetent.*

THIS was an appeal from the judgment of the Court of Queen's Bench for Lower Canada, dated the 8th June 1892, affirming by the unanimous judgment of five judges a judgment of De Lorimier, J.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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The question arose upon a petition presented by the appellant under a statute of Quebec, 42 & 43 Vict., c. 53, s. 12, and the point at issue was whether such petition was presented within the prescribed time. The section in question is in the following terms:

Any municipal elector in his own name may, by a petition presented to the superior court sitting in the district of Montreal, demand and obtain on the ground of illegality the annulment of any bye-law, resolution, assessment roll, or apportionment, with costs against the corporation, but the right of demanding such annulment is prescribed by three months from the date of the coming into force of such bye-law, resolution, assessment roll, or apportionment, and after that delay every such bye-law, resolution, assessment roll, or apportionment shall be considered valid and binding for all legal purposes whatsoever, provided that it be within the competence of the said corporation.

By an Act passed more than three years after the presentation of the petition now in question, namely on the 21st March 1889, the period of three months mentioned in the above section was extended to six months, 52 Vict. c. 79, sect. 144 (Statutes of Quebec).

On the 29th March 1886 the municipal council of the city of Montreal passed a resolution affirming amongst other things the expenditure of a sum of 1,922,173 dols. for the municipal expenses of the city for the year 1886.

The three months prescribed for the presentation of a petition by a municipal elector against such resolution expired on the 29th June 1886. The appellant, who was a municipal elector, took no steps to question the resolution during that period, but on the 30th June 1886 he produced at the registry of the superior court of the district a petition upon which was inscribed a notice that the same would be presented to such court upon the 1st Sept. 1886, and he afterwards on the same day left a copy of this petition containing such notice with the prothonotary of the respondents, and also with certain of the councillors named therein, and produced to them respectively the original. He took no further steps whatever until the 1st Sept. 1886 when he presented the petition to the court.

Upon the merits the substantial question between the parties appeared to be whether the council were justified in including in the budget for the year a sum of 136,000 dols., by which the same was in excess of the prescribed limit of expenditure for expenses incurred by them in combating a virulent epidemic of small-pox which had broken out within the municipality. The regulation of the budget of the municipality is vested in the council, but the yearly sum which they are entitled to appropriate thereto is limited to an amount not exceeding the receipts of the previous year added to the balance of such receipts which remained unexpended, but the limit may be exceeded in case of urgent necessity.

The respondents, however, in addition to contesting upon the merits the allegations in the petition, raised with reference to it the contention that the appellant's remedy by petition was under the section above mentioned barred by effluxion of time. The appellant, on the other hand, contended (1) that, inasmuch as the 29th June 1886 was a legal holiday, being the feast of St. Peter and St. Paul, the period of three months in the section mentioned was extended until the succeeding day, the 30th June 1886; (2) that the acts done by him on the said 30th June 1886, as hereinbefore mentioned, constituted a compliance with the section. He subsequently on appeal raised, in addition, the further points (namely): (3) that the three months' limitation did not apply in cases in which the resolution was beyond the competence of the council, and that it was so in the case in question; (4) that he was entitled to the benefit of the Act subsequently passed in 1889, which extended the period for presenting the petition to six months. The respondents contested each of these propositions. The statutory provisions which the appellant relied on in support of his first contention were the 3rd article of the Code of Civil Procedure and the 20th article of the Revised Statutes of Quebec, which last-mentioned article by the first article of the same statutes is stated to be applicable to all statutes of the legislature of the province, except in so far as such application might be inconsistent with the object, the context, or any of the provisions of such statutes. These provisions are as follows:—

Article 3 of the Code of Civil Procedure:

If the day on which anything ought to be done in pursuance of the law is a non-juridical day, such thing may be done with like effect on the next following juridical day.

Article 20 of the Revised Statutes of Quebec:

If the delay fixed for any proceeding or for the doing of anything expires on a non-juridical day, such delay is prolonged until the next following juridical day.

The parties proceeded to *enquête* on the merits, but subsequently agreed that the preliminary question above mentioned should be dealt with in the first instance, and it was accordingly argued before De Lorimier, J., who on the 21st Nov. 1890 decided in favour of the respondents' contention.

The appellant appealed to the Court of Queen's Bench for Lower Canada, and the appeal came on for hearing before Sir Alexander La Coste, C. J., Bossé, Blanchet, Hall, and Würtele, JJ., who on the 8th June 1892 unanimously dismissed the appeal. The reasoning of the learned judges proceeds on the assumption (but without deciding) that the acts done by the appellant upon the 30th June 1886 would have been a sufficient compliance with the section if done within the prescribed time. They held, however, that the statutory provisions above referred to with regard to legal holidays had reference to matters of procedure only, that the expiration of the three months operated by way of forfeiture (*dechéance*) of the appellant's right to present a petition that the case was governed by the rules applicable to prescriptive rights, and that numerous authorities in French law, which they cited, established that the fact that the last day for defeating the acquisition of a prescriptive right was a legal holiday did not extend the time for doing so until the following day. They further held that the enlargement by a subsequent statute of the period for petitioning could not apply to a case when the period fixed for petitioning under the original statute had already expired, and that the resolution of the council, if illegal, was not incompetent within the meaning of the proviso.

Bompas, Q.C. and *Barnard* Q.C. (of the Canadian Bar) appeared for the appellant.

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Fullarton, Q.C. and *Gore*, who appeared for the respondents, were not called upon to address their Lordships.

At the conclusion of the argument for the appellant, their Lordships took time to consider their judgment.

July 28.—Their Lordships' judgment was delivered by

Lord WATSON.—The respondent corporation are authorised by sect. 101 of 37 Vict. (Quebec), c. 51, to make an annual appropriation for the amounts necessary to meet the expenses of municipal administration during the current year. By the same clause it is enacted that "such appropriation shall never exceed the amount of the receipts from the preceding year added to the balance of the said receipts which have not been expended." Sect. 12 of the Quebec statute (42 & 43 Vict. c. 53) provides that "any municipal elector in his own name may by a petition presented to the Superior Court sitting in the district of Montreal demand and obtain, on the ground of illegality, the annulment of any bye-law, resolution, assessment roll, or apportionment, with costs against the corporation; but the right of demanding such annulment is prescribed by three months from the date of the coming into force of such bye-law, resolution, assessment roll, or apportionment, and after that delay every such bye-law, resolution, assessment roll, or apportionment shall be considered valid and binding for all legal purposes whatsoever, provided that it be within the competence of the said corporation." The effect of these provisions, taken by themselves, appears to their Lordships to be plain and free from ambiguity. They confer upon each and every municipal elector the right, which he had not at common law, to challenge, on the score of illegality, any corporate appropriation of money to meet the expenses of the current year, subject to the condition that the right shall prescribe, if not exercised within three months from the time when the appropriation came into force. They also confer upon the corporation an absolute immunity from liability to have the legality of the appropriation questioned, at the instance of any person whatsoever, after the lapse of those three months. But they do not interfere with any right existing by law to impeach the appropriation after the expiration of the three months, upon the ground that it was beyond the competence of the corporation. On the 29th March 1886 the respondents passed a bye-law or resolution, which became immediately operative, appropriating the sum of 1,922,173 dols. to the expenses of the current year. Upon the 30th June 1886, the day after the period of three months expired, the appellant, who is a municipal elector of the city of Montreal, presented a petition to the court praying for annulment of the appropriation to the extent of 136,000 dols. 36 cents, which sum was alleged to be in excess of the limit prescribed by the Act 37 Vict. c. 51. The last day of the three months was the feast of St. Peter and St. Paul, which, by sect. 2 of the Civil Procedure Code, is declared to be non-juridical. In defence the respondents, whilst disputing the allegations upon which the petition was founded, pleaded that it was out of time. The parties arranged that before entering into the merits of the case the judgment of the Court should be taken upon that plea, and that for the purpose of raising the plea it should be assumed that in making the appropriation the corporation had exceeded the limit of their statutory power by the sum of 136,000 dols. 36 cents. Mr. Justice De Lorimier, in the court of first instance, sustained the plea and dismissed the petition. On appeal his decision was unanimously affirmed by five learned judges of the Court of Queen's Bench. The arguments submitted by the appellant to the Court of Queen's Bench are summarised in the case which he laid before the board, to which it may be convenient to refer. As therein stated, he pleaded "(1) That the resolution complained of was not within the competence of the municipal council. (2) That the question of the delay within which the petition could be presented was one of civil procedure. (3) That the law making valid an act done on the next juridical day, where the last day on which it could be otherwise done was a holiday, applied in all cases, and not only in matters of civil procedure. (4) That the Act extending the time for presenting a petition to six months applied to the present case." Those pleas cover the whole points which were discussed in the lengthened argument addressed to their Lordships in support of the appeal. The second and third of them are the only pleas which can be regarded as having any substance, or any relevancy to the preliminary question of title which the parties agreed to try before the facts were investigated. To begin with the first of those pleas, it is true that an incompetent resolution must be illegal; but it does not follow that an illegal resolution must be beyond the competence of the council. In this case, the resolution sought to be impeached was plainly within their competence, seeing that it exclusively related to matters committed to the council by statute. Even if it had been incompetent, that circumstance could not enable the appellant to bring a petition for its annulment after the expiration of the three months. After the lapse of that period the right conferred upon a municipal elector by 42 & 43 Vict. c. 53, sect. 12, is at an end, though the incompetent resolution remains open to challenge at the instance of persons who have a proper title. The fourth plea is to the effect that the time allowed to the appellant for bringing the suit, by 42 & 43 Vict. c. 53, was enlarged to six months by the Quebec Act, 52 Vict. c. 79, sect. 144. The plea is sufficiently refuted by stating two facts. The three months allowed to the appellant ran out, according to his own contention, upon the 30th June 1886. The Act upon which the plea was founded was passed about two years after that date. The second and third pleas may be treated as one. They were meant to express the proposition that, by the law of the Province of Quebec, June 29, 1886, being a non-juridical day, the three months period was extended to the next day, which was juridical. The appellant maintained that the right given to him by the 12th section of 42 & 43 Vict., c. 53, was substantially a matter of procedure, and, in the event of its being held otherwise, that the same rule which obtained in matters of procedure had been extended by statute to the time limited for the prescription of any right of action. The respondents did not dispute that when an action was depending the rule on which the appellant relied was applicable to proceedings in the litigation, but they maintained that the statutory title of

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the appellant to petition the court and their own statutory immunity which arose immediately upon the cesser of his title, were matters of right and not of procedure, and that the prescription by which his title was cut off and their immunity established, is regulated by the provisions of the civil code. The rule for which the appellant contended is to be found in sect. 3 of the Code of Civil Procedure, which enacts as follows:—If the day on which anything ought to be done in pursuance of the law is a non-juridical day, such things may be done with like effect on the next following juridical day." In the opinion of their Lordships, that enactment refers exclusively to things which the law has directed to be done either by the plaintiff or the defendant in the course of a suit, and had no reference to the title or want of title in the plaintiff to institute and maintain it. The enactment on which the appellant chiefly relied was sect. 20 of the Quebec statute 49 & 50 Vict. c. 95. The statute did not become law until the 25th Aug. 1886, nearly two months after the present petition was brought, but was said to be declaratory. Sect. 20 is in these terms: "If the delay fixed for any proceeding or for the doing of anything expires on a non-juridical day, such delay is prolonged until the next following juridical day." The section appears to their Lordships to be essentially a procedure clause, and to be, in substance, a re-enactment of sect. 3 of the Code of Civil Procedure. Its language is not calculated to suggest that a claimant may bring an action for recovery of land, after the period of limitation has run, if he can show that the last day or days of that period were non-juridical, and that his claim was preferred upon the first juridical day after its expiration. Yet that would be the logical result of giving effect to the argument of the appellant. Their Lordships are satisfied that no question of procedure is raised by the circumstances of the present case, and they are also of opinion that sect. 12 of 42 & 43 Vict. c. 53, is not controlled either by the Code of Civil Procedure or by sect. 20 of the Act 49 & 50 Vict. c. 95. The latter clause is qualified by sect, 1 of the same Act, which provides that the enactments which it contains, including sect. 20, though otherwise applicable, should have no effect against any other statute, in so far as they may be inconsistent with the object, the context, or any of the provisions of such statute. Even if sect. 20 were *primâ facie* applicable to the present case. their Lordships venture to doubt whether, having regard to that reservation, it could be permitted to control the plain intention of the Legislature as expressed in the clause which gives a right of challenge to the appellant; but in the view which they take it is unnecessary to decide that question, Their Lordships have to express their concurrence in the reasons rendered by the learned judges in both courts below. They will humbly advise Her Majesty to affirm the judgments appealed from, and to dismiss the appeal, the costs of which must be borne by the appellant.

Solicitors for the appellant, *Carr* and *Martin*.

Solicitors for the respondents, *Wilde*, *Berger*, and *Moore*.

July 3, 4, 5, *and* 28.

(Present: The Right Hons. the EARL of SELBORNE, Lords WATSON, HOBHOUSE, MACNAGHTEN, MORRIS, and SHAND, and Sir R. COUCH.)

HIRSCHE AND OTHERS *v.* SIMS AND OTHERS. (*a*)

ON APPEAL FROM THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

Company — Liability of directors — Agreement made bonâ fide *but* ultra vires—*Measure of damages—Market price of shares.*

Where the directors of a company made an agreement for the sale of shares, which was in fact partially ultra vires, *but was made* bonâ fide, *in the honest and reasonable belief that it was for the interest of the company, they cannot be charged with* dolus malus *or fraud merely because the effect of the transaction was to cause a rise in the shares of the company, which enabled them to sell shares of their own at prices which gave them large profits; and the proper measure of damages in an action brought by shareholders against the directors in respect of the transaction is the value of the shares to the company if the agreement had not been made. A subsequent market price, due to the influence upon a market, fluctuating from day to day, of the impugned transaction itself, is not the proper measure of what might have been realised from the shares if no such transaction had taken place.*

Judgment of the court below reversed.

McKay's case (33 *L. T. Rep.* 517; 2 *Ch. Div.* 1); *and* Weston's case (40 *L. T. Rep.* 43; 10 *Ch. Div.* 589) *distinguished.*

THIS was an appeal from a judgment of the Supreme Court of the Cape of Good Hope (De Villiers, C.J., Buchanan and Upington, JJ.), who had reversed a judgment of the High Court of Griqualand (Laurence, J. president, and Solomon, J.), in an action brought by the respondents against the appellants.

The respondents were the trustees of the Orange River Asbestos and Land Company Limited, and the appellants were three of the directors of the company.

The facts out of which the litigation arose appear very fully from the judgment of their Lordships.

The *Attorney - General* (Sir J. Rigby, Q.C.), *Finlay*, Q.C., and *C. E. E. Jenkins* appeared for the appellants.

Sir *E. Clarke*, Q.C., *Cozens-Hardy*, Q.C., and *H. Dobb* for the respondents.

The following authorities were cited in the course of the arguments, which turned to a great extent upon the effect of the evidence:

Eden v. *Ridsdale's Railway Lamp Company*, 61 L. T. Rep. 444; 23 Q. B. Div. 368;
Weston's case, 40 L. T. Rep. 43; 10 Ch. Div. 579;
McKay's case, 33 L. T. Rep. 517; 2 Ch. Div. 1;
Nant-y-Glo Iron Works Company v. *Grove*, 38 L. T. Rep. 345; 12 Ch. Div. 738;
Clay v. *Rufford*, 5 De G. & Sm. 768;
Oceanic Steam Navigation Company v. *Sutherberry*, 43 L. T. Rep. 743; 16 Ch. Div. 236.

Finlay, Q.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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July 28.—Their Lordships' judgment was delivered by

The EARL of SELBORNE.—This action was brought in Dec. 1891 by the respondents, as trustees for the Orange River Asbestos and Land Company Limited, a company established at Kimberley, in South Africa, and registered under that name on the 16th Dec. 1889, against the appellant and two others, Voelklein and Haarhoff, who had been directors of the Griqualand West Copper and Mineral Mining Syndicate Limited, under which name the business of the plaintiffs' company was carried on from the 5th Feb. 1889 to the end of that year. The principal ground on which relief is sought against the appellants is set forth in paragraphs 9 to 12 of the plaintiffs' declaration, which are as follows: "The plaintiffs further say that on or about the 8th Aug. 1889, when the said company carried on business as the Griqualand West Copper and Mineral Mining Syndicate Limited, the defendants, as such directors as aforesaid, engaged the services of one Francis Oats to report on the farm Zoetvlei, the property of the said syndicate, for which report the defendants promised to give the said Oats the option of purchasing at par 10,000 reserved shares of the said syndicate of the nominal value of 1*l.* each, such option to expire on the 23rd Aug. 1889, and further promised that in the event of the said Oats purchasing the said 10,000 shares, the defendants would pay him 1000*l.* The said Oats inspected the said farm Zoetvlei, and reported favourably but incorrectly thereon to the defendants on the 19th Aug. 1889, and on the 23rd Aug., in pursuance of the aforesaid agreement, the defendants delivered to the said Oats 10,000 shares of the syndicate, which were then of the value of 48*s.* 6*d.* per share, and paid him the sum of 1000*l.* The aforesaid contract between the defendants and the said Oats, under which the said shares were delivered to the said Oats, was wrongful, unlawful, and fraudulent, and was made by the defendants not in the interests of the said syndicate, but to induce the said Oats to make a favourable report on the said farm, so that the shares of the said syndicate might rise in value, and enable the defendants, who were large shareholders in the said syndicate, to benefit themselves thereby. The plaintiffs submit that the delivery of the said 10,000 shares, the property of the said syndicate, by the defendants to the said Oats, was wrongful, unlawful, and fraudulent, and that the plaintiff company is entitled to recover from the defendants the difference between the value of the said shares on the 23rd Aug. 1889, to wit, 24,250*l.*, and the amount received for them from the said Oats, to wit, 10,000*l.*, such difference being 14,250*l.* The plaintiffs further submit that they are also entitled to recover the sum of 1000*l.* from the defendants." There were some other matters, in respect of which relief was not obtained; of those no notice need be taken. The High Court of Griqualand, on the 15th Dec. 1892, gave relief to the extent of holding the appellants liable for 1000*l.*, the difference between the par value of the shares taken by Francis Oats and the sum of 9000*l.* paid by him to the company; Laurence, J., President of that court, thinking that there was no "clear proof either of fraud as against the company in the agreement with Oats, or of resulting damage to the company." Solomon, J., the other judge, also held that the charge of fraud was not proved, but thinking that the defendants, as directors, were not justified in the delivery of the shares to Oats on the 23rd Aug. 1889, and that the proper measure of damages was the price of the company's shares on that day, as quoted in the Kimberley share market, he would have given judgment against the appellants for 11,875*l.* In the Court of Appeal (the Supreme Court of the Cape of Good Hope) a case of fraud was held to be established, and judgment was given against the appellants on the 2nd March 1893 for 10,875*l.*, which sum the plaintiffs declared their willingness to accept, although (but for that concession) the court would have given them 14,250*l.*, the amount claimed in their declaration. Their Lordships are of opinion that the appellants were properly held liable in the High Court of Griqualand for the difference between 9000*l.* and the par value of the shares, and that the real question upon the present appeal is whether they ought to be held liable for more. The bargain with Francis Oats is admitted to have been that he should have the option for a fortnight, in consideration of the service he was to render, of taking the 10,000 shares in question at a discount of 10 per cent., though the lawyers who drew up the agreement of the 8th Aug. thought it prudent to give it the form which it there assumed. It was not, in their Lordships' opinion, competent for the directors to issue those shares at a discount so as to make the holder liable for less than their full amount. Oats received certificates for the 10,000 shares as fully paid up, and on the faith of those certificates all those shares afterwards passed into the hands of *bonâ fide* purchasers from him (or from his agent and partner Hinrichsen) as against whom the company was estopped from saying they were not fully paid up. In these circumstances (unless the larger claim has been made out), the appellants, as directors who issued those shares, are, in their Lordships' opinion, answerable for the difference between the 9000*l.* paid and the par value. The question whether the company is entitled to the larger relief given by the Court of Appeal depends on particular facts, and the inferences proper to be drawn from them. The plaintiffs have been content to rely on the statements (chiefly on cross-examination) of the defendants themselves and of Oats and Hinrichsen, and on the documents filed in the cause. They have sought no relief against Oats or Hinrichsen in this action or otherwise. The company, under its original name, was registered on the 1st Feb. 1889, and had, before July in that year, acquired certain properties, which do not appear to have been profitable. Its nominal capital was 80,000 shares of 1*l.* each, of which all but 15,000 were either taken by the promoters or issued to the public, 15,000 being reserved for future allotment. No dividend was ever paid, and the only market for the shares (now valueless) appears to have been at Kimberley, a small place, which, in consequence chiefly of the neighbourhood of diamond fields and gold fields, was the centre of various speculative undertakings. One of the exhibits in the cause, much relied upon by the respondents, is a certified extract from the books of the Kimberley Share Dealers and Brokers Association, showing "all the official Stock Exchange quotations relating to the dealings in the shares of the Griqualand West Copper and Mineral Company, Limited between

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July 1 and Oct. 30, 1889," by which it appears that in that market there were no actual sales of those shares during July, except at a discount of fifty per cent. or more, and that the August quotations down to the 8th were very little higher, without any actual sale at more than 12*s.* per share. On the 8th Aug. the morning quotation was 14*s.*, that in the afternoon 18*s.*, at which prices there were some actual sales. The rise went on by rapid steps till the 22nd Aug. when the price of 50*s.* 6*d.* was reached; afterwards there was a gradual decline, beginning with 48*s.* 6*d.* on the 23rd Aug., but the shares continued above par till the end of October. There is some danger, even in a court of justice, of the mind being too much affected by the unfavourable impression produced by an atmosphere of speculation such as that which prevailed at Kimberley in 1889, of which the influence on all the parties to the transaction in question (unless Mr. Weingarten be an exception) is sufficiently manifest. For that as well as other reasons their Lordships thought it their duty to examine closely the evidence on which their judgment ought to depend. The purchase of the Zoetvlei farm, between 120 and 150 miles from Kimberley, by the company from two of the defendants, Hirsche and Weingarten, and certain other persons, was the cause which gave occasion for the agreement with Oats of Aug. 8, 1889. It was made about the middle of July 1889, and was ratified at the same time with that agreement by the board of directors on Aug. 21. Its good faith and validity have not been impeached, except by questions addressed to some of the defendants in the suit on cross-examination. Their Lordships see no reason to doubt that that purchase was made under a *bonâ fide* belief that it would be profitable to the company. The farm had been acquired by the vendors in 1888 from an insurance company at the Cape for 4500*l.*; and something more was afterwards spent by them on it. The Griqualand Company took it over as at cost price, with a stipulation for a further payment to the vendors out of profits, if made. It contained a large deposit of the mineral called asbestos, which, if suitable in quality to the English or European markets, might have proved very valuable. Some samples, obtained near the surface, had been sent in 1888 to Hamburg and to London, and had been condemned as too brittle for those markets. But to the London opinions upon them it was added that it was consistent with experience that the quality might improve as the workings got deeper; and of other samples which were sent to Cardiff in May 1889 a very favourable opinion was given. Mr. Francis Oats was a mining engineer, well known at Kimberley, who had held important appointments and stood high in his profession; a man of substance, and in all respects of good reputation; not, indeed, qualified as an expert to pronounce upon the commercial value of the mineral, but a man whose report upon it, as a mining engineer, might be trustworthy and valuable. The agreement with him was that he should go to Zoetvlei and report upon it; and that, for that consideration, he should have, for a fortnight reckoned from Aug. 9, 1889, the option of taking 10,000 of the company's reserved shares at 2*s.* less than the par value, being 4*s.* more than the highest price at which they had until then been quoted. To allow that time was not, in the opinion of their Lordships, unreasonable or beyond the power of the directors, if acting in good faith. If, on the other hand, the intention was (as alleged by the plaintiffs) to bribe Oats to make a favourable report, the givers and the receiver of such a bribe would be equally culpable, and a remedy might have been sought against Oats as well as the directors. But, although Oats was a man of substance and had made a large profit by selling the shares, no proceeding has been taken against him. The *bona fides* of his report, as made on the 19th Aug. has not been seriously (if at all) called into question. In those circumstances their Lordships cannot presume bad faith, without cogent proof, against a man not called upon to defend himself, and they think that the onus of proving it against the directors who made or who ratified the agreement must be satisfied in some other way than by mere inference from the terms of the agreement itself, though they do not approve of the form which it was made to assume. The plaintiff's case was that in making that agreement on the 8th Aug. the defendants acted with a view only to their own interest as shareholders desirous of making a profit out of their shares, and not with a view to the interest of the company. Of that case there is no direct evidence. It is denied positively on oath by all the defendants who took part in negotiating the agreement, and the question is whether facts have been proved from which, notwithstanding that denial, it ought to be inferred. If the true effect of the whole evidence is that the defendants truly and reasonably believed at the time that what they did was for the interest of the company. they were not chargeable with *dolus malus* or breach of trust merely because in promoting the interest of the company they were also promoting their own, or because they afterwards sold shares at prices which gave them large profits. Mr. Oats and his attorney (and partner in the profit derived from the transaction), Mr. Hinrichsen, though not defendants, were witnesses in the cause, and they were not cross-examined as if their credit was meant to be called in question. To their evidence their Lordships will first refer, premising that the negotiation with Oats was throughout conducted and concluded by the defendant Hirsche, on behalf of himself and his co-directors, King and Voelklein. They were consenting parties to the agreement; and all three afterwards concurred with Weingarten (who lived at some distance) in ratifying it at the board meeting of the 21st Aug., and in authorising the delivery of the 10,000 shares. That the company, after completing the purchase of Zoetvlei, had not more than 2000*l.* or 3000*l.* left available for working the asbestos, or for their other operations, is a fact not in controversy. Oats's account of the matter was that when it was first proposed to him that he should visit Zoetvlei and report on the mineral deposit, he said "It was an awkward place to go to, and, having no interest in the company, I should expect to be well paid;" to which the reply was that "they were short of funds;" and that he then himself made the suggestion that "they might compensate me by giving me the refusal of an interest." "I suggested," he says, "the refusal of a small interest at market rates. They insisted on my taking a refusal of not less than 10,000, if any." And, on cross-examination, "I did not think it a very good bargain when I made

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it. Thought the odds were against my exercising the option." He denied that any inducement was held out to him to report favourably, and said that his report "was simply based on what he saw, and made for no ulterior motive." As to the state of the market, and the sales made for him by Hinrichsen during his absence from Kimberley, he said that "when the discussion began the shares were at 11*s*. or 12*s*. They had begun to rise and went on rising during discussion." Hinrichsen sold about 7000 of them; he thought, mostly to King; they were "not worth keeping at the price they went to; . . . the rest of my shares were then placed in the pool. I think I arranged with Hinrichsen to sell at 25*s*." Hinrichsen said that Oats did not consult him about the arrangement with the company, but only told him about it afterwards. While Oats was away no communication between them took place, or was possible. "He told me I should do the best for his interest in his absence; it was at my suggestion that he gave me these instructions. The shares went up rapidly. I signified to the directors he would exercise the option while he was absent, about a week after his departure. I sold most of the shares, these very shares, about this time at 35*s*. The shares rose from the 8th to, say, the 16th, and by that time I had sold pretty well half of the 10,000 shares. I subsequently sold about 1500 more, and the rest I pooled with Mr. King. I sold the shares openly in the market; everyone knew they were Oats's shares. It did not strike me that his selling would create suspicion in the minds of the public. I should say Mr. Oats made between 6000*l*. and 7000*l*. profit out of the sale transaction of the shares. This would be including the 1000*l*." That estimate must represent the whole profit made by the sale of the 10,000 shares, and not merely Oats's portion of it as between himself and Hinrichsen; about half of them (according to the same evidence) having been sold at 35*s*., and 3,000, or more, having been "pooled" after the market began to decline. If the "pooled" shares were sold after the 16th Sept. (as might be inferred from Weingarten's statement that he received what was due to him from the produce of the "pool" in October), they realised less than 35*s*. per share. It would not be safe to draw conclusions from Oats's impression (which was not corroborated by other evidence), that most of the shares sold by Hinrichsen before "pooling" the rest were purchased by the defendant King. Nor do their Lordships think that any inference, unfavourable to the parties concerned, ought to be drawn from the fact that the certificates for the 10,000 shares, which were originally prepared in the name of Oats, were issued in that of Hinrichsen. It seems obvious that the relations between Oats and Hinrichsen, and the frequent and necessary absence of Oats from Kimberley (he said he was there only for a day or two after his return from Zoetvlei), might have made that convenient, and, if Hinrichsen spoke truth, there was no disguise about the fact that the shares sold by Hinrichsen belonged to Oats. The evidence of those witnesses does not appear to their Lordships to be wanting in candour; and they see no reason to disbelieve it. It is confirmed in all the material points which must have been matter of common knowledge to Oats and the defendants, by what the defendants say. It might at first sight seem that the instructions given by Oats to Hinrichsen as to selling, if the market price should reach 25*s*., ought to discredit his statement that he thought "the odds were against" his "exercising the option." But such a contingency might be provided for, without an expectation that it would happen. The defendants King and Hirsche both said, in effect, that such a rise as took place after the 8th of Aug. could not at that time reasonably have been anticipated, and they referred to their own acts as showing that they did not expect it. King says that he sold some thousands of shares at about 15*s*.; and Hirsche, that he accompanied Oats to Zoetvlei without leaving any instructions as to his shares. It was with Hirsche alone that Oats had any direct communication, and whatever profit Hirsche might have made out of the shares which he sold, he was at all events in no haste to sell, and both he and King and Weingarten retained to the last a large number of shares unsold. Hirsche had in his name from the commencement of the company's operations a great many shares, of which he said that the chief part belonged to or were distributed by him amongst other persons, and that he retained at his own disposal about 8900, of which only one-fourth were his own, and that of these 8900 he still held about four-fifths when his evidence was given. His share accounts, extracted from the company's registers, were in evidence; they showed that between the end of July and the end of September 1889 he sold only 2050 shares, and of those only 325 in Aug., and that at the end of that year 20,528 shares remained in his name, out of which (about 850 having been acquired by purchase in December), 6198 remained when the company was reconstituted under its new name, and he then increased his interest, and in April 1892 held 11,819 shares. As to the *bona fides* of the agreement with Oats, Hirsche said: "I decidedly considered that this arrangement with Oats was in the interest of the company. I thought that if he reported favourably he would exercise his option, and the company would get 9000*l*., which would materially strengthen its financial position and enable it to work on a larger scale, while if he reported unfavourably the company would be no loser. I had no conversation with Oats during the journey either to or from the farm as to his report upon the prospecting, and did not influence him in any way. Apart from the special agreement with Oats, I should have considered the bargain with him good business in the financial position of the company" (meaning, as he explained in answer to a question by the Court, "in connection with getting this report, and not independently of it") . . . "I do not now consider this was a most imprudent contract; would make a similar one again." Those statements of Hirsche are corroborated by those of the defendants King and Voelklein, which were equally strong and distinct. Hirsche was in frequent communication with King; Voelklein was ill at the time, but was kept informed by King of what was going on. Those witnesses were severely cross-examined as to their own speculations, and as to certain combinations or syndicates to "protect the market," begun very soon after the company was formed, and continued till it changed its name or later; to which, as to "pooling," when the market fell in Sept. 1889

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Oats and Weingarten became parties. King, though he sold most of his shares, retained to the end a great many; not less (as appeared from the extracts from the share registers) than 4780. Voelklein was a dealer in shares, and had a large interest in the company, and admitted that he "jobbed, bought, and sold." The particulars of his dealings, and how many shares he retained unsold, do not appear; nor do the particulars of the operations, in Aug. or Sept. 1889, of the "protecting" syndicate or of King; they do not seem to have been asked for. Whatever suspicion those dealings might have justified, if the evidence of those two defendants had stood alone, it does not stand alone; and there is no counter evidence on the main point as to the good faith of the agreement with Oats. Weingarten stood in a more favourable position. He was one of the vendors of Zoetvlei of the minerals on which he had formed a hopeful opinion. He lived and carried on business in Griquatown, at some distance from Kimberley, and said he had nothing to do with the share market. Of the arrangement with Oats he knew nothing till after it was concluded; he was first informed of it when Oats and Hirsche passed through Griquatown on their way back from Zoetvlei. He approved of it. and was afterwards present at the meeting of the 23rd Aug. when it was confirmed. He was not a director of any other company besides those syndicates; he "pooled" some of his shares, and in Oct. 1889 received from Hirsche as his quota of the produce of the pool 3000*l*. When examined he still held about 5000 shares. So far as probabilities go their Lordships cannot say that they are opposed to the statements of the defendants that, in making the agreement with Oats, they acted in good faith and believed they were doing the best for the company's interest. Their Lordships think that as things stood on the 8th Aug. they might reasonably entertain that belief, and that if they did so no *dolus malus* ought to be imputed to them because they afterwards confirmed and acted upon that agreement, the market for shares having in the meantime risen. The company beyond question wanted money, and it does not appear to their Lordships that there was any probability on the 8th Aug. of its being obtained by any attempt to dispose of the reserved shares in any other manner on better terms or with more prospect of advantage to the undertaking. It is impossible on the evidence to say that there was not at that time reasonable ground for believing the asbestos to be valuable. The character and reputed means of Oats might well be thought likely, if he took the shares, to add strength to the company; even the knowledge that such a man was consulted, and had agreed to view the property and report upon it, stipulating for a fortnight's option to take 10,000 shares, might create confidence in and add to the credit of the undertaking (as it would appear by some passages in the evidence to have actually done), though the rapidity with which that effect would be produced might not have been foreseen. On the other hand, if those 10,000 shares had been at that time thrown upon the market by the directors themselves (and whatever was done was sure to be known in the share market of such a place as Kimberley), without anything else being done to strengthen the company's position, the effect might very probably have been to depress, instead of raising, the market; and no purchasers might have been found for so large a number of shares at 18*s*., much less above par value. Nor is that a mere speculative opinion; the weight of evidence appears to their Lordships to be in favour of the conclusion that the price of those shares would never have gone up as it did if the agreement with Oats had not been made, though the upward tendency of the general share market at Kimberley and the operations of some speculators might have contributed to it, as the defendant King said they did. But King had said just before, "To the best of my memory, when the negotiations with Oats first commenced, the shares of the Griqualand Syndicate were somewhere between 9*s*. 6*d*. and 11*s*. per pound share, fully-paid; and from that time till the negotiations were concluded there was a constant improvement in the shares, it having become known that there was a possibility of Oats going out to report." Hirsche said, "As I was seen talking to Oats by brokers and others (the conversation being in the street) the shares rose." And it was proved by the quotations which were in evidence that the company's shares were quoted and sold at 14*s*. on the morning and 18*s*. in the afternoon of the 8th Aug. The opinion of Oats himself (who did not believe that the "talk" with him or his "going out" led to or had anything to do with the rise in the shares) is not, in their Lordships' judgment, of equal weight with that of his attorney, Hinrichsen, who lived at Kimberley, and was likely to know more of the ways of the market there. Hinrichsen sold the shares which Oats took openly. "Everyone," he says, "knew they were Oats's shares; it did not strike me that his selling would create suspicion in the minds of the public." And as to the cause of the rise, "I have had considerable experience in share-dealing in Kimberley. My opinion is the shares went up on the strength of such a man as Mr. Oats interesting himself in the property, and going out to it, the shares having been neglected for so long. The share market generally at Kimberley about that time was of an improving state. Their Lordships, upon the whole evidence, are unable to differ from the judgment of the learned President of the High Court of Griqualand as to the absence of any sufficient proof either of fraud against the company in the agreement with Oats, or of resulting damage to the company beyond the 1000*l*. As to the measure of damage, they do not think that the authorities cited by the respondents, of which *McKay's case* (33 L. T. Rep. 517; 2 Ch. Div. 1), and *Weston's case* (40 L. T. Rep. 43; 10 Ch. Div. 579), are typical examples, are applicable to this case when reduced to one of an agreement made *bonâ fide*, but partially *ultra vires*. Those were cases in which directors or fiduciary agents of companies had appropriated to themselves and for their own benefit, by means of secret bargains with promoters or vendors, shares represented as paid-up for which no consideration had been given, or other property of which they were trustees for their companies. In all of them the actual or presumable value was treated as a proper subject for evidence; and the principle applicable is (in *McKay's case*) thus explained by Mellish, L.J.: "I think he is only liable for what was the fair value of the shares when the allotment

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was made, or at any subsequent time. But McKay is a wrong-doer; and therefore, in estimating the damages, a presumption may be made against him which could not be made against a person who was not a wrong-doer." In the present case, unless fraud or bad faith in making the agreement of the 8th Aug. 1889 has been brought home to the defendants, they are not wrong-doers in the sense in which Mellish, L.J. used the word. They speculated, indeed; but only with their own shares, their title to which was unquestionable, and has not been questioned. They made no condition or stipulation with Oats for their own benefit, and had no interest in the 10,000 shares which he took, or any of them. If the agreement itself of the 8th Aug. was not fraudulent, none of the consequential steps, taken upon the footing of it either by Oats or by the directors, were so. If a case of fraud or bad faith had been made out, it might follow that the 23rd Aug., when the shares were delivered, and not the day on which the agreement was made, ought to be regarded in the estimation of damages. Even in that case, their Lordships would have been unable to agree with the learned judges, who thought that the price quoted for the company's shares in the Kimberley market on the 23rd Aug. was the necessary or proper measure of damages. The case of premiums fluctuating from day to day in a suddenly inflated local market is not one which, in any of the authorities to which reference has been made, the courts had to consider; the facts in those cases did not raise the question whether more than par value should be charged. It is, no doubt, true that in the Kimberley market all the 10,000 shares taken by Oats were (at different times) actually sold, as were a large number of other shares in the company; some belonging to the defendants, and some of them (it does not appear whose or how many) were sold at 48*s.* 6*d.* on the 23rd Aug. But the inference that 10,000 shares, if brought into the market on that day, would or might have been all sold for that price, does not appear to their Lordships to be warranted or reasonable. The profits actually made by the sale of those 10,000 shares (which might have been recovered from Oats, if a case could be made out against him, in a suit properly instituted) were only about 7000*l.*, less than half the amount claimed by the declaration in the case, which the Supreme Court of the Cape of Good Hope would have awarded if no concession had been made by the plaintiffs, and less by more than 3000*l.* than the 10,875*l.* to which the claim was reduced by their concession, the sum which has been awarded by the judgment under appeal. Their Lordships express no opinion upon the question whether, if fraud had been proved, the amount of the profits made by Oats would have been a just measure of damages as against the directors, but they have no difficulty in saying that it would have been much more consonant with their ideas of justice than that adopted by the Supreme Court of the Cape of Good Hope. Not thinking fraud proved, and looking upon the confirmation of the agreement of the 8th Aug. at the board meeting of the 21st, and the subsequent delivery of the shares as only the performance in good faith of that agreement by the directors after Oats had done the stipulated service to the company in reliance upon it, their Lordships have come to the conclusion that the damages in the case ought not to exceed what would have been the fairly presumable value of the 10,000 shares to the company if the agreement of the 8th Aug. had never been made. That was the utmost that the company could have lost by the transaction, and they ought not to recover more than they might reasonably be presumed to have lost. A subsequent market-price, due wholly, or to an extent which could not now be distinguished, to the influence upon the market of that transaction itself, cannot be a just or reasonable measure of what might have been realised from the shares if no such agreement had been made; and their Lordships are led by the evidence to conclude that the transaction did, in fact, so influence the market. Under those circumstances they think that the 8th Aug. and not the 23rd is the date to which they ought to look for the purpose of estimating the loss to the company by the transaction: the shares were not before that date quoted at a price equal to that which Oats agreed to give; and there are no materials from which their Lordships can infer that the company would have been able to issue them above par if there had been no agreement giving Oats the option to take them, Their Lordships will therefore humbly advise Her Majesty to reverse the judgment of the Supreme Court of the Cape of Good Hope. and to restore that of the High Court of Griqualand. The appellants will have the costs of the appeal; but there will be no costs, on either side, of the appeal to the Supreme Court of the Cape of Good Hope.

Solicitors for the appellants, *Ingle, Cooper,* and *Holmes.*

Solicitors for the respondents, *White* and *De Buriatte.*

Supreme Court of Judicature.

COURT OF APPEAL.

May 29, 31, *and June* 1.

(Before LINDLEY, LOPES, and DAVEY, L.JJ.)

THE GROSVENOR AND WEST END RAILWAY AND TERMINUS HOTEL COMPANY LIMITED *v.* HAMILTON. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Nuisance—Landlord and tenant—Injury to house — Vibration — Working of steam-engines on adjoining land of lessor—Estoppel—Derogation from grant—Damages—Remoteness.

The vibration caused by the working of steam-engines on land belonging to lessors adjoining certain buildings demised by them to a lessee necessitated the pulling down of the buildings as dangerous structures, obliging the lessee to take other premises for his business, which thereby suffered damage. At the date of the demise both lessors and lessee knew that the demised buildings were in an unstable condition, and the lessee was also aware of the existence of the engines on the lessors' land.

Held, that the lessee had a cause of action against

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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the lessors on the ground of nuisance; that the lessors were estopped from saying that the buildings were in an unstable condition at the time of the demise; and that, in estimating damages, not merely the loss of the term demised, but also all losses fairly attributable to the wrongful act of the lessors, ought to be regarded.

Decision of Grantham, J. affirmed.

This action was brought to recover the sum of 62*l.* 10*s.*, being one quarter's rent due in respect of certain buildings which had been demised by the plaintiff company to the defendant, Henry Thomas Hamilton, by an indenture dated the 25th March 1887, for a term of fourteen years, subject to a proviso enabling the plaintiff company to put an end to the lease at any time upon giving six months' notice to the defendant. The lease contained a covenant by the plaintiff company that the defendant, his executors, administrators, and assigns, duly paying the rent, and performing and observing the covenants thereby reserved and contained, might at all times during the continuance of the term thereby granted quietly enter into, hold, enjoy, receive, and take the rents, issues, and profits of the demised premises without any claim or demand to the contrary by the plaintiff company, their successors or assigns, or any person rightfully claiming by, under, or in trust for them.

By his amended statement of defence the defendant denied that he owed the plaintiff company the sum of 62*l.* 10*s.*, or any sum, for the following reasons:

The defendant stated that he was a printer and publisher, and had carried on his business in the buildings held under the lease, and that he and his predecessors in title for more than twenty years before the commencement of this action had been entitled to have and had of right the buildings supported by the land adjacent thereto.

The defendant alleged that shortly after he entered under the lease the plaintiff company wrongfully excavated, and in a careless and negligent manner, the land owned by them adjacent to the buildings of the defendant, and wrongfully removed the land, or part of it, and placed on land adjacent to the buildings of the defendant engines for boring and working artesian wells for the purpose of supplying the hotel, the property of the plaintiff company, with water, and other engines for working dynamos for supplying the said hotel with electric light; that the engines were placed and worked in a negligent and careless manner, and lessened and damaged the support to the defendant's buildings by vibrations; that the buildings of the defendant were thereby deprived of the support to which they were entitled, and cracked, bulged, started and warped, and became dangerous; that upon the 24th June 1893, on the application of the London County Council to a metropolitan police magistrate, the buildings were condemned as dangerous structures, and were ordered to be renovated and repaired; and that, consequently, the defendant, with his family and under-tenants, was obliged to leave the buildings, and ceased to carry on his business therein.

In the alternative the defendant alleged that by reason of the premises he had been interfered with in the quiet enjoyment of the buildings, and been deprived of the use and advantages thereof, contrary to the plaintiff company's covenant, and that his business had thereby been damaged

The defendant counter-claimed, alleging that by reason of the premises he has been obliged to seek for and obtain other buildings wherein to carry on his business, and in so doing had been put to great expense, and had been damaged and suffered great loss.

The defendant stated the particulars of special damage, which amounted to 195*l.* 18*s.* To which he added the loss of profits of his business when carried on in the new premises—69*l.* 17*s.*; and he claimed 1850*l.*

The plaintiff company, in reply, alleged that the buildings at the time when they were demised to the defendant were old and in an unstable condition; that the engines complained of had been previously erected; and that the defendant knew these facts at the time of taking the lease. It was proved at the trial that the defendant's buildings at the date of the lease were in an unstable condition.

The action was tried before Grantham, J. and a common jury on the 23rd and 24th April 1894, when his Lordship directed the jury that, if the defendant's buildings were in fact brought down by the vibrations from the plaintiff company's engines, the plaintiff company was liable in damages to the defendant on the counter-claim.

The jury found a verdict for the plaintiff company on the claim for 62*l.* 10*s.* (the amount of the rent), and a verdict for the defendant on the counter-claim for 308*l.* 5*s.* with costs of the action, and judgment was entered accordingly.

The plaintiff company now appealed, and also applied for a new trial as to the counter-claim on the ground of misdirection in that the learned judge was wrong in directing the jury that the defendant was entitled to a verdict on the counter-claim if they found that the vibrations from the plaintiff company's engines had injured the defendant's buildings, and that the learned judge ought to have directed the jury that the plaintiff company would be liable if there was such an amount of vibration from the engines as would have affected houses of ordinary stability, and that the plaintiff company would not be liable unless there was such an amount of vibration from their engines; and further, on the ground that the verdict found for the defendant on the counter-claim was unreasonable and against the evidence; and further, on the ground that the damages were excessive, and that some of the damages awarded by the jury were too remote and not recoverable in point of law.

J. G. Witt, Q.C. and *Hume-Rothery* (*T. Terrell* with them) for the appellants.—At the time when the respondent took the lease the demised buildings were in an unstable condition to his knowledge. That fact was disregarded by the learned judge, although it was a very material one. If the buildings had not been in an unstable condition they would not have been brought down by the vibrations of the appellants' engines. To entitle the respondent to succeed on his counter-claim he must prove that the vibrations were such as to be a nuisance to a person occupying a reasonably well-built house:

Robinson v. *Kilvert*, 61 L. T. Rep. 60; 41 Ch. Div. 88;

Adams v. *Gibney*, 6 Bing. 656;

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Gas Light and Coke Company v. *Vestry of St. Mary Abbotts, Kensington*, 53 L. T. Rep. 457; 15 Q. B. Div. 1;
Crump v. *Lambert*, 15 L. T. Rep. 600; L. Rep. 3 Eq. 409.

[Davey, L.J. referred to *Walter* v. *Selfe* (4 De G. & Sm. 315), where burning bricks on a man's own land so as to be offensive to a neighbour was held to be a nuisance.] It is true that a man who creates on his land an electric current for his own purposes and discharges it into the earth beyond his control is, on the principle of *Fletcher* v. *Rylands* (19 L. T. Rep. 220; L. Rep. 3 E. & I. App. 330), as responsible for damage caused by that current as he would have been if instead he had discharged a stream of water. But where the act is done in pursuance of a provisional order of the Board of Trade it is protected to the same extent as other nuisances under statutory authority:

National Telephone Company Limited v. *Baker*, 68 L. T. Rep. 283; (1893) 2 Ch. 186.

[Davey, L.J.—*Fletcher* v. *Rylands* (*ubi sup.*) and the long series of decisions from *Tenant* v. *Golding* (1 Salk. 21, 360) downwards, show that anyone who brings upon his land that which would not in the natural condition of the land be there, ought to keep it in at his peril; and that if it escapes he is liable for the consequences.] As between two neighbours the vibrations caused by the appellants' engines would not have been a nuisance, and the fact that the appellants and the respondent stood in the relation of landlord and tenant can make no difference, because the existence or non-existence of a nuisance does not depend on the relation of the parties. [Davey, L.J.—The nature of the act of nuisance does not; but whether it is actionable or not may depend on the relation of the parties. A man cannot derogate from his own grant: *Caledonian Railway Company* v. *Sprot*, 2 Macq. 449.] The lease here contained an express covenant for quiet enjoyment, limited in its application, for it only applied so long as the respondent paid his rent. Therefore the respondent cannot succeed on his counter-claim on the ground of breach of implied covenant for quiet enjoyment. For the whole covenant implied in the word "demise" is restrained by an express covenant for quiet enjoyment:

Line v. *Stephenson*, 4 Bing. N. C. 678.

[Davey, L.J.—The principle that a landlord cannot use his land so as to interfere with the enjoyment of adjoining premises demised by him was considered in *Elliott* v. *North-Eastern Railway Company*, 10 H. of L. Cas. 333.] As regards the damages, even if the respondent had any cause of action, he was not entitled to damages occasioned by the fact that the new premises he took were not suitable for carrying on his business of a printer and publisher, and that his business fell off. The loss must be shown to be the natural and reasonable consequence of the appellants' conduct:

Williams v. *Burrell*, 1 C. B. 402;
Locke v. *Furze*, 15 L. T. Rep. 161; L. Rep. 1 C. P. 441;
Hadley v. *Baxendale*, 9 Ex. 341.

The lease was determinable by a six months' notice by the appellants, and that fact is material in estimating the damages. The true measure of damages can only be the loss of the value of the lease.

Coleridge, Q.C. and *T. Dale Hart*, for the respondent, were not called upon to argue as to whether the respondent had a cause of action on the counter-claim; and as to the amount of damages on the counter-claim they were willing to leave that to be settled by the court, acceding to the suggestion of the court that the damages should be reduced to 200*l*.

Lindley, L.J.—This case raises a question of some importance. The action is by the plaintiff company as landlords against the defendant as tenant for a quarter's rent. That is met by a counter-claim to the effect that the plaintiff company has by working certain pumping and dynamo engines in the immediate vicinity of the tenant's house shaken the house down. The vibration caused by working the engines was so great that the tenant was obliged to move. And he complains that he has been put to necessary expense through what has been done by the plaintiff company. The first question is this, Is there any cause of action on the counter-claim at all? Mr. Witt argued that there was not. He said that the tenant's house was a weak, delicate house, and that in consequence of that the tenant was seeking to impose on his landlords a more extensive burden than an ordinary person would have. And Mr. Witt argued that, in order to support the action on the counter-claim, the vibration must have been such as to be a nuisance to a person occupying a reasonably well-built house. As between persons not standing in the relation of landlord and tenant that might be so; but this is a case of landlord and tenant—not a case of strangers, merely neighbours to each other—and that is a different matter. The house at the time it was shaken down was an old house. It was described by one of the witnesses as being a delicate house. It was built on piles in a place which had formerly been a marsh, and was twelve inches out of the perpendicular. This must have been known to the landlords at the time the house was let. The landlords have shaken the house down, and yet it is said that the tenant has no cause of action. In my opinion, the tenant has a cause of action on the counter-claim. The cause of action arises from the vibration which shook the house down, and in consequence of the relationship of landlord and tenant existing between the parties, the landlords (the company) are estopped from saying that the house was a weak house. Otherwise we should be allowing the landlords to derogate from their own grant, and that cannot be the law. I agree that the derogating from the grant would not of itself be a cause of action. But the cause of action here is the shaking down of the house. This view gets rid of all difficulty about implying a covenant for quiet enjoyment more extensive than the express covenant contained in the lease. [His Lordship read the covenant and continued:] That is a very limited covenant which would not cover this case; and *Line* v. *Stephenson* (*ubi sup.*) shows that, where a lease contains an express covenant for quiet enjoyment, it excludes any more extensive covenant being implied. But the cause of action here is nuisance, not the breach of any implied covenant. Then a question was raised as to the amount of damages. It is said that the true measure of damages is the loss of the value of the lease. Unquestionably, if the lease had any value, that would have to be taken into

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consideration in estimating damages, and the term of the lease would be material. But the damages in my opinion are not confined to the damage (if any) which flowed from the loss of the lease; it would be erroneous to hold that. The true principle to be applied is that which is applicable to cases of tort, *i.e.*, that the injured party is entitled to damages for whatever is the natural consequence of the wrongful act. Here it was a natural consequence of the wrongful act of his lessors that the tenant was obliged to take another house, and he is entitled to damages for the expenses of removal. The jury have assessed the damages on a somewhat too liberal scale, and we think that the right course will be to reduce the damages on the counter-claim to a sum of 200*l.*, which seems to be what is fairly attributable to the wrongful act of the lessors. As, however, the appeal has in substance failed, the appellants must pay the costs.

Lopes, L.J.—I am of the same opinion. The point that we have to consider arises really upon the defendant's counter-claim. The defendant says that the plaintiffs have shaken down his house. The lease contains an express covenant for quiet enjoyment of a limited character, and *Line* v. *Stephenson* (*ubi sup.*) shows that the defendant cannot consequently avail himself of any implied covenant of a more extensive character, therefore the counter-claim cannot be based upon implied covenant. But the vibration of the plaintiffs' engines has shaken down the defendant's house, and it cannot be denied that what the plaintiffs have done constituted an interference with the comfortable and convenient use and occupation of his house by the defendant. That is a nuisance, and is therefore a cause of action. The plaintiffs cannot by way of answer rely on this, viz., that they were only using their own premises in a reasonable manner, that is no answer: (see *Bamford* v. *Turnley*, 3 B. & S. 62.) But then the plaintiffs say that the defendants' house was an old and delicate one, and that if it had been a reasonably stable house there would have been no nuisance. It is unnecessary to say how that might be as between strangers. But the fact that the house was unstable cannot be taken advantage of by the plaintiffs, because they let the house in that state and condition of instability to the defendant. The plaintiffs are therefore estopped from setting up the instability of the house as an excuse for what they have done, because that would be derogating from their own grant. As regards the amount of damages I think that the defendant received more than he was entitled to; and I think that 200*l.* is the proper sum.

Davey, L.J.—I am of the same opinion. Notwithstanding the able and ingenious argument of Mr. Witt, I think that the defendant (the plaintiff on the counter-claim) is entitled to recover on his counter-claim. I agree that the right of action cannot be based on any implied covenant for quiet enjoyment. The right of action, in my opinion, is based on trespass or nuisance; and it depends on this, that the plaintiffs (the defendants on the counter-claim) have derogated from their own grant. It is an absolute rule of law that a grantor cannot derogate from his own grant. He cannot use his adjoining land so as to interfere with the enjoyment of the demised premises. That principle is clearly stated in *Caledonian Railway Company* v. *Sprot* (*ubi sup.*); *Elliott* v. *North-Eastern Railway Company* (*ubi sup.*) and *Rigby* v. *Bennett* (48 L. T. Rep. 47; 21 Ch. Div. 559). It is sometimes put as a case of implied obligation, and sometimes as a grant of a *quasi*-easement—*i.e.*, something in the nature of an easement—to place the lessee in the position of not being interfered with by any dealing by the lessor with his adjoining land. That is the way in which Sir George Jessel, M.R. put it in *Rigby* v. *Bennett* (*ubi sup.*). He said this: "If the corporation had granted a lease of land on which a house was to be built, and it was built in a reasonable manner, it appears to me impossible to say that they could afterwards be entitled to let the land down by dealing with the adjacent land belonging to them. If, again, they granted the house to the plaintiff as it then stood, or granted the land on which the house was standing, they granted with it—if I may say so—the easement or the implied obligation or warranty that the house should not be let down by anything done on their adjoining land." The rule of law as to that is also treated very elaborately from the same point of view by Thesiger, L.J. in *Wheeldon* v. *Burrows* (41 L. T. Rep. 327; 12 Ch. Div. 31). In my opinion, therefore, the tenant is entitled to recover on this counter-claim. I should arrive at the same result if I dealt with the right of the lessee as a grant—in the nature of an easement which he has purchased—of being undisturbed by any dealing by the lessors with their adjoining land. As to the damages, I agree with the view of the other Lords Justices.

Appeal dismissed.

Solicitors for the appellants, *Mossop* and *Rolfe*.
Solicitor for the respondent, *J. M. McDonnell*.

July 30 *and Aug.* 6.

(Before Lindley, Lopes, and Davey, L.JJ.)

Re Frances Browne (a person through mental infirmity incapable of managing her affairs). (*a*)

ORIGINAL APPLICATION TO THE LORDS JUSTICES SITTING IN LUNACY.

Lunacy—Person through mental infirmity incapable of managing her affairs—Management and administration—Lunacy Act 1890 (53 *Vict. c.* 5), *s.* 116—*Lunacy Act* 1891 (54 *&* 55 *Vict. c.* 65), *s.* 27, *sub-sect.* 4—*Rules in Lunacy* 1892, *r.* 56.

Having regard to the language of sect. 116 *of the Lunacy Act* 1890, *sect.* 27 (4) *of the Lunacy Act* 1891, *and rule* 56 *of the Rules in Lunacy* 1892, *the intention of the Legislature is that persons who, through mental infirmity arising from disease or age, are incapable of managing their affairs, shall, for the purposes of management and administration, be in all respects treated as lunatics.*

A master in lunacy or a judge has jurisdiction to appoint a receiver of the dividends alone of Government and other securities standing in the name of a lunatic, without ordering a transfer of such securities into the name of the receiver, and in some cases that would be the proper course to adopt; but the usual practice is to order the securities to be transferred into court, and then

(*a*) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

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to let the receiver obtain the dividends from the Paymaster-General.

An order was made by a master in lunacy, under sect. 116 of the Lunacy Act 1890, on the application of Miss M. A. Browne, a niece and one of the next of kin of Miss Frances Browne, a lady who was eighty-four years of age and very infirm, and it was entitled, "In the matter of Frances Browne, spinster; and in the matter of the Acts, 53 Vict. c. 5, and 54 & 55 Vict. c. 65." The order provided (*inter alia*) as follows:

And it having been established to my satisfaction that the said Frances Browne is a person who, through mental infirmity arising from age, is incapable of managing her affairs, I do order that, upon the certificate of the said master that she has completed her security, the said M. A. Browne be and hereby is authorised on behalf of the said Frances Browne to receive and give a discharge for the dividends accrued and to accrue upon the undermentioned securities standing in the name of the said Frances Browne.

Among the securities undermentioned were some sums of Colonial inscribed Stocks, which are registered in books kept at the Bank of England, the dividends being paid there.

The Bank objected to act upon this order, on the ground (1) that it was wrongly entitled, and (2) that the master had no jurisdiction to make it.

Sect. 116 (1) of the Lunacy Act 1890 enacts that:

The powers and provisions of this part of this Act relating to management and administration apply (*d*) to every person . . . with regard to whom it is proved . . . that such person is through mental infirmity arising from disease or age incapable of managing his affairs.

Latham, Q.C. (*Howard Wright* with him) for the Bank of England.

Swinfen Eady, Q.C. (*Sebastian* with him) for Miss M. A Browne.

Cur. adv vult.

Aug. 6.—The following written judgments were delivered:—

Lindley, L.J.—In this case an order has been made by a master in lunacy under sect. 116 of the Lunacy Act 1890, but on presenting it to the Bank of England the bank officials have raised objections to it, and have declined to act upon it without the direction of the court. The order runs thus: [His Lordship read it, and continued:] The first objection taken was to the title of the order. But the order is in the form given in the schedule to the Rules in Lunacy 1892, and those forms were carefully settled. In cases of this description it is not thought desirable to head the forms of "orders in lunacy" so as to publish more than is necessary the fact that the person named in the title is in the unfortunate condition in which that person really is. This objection is untenable, and very properly was not seriously insisted on. The next objection was, that there was no jurisdiction to make the order. This is, of course, an important matter. The general jurisdiction of a judge in lunacy is conferred by sect. 108 of the Lunacy Act 1890, and extends (*inter alia*) to the management of the estates of lunatics, and by sect. 341 "lunatic" includes a person of unsound mind. The general jurisdiction of masters is conferred by sect. 111, and by rule 10 of the Rules in Lunacy of 1892. The Act is divided into parts. Part 4 is headed thus: "Judicial powers over person and estate of lunatics," and is subdivided into groups of sections; one group, commencing with sect. 116 and ending with sect. 130, is headed "Management and Administration." This group of sections, it will be observed, applies, first, to lunatics so found by inquisition; secondly, to lunatics not so found; and thirdly, to persons who are, through mental infirmity arising from disease or age, incapable of managing their affairs. Such persons may be lunatics in the common acceptation of the term, or they may not. They are on the border line, but even if they are not insane enough to be found lunatic by inquisition, they may for many purposes be treated as lunatic, though not so found by inquisition. This is plain from the language of sect. 116 of the Lunacy Act 1890, and sect. 27 (4) of the Lunacy Act 1891, and of rule 56 of the Rules in Lunacy 1892. The power of a judge in lunacy to appoint a receiver of the property of a person subject to his jurisdiction under the Act is conferred generally by sects. 108 and 116 of the Lunacy Act 1890, and rule 83 of the Rules in Lunacy 1892. Rule 83 expressly says: "A receiver may be appointed in every case in which such appointment shall be deemed expedient." Certain specific powers are authorised to be conferred on committees by sect. 117 and subsequent sections of the Lunacy Act 1890, and sect. 120, which does not mention the appointment of a receiver, does not, by implication or otherwise, negative the power of the judge to appoint a receiver under the general authority to which I have alluded. The power to appoint a receiver is clearly a power relating to "management and administration," and, although not specially mentioned in the group of sections so headed, is within the general words with which sect. 116 commences. This being so, the power can be exercised by a master, and it need not be exercised by a judge in person. Soon after the Rules in Lunacy 1892 had been made a question arose whether a master had jurisdiction to make a vesting order under sects. 133 *et seq.* of the Lunacy Act 1890, and after carefully examining the Acts and Rules, all the members of the Court of Appeal came to the conclusion that he could, and such orders have ever since been made accordingly. Sect. 133 and rule 54 authorise orders for transfer into court and vesting orders in cases to which sect. 116 applies. The jurisdiction to make the order being clear, it is also clear that the Bank of England may safely act upon it. Sect. 146 alone is enough to protect the bank. Sect. 333 is still more explicit, and although the expression there is "so far as relates to any property in which a lunatic is interested," that expression clearly, in my judgment, includes all persons who, whether lunatic or not, are subject to the jurisdiction conferred on the judges in lunacy, and can be treated as if they were lunatic under sect. 116 of the Lunacy Act 1890. The practice of appointing a receiver of the dividends of Government and other securities, without ordering a transfer of them into the name of the receiver, is not, however, usual in Chancery, nor has it been usual in lunacy. The practice has been to order the stocks, &c., to be transferred into court, and then to let the receiver obtain the dividends from the Paymaster-General. A settled practice like this ought not to be departed from without sufficient

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reason, and, in general, it ought to be adhered to. Nor is there any reason for not adhering to it in this case. The order, therefore, will be remitted to the master for alteration accordingly. I have no doubt, however, of the jurisdiction of the master to make an order in the form adopted in this case, nor of the safety of the bank in acting upon it, and, if hereafter an order in this form should be deliberately made for any special reason, the bank ought to act upon it and to pay the dividends to the receiver, treating him as an agent duly appointed to receive dividends only. In cases of shares, &c., in companies, a transfer into court might be inexpedient, if not impossible, and yet a receiver of the dividends might be highly desirable.

Lopes, L.J.—The matter has been so fully gone into in the judgment which has just been read by Lindley, L.J. and in the judgment of Davey, L.J. which he has asked me to read for him, as I propose presently to do, that I myself shall say very little. There are three classes of persons mentioned in sect. 116: first, lunatics so found by inquisition; secondly, lunatics not so found; thirdly, persons who, through mental infirmity arising from disease or age, are incapable of managing their affairs. Having regard to the language of sect. 116 of the Lunacy Act 1890, and sect. 27, sub-sect. 4, of the Lunacy Amendment Act 1891, and of rule 56 of the Rules in Lunacy of 1892, I am of opinion that it was the intention of the Legislature that the last-mentioned class, for the purposes of management and administration, were to be, in all respects, regarded and treated as lunatics. If this is correct, all difficulty is removed, and the same powers and the same jurisdiction in respect of management and administration exist in respect of the last class as exist in the case of the two former classes of persons, and the bank is indemnified under sects. 146 and 333. In my judgment, there is jurisdiction to appoint a receiver of the dividends alone, and, in some cases, that would be the proper course to adopt. But, in this particular case, I see no reason to depart from that which appears to have been the usual practice. The objection to the title of the order cannot be supported. The title is in accordance with the form given in the schedule to the Rules in Lunacy of 1892.

Lopes, L.J. read the following judgment of Davey, L.J.:—The question in this case is whether the Bank of England is bound to act upon an order of Master Bulwer, appointing a receiver of the dividends on certain stocks standing in the name of Miss Browne in the books of the bank. Mr. Latham first objected to the title of the order, but it appears to be in the form provided for such cases as the present in the rules, and therefore no objection can be made to it. [His Lordship read sect. 116 (1) of the Lunacy Act 1890, and continued:] Mr. Latham contended that the "powers and provisions" so made applicable are only those which are found in the group of sections under the heading "management and administration." In my opinion this is wrong. I think that the Act means what it says, and that all powers and provisions relating to "management and administration" which are found in Part 4 of the Act are included. Sect. 108 (2) enables the judge in lunacy to make orders for the custody of lunatics so found by inquisition, and the management of their estates. By the 83rd of the rules made in pursuance of the Act, "A receiver may be appointed in any case in which such appointment shall be deemed expedient." I agree that, if there was jurisdiction to make the order impeached, it might be made by the master. And I am of opinion that, by the joint effect of sect. 108 (2), rule 83, and sect. 116 (1) (*d*), the order for a receiver in the present case could be made. And I also think that the court can make a vesting order under sect. 133. Mr. Latham may be right, and I rather think he is right, in construing sect. 116 (2) with reference to sect. 120 as enabling the judge to confer, in a case like the present, all or any of the powers in sect. 120 on a person to be named. But I think he is wrong in treating sect. 120 as exclusive. As I have already said, I think the judge may make orders for the management of the estate of the *quasi* lunatic generally, and I think that sect. 116 (2) is not a limiting section, but is inserted *ex majori cautela*, to enable the judge to confer the additional or special powers enumerated in sect. 120. But, says Mr Latham, the bank will not be indemnified in acting on the order, because sect. 333 confines the indemnity to any act "so far as relates to any property in which a lunatic is interested," and the person in question in this case is not a lunatic, and he refers to sect. 27 (4) of the amending Act of 1891. In my opinion, the bank will be amply protected by sect. 146, but I also think that sect. 333 applies to the case, and that a person within the description in sect. 116 (1) (*d*) is a lunatic for the purposes of that section. Lastly, it was said that the order was wrong in appointing a receiver of the dividends only of stocks standing in the books of the Bank of England in the name of the person whose property the court has taken under its protection. No statutory provision relating to the bank which prohibits or prevents such an order being made was brought to our attention. And I am of opinion that the court has jurisdiction, and I think it important that we should not allow any doubt to be entertained as to our jurisdiction to appoint a receiver of dividends only. There may be many cases in which it would be highly desirable to adopt that course. The receiver is but the statutory or judicial agent, or attorney, to receive dividends due to the person in whose name the stocks are standing. But, as it appears to be unusual to appoint a receiver of dividends on stocks in the books of the Bank of England, and there is no sufficient reason in the present case why the stocks should not be brought into court, it will, perhaps, be better to follow the usual practice, and direct the stocks to be transferred into the name of the Paymaster-General.

Solicitors for the applicants, *Freshfields* and *Williams*.

Solicitors for the respondent, *Kingsford, Dorman*, and *Co.*

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HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Wednesday, July 11.

(Before NORTH, J.)

WEST SURREY WATER COMPANY v. GUARDIANS OF THE CHERTSEY UNION. (a)

Waterworks—Supply of water—Sewage works—Public Health Act 1875 (38 & 39 *Vict. c.* 55), *ss.* 4, 27, 51, 52—*Waterworks Clauses Act* 1847 (10 *Vict. c.* 17), *s.* 37—*West Surrey Water Act* (32 & 33 *Vict. c. cxii.*), *ss.* 2, 4, 6, 35, 38.

A rural sanitary authority, acting under the provisions of the Public Health Act 1875, *empowering them to construct sewage works, and in pursuance of a sewage scheme approved of by the Local Government Board, had constructed a well into which water from the Thames flowed by gravitation through a six-inch pipe; and, with the consent of the Conservators of the Thames, had laid down a pipe for the purpose of drawing water from that river by means of a pump. They had also constructed large automatic flushing chambers capable of holding many gallons of water, and were laying down, about three miles of iron water pipes, generally in the same trenches in which the sewers ran, to convey water to the flushing chambers for the purpose of flushing their sewers, but without the intention to supply the water thus obtained by them to any person for any purpose whatever. A water company incorporated by Act of Parliament, and under legal obligation to supply water to any persons requiring it who resided within the limits fixed by the Act of the company for the supply of water by them, were willing to supply water to the rural sanitary authority for the purpose of flushing their sewers, but the rural sanitary authority could obtain for themselves unfiltered water fit for the sewage works at much less cost than the water company could supply their pure filtered water, and neither the rural sanitary authority nor any person residing within the limits fixed for the supply of water by the water company were under any legal obligation to take their water from the water company. On a special case stated for the opinion of the court:*

Held, that "supply of water" under the Public Health Act 1875 *means a passing of water from one person who has it to another person who requires it, and that the works in course of construction by the rural sanitary authority were not waterworks for the supply of water within the meaning of the Public Health Act* 1875, *and were not an infringement of the rights of the water company.*

SPECIAL CASE.

1. The plaintiffs are a duly incorporated water company, the special Act incorporating them being the West Surrey Water Act 1869.

2. The defendants are by virtue of the Public Health Act 1875, the rural sanitary authority of the Chertsey Union.

3. The defendants are constructing certain works for the purpose of draining and disposing of the sewage of the parish of Weybridge, and the special drainage district of Oatlands. The whole of the said works are within the limits for the supply of water by the plaintiff company. The defendants have constructed as part of such works, or are constructing a large tank in order that into it may flow by gravitation through the sewers the sewage of the said parish and district. The defendants are erecting, as further part of such works, condensing steam-engines to work pumps, to force the sewage from the tank to the defendants' sewage disposal works, which are situate near Byfleet. The defendants have since the issue of the writ constructed a well or chamber four feet wide, seven feet long, and thirteen feet deep, and water from the river Thames will flow by gravitation through a six-inch pipe into it. The defendants have entered into an agreement with the Conservators of the Thames under which the latter agree, in consideration of the annual payment of the sum of 2*l.*, to grant permission (during pleasure) to the defendants to lay down such six-inch suction pipe under the towpath near Weybridge-lane, with a rose extending beyond the face of the river bank, for the purpose of drawing a supply of water for the sewage works. The defendants intend to affix to the steam-engines a pump or pumps to raise water from the well or chamber for the purpose of supplying water to the condensers of the engines, and of flushing the sewers in their district, and intend to use about 30,000 gallons a day for the condensers, and also about 30,000 gallons a day for flushing the sewers.

4. The defendants are constructing sixteen automatic flushing chambers, each being at a higher level than the well or chamber, the highest being 154 feet above Ordnance datum, and level with the sewer. Of such chambers one has a capacity of 500 gallons, one a capacity of 750 gallons, four a capacity of 1000 gallons each, seven a capacity of 1500 gallons each, one a capacity of 3000 gallons, and two a capacity of 5000 gallons each, making together 28,750 gallons.

5. The defendants have laid or are laying about three miles of iron water pipes generally in the same trench and at the same depth as the sewers, to convey water to the flushing chambers. In these water pipes at the bottom of the manholes the defendants have fixed or are fixing about 115 special flushing valves, which the defendants intend to connect with the sewers. The defendants intend to use the pipes and the flushing chambers and the flushing valves for flushing the sewers.

6. At the said sewage disposal works the defendants are erecting steam-engines and a pump, and are constructing a well, and intend therewith to pump water to be used in supplying the last-mentioned engines, and for treating the sewage, for which purpose they will also use rain water.

7. The water which the defendants propose to use will be unfiltered water, which it is intended shall be taken only in the manner and for the purposes aforesaid.

The questions for the decision of the court are: (1) Whether the works, or some of the works, constructed or proposed to be constructed by the defendants are waterworks within the meaning of the Public Health Act 1875. (2) Whether the proposed dealing by the defendants with the water is "a supply of water," and whether the works or proposed works are for supplying, or used for supplying, water in contravention of

(a) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

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the provisions of the Public Health Act 1875. (3) Whether the defendants have the right to take, pump up, store, and distribute, by way of pipes and otherwise, such water as they may require for their own use, and for the purposes of their condensing engines, and for flushing their sewers in the parish and district aforesaid.

Cozens-Hardy, Q.C. and *Mulligan* for the plaintiffs.—The defendants are making sewage works, and in the course of so doing are erecting waterworks, and thereby infringing the plaintiffs' rights under their Act. They referred to the West Surrey Water Act 1869, ss. 2, 4, 6, 35, 38. [NORTH, J.—That is, the plaintiffs have power to supply the defendants with what they want.] Yes. The plaintiffs must supply the defendants with water for flushing sewers. They referred to the Waterworks Clauses Act 1847, s. 37. The defendants are prohibited from constructing any waterworks even for the purpose of supplying themselves. They referred to the Public Health Act 1875, ss. 4, 51, 52. [NORTH, J.—Do you say that the defendants could not sink a well for the purpose of supplying any townhall or any building they may have, or put in a pump for that purpose?] They might to supply only the house where the well or pump was situated. [NORTH, J.—Is this supplying a district with water for public purposes?] Yes; we say the defendants are supplying the districts of Oatlands and Weybridge for public or private purposes. [NORTH, J.—To whom do the defendants supply the water? A supply must be to some one.] They may in one character supply it to themselves in another character; *e.g.*, they may supply it for watering the roads. [NORTH, J.—Could not the defendants sink a well on their own land to supply their water carts?] We submit not. What they have done amounts to constructing waterworks within the meaning of the Public Health Act 1875. It is none the less constructing waterworks because it is part of a sewage scheme. The plaintiffs are willing to supply the defendants with water for their sewage works. [NORTH, J.—If the defendants could obtain water themselves cheaper than you could supply them, it would be their duty to the ratepayers to do so.] Perhaps so, but the plaintiffs are placed under many obligations with respect to supplying water, and their Act was intended to prevent the local authority, who have great powers, from competing with the plaintiffs in supplying water. In case of any dispute as to the charge for the supply of water, there is a provision for settling the matter by arbitration.

Swinfen Eady, Q.C. and *F. Gore Browne* for the defendants.—The defendants have not constructed waterworks at all. The whole of the works constructed by them are part of their sewage works. The flushing of the sewers after the water has been pumped up is automatic. Sects. 51 to 67 of the Public Health Act 1875 deal with the supply of water as appears from sect. 55. The defendants have power to construct sewage works: (Public Health Act 1875, s. 27.) The plaintiffs rely on the definition of waterworks under sect. 4 of the Public Health Act 1875, but the defendants' works are not intended for the supply of water. Mr. Hardy admits that the defendants can sink a well and pump water out of it. Why should they not pump water out of the Thames? The plaintiffs say that the defendants' small iron pipes are waterworks. The water the defendants take is contaminated water from the Thames, for the purpose of flushing the sewers. It may well be that the price of pure water such as that supplied by the plaintiffs, even when fixed by arbitration, must necessarily come to more than the cost of obtaining the contaminated water used by the defendants. The defendants are not supplying water at all.

Mulligan in reply.—The works of the defendants are waterworks within sect. 4 of the Public Health Act 1875, and they have no power to construct such works for any purpose. By sect. 37 of the Waterworks Clauses Act 1847 the plaintiffs are compellable to supply water for flushing sewers. [NORTH, J.—There is not necessarily any mutuality. Many persons may require a supply, but are not bound to take it.]

NORTH, J.—I think the plaintiffs have mistaken their rights. The plaintiffs are the West Surrey Water Company, incorporated by a special Act, 32 & 33 Vict. c. cxii., and the defendants are the Guardians of the Poor of the Chertsey Union, in the county of Surrey. The defendants have to provide for the disposal of sewage, and have adopted a scheme for that purpose. The defendants have to take care that the sewage pipes are in a proper state, and water is necessary to carry off the sewage, and to flush the sewers from time to time. They are proposing to get water for the sewers from the Thames, and for that purpose they have not only laid down sewers, but also have erected tanks in various places, and for the purpose of supplying them with water they have laid pipes in the trenches through which the sewers run, and have obtained leave to take water from the Thames in large quantity and to pump it through the pipes. The plaintiffs are under legal obligation to supply water to the district for public as well as private purposes. The sections of their special Act which have been quoted show that they are under this legal obligation, but I do not find that there is any reciprocal obligation on persons residing within the district to take their water from the plaintiffs. Any inhabitant of the district may sink a well and supply his own house with water; and there is no reason why he should not supply his neighbour so long as he does not erect waterworks. The plaintiffs' case rests on this, that these are waterworks, and that they have a monopoly of such works—that the waterworks which the sanitary board have established are waterworks within the meaning of the Public Health Act 1875, which, therefore, the board had no right to erect without first giving to the plaintiffs the option of supplying the water that is required, which the plaintiffs are ready and willing to do. The answer to that is, that the defendants do require water, but they do not require the filtered article which the plaintiffs supply and sell. It is their duty to obtain water in the cheapest way they can for the purpose of saving the rates imposed upon the ratepayers. The best thing they can do for this purpose is to take the water out of the Thames which they have obtained leave to do, and which they can do for a much less sum than they would have to pay to the waterworks company, who have only one set of mains for supplying water, and who are bound to supply pure wholesome drinking water in those

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mains, and who therefore cannot possibly afford to let the defendants have water at the same price at which the defendants can take it for themselves. I come to that conclusion for this reason, that if the defendants could get it more cheaply from the plaintiffs than in the way the defendants propose to get it—it not being suggested that the plaintiffs' water would not answer the purpose as well—I think it would be the duty of the defendants to do so for the sake of the ratepayers. It is obvious, however, that they are incurring expense because they see their way to saving money to the ratepayers by the course which they are adopting. The only question is, whether they are infringing the rights of the plaintiffs as to waterworks under the Public Health Act. It is admitted that the Waterworks Clauses Act and the special Act do not in any way prevent the defendants from doing what they are now doing. The plaintiffs' claim rests upon the provisions of the Public Health Act 1875 only, at which we must now look. The Act is divided into parts, and at Part 3 we have a division under the head of "sanitary provisions." First of all we come to the provisions relating to sewage and drainage, which is subdivided again into regulations upon these points—sewage works within the district of a local authority, and sewage works without the district, and so on. The sections as to sewerage and drainage extend down to the 34th section. Then, under a different heading, are put "privies, water-closets," &c. Then "scavenging and cleansing," and so on. Then we come to the 51st section. We start a fresh topic all included under the general head of "sanitary provisions." The topic of the 51st section is "water supply," the first sub-section being "powers of local authority in relation to supply of water." What is supply? Supply I understand to mean the passing of water from persons who have it to persons who want it. I do not see how it could be said that supply of water means supplying yourself in the natural meaning of the words, especially when we come to look at the particular words used in this 51st section which I am now going to read: "Any urban authority may provide their district or any part thereof, and any rural authority may provide their district or any contributory place therein," that is referring to other provisions of the Act, "or any part of such contributory place with a supply of water proper and sufficient for public and private purposes, and for those purposes or any of them may: (1) Construct and maintain waterworks, dig wells, and do any other necessary acts; and (2) take on lease or hire any waterworks, and (with the sanction of the Local Government Board) purchase any waterworks, or any water, or right to take or convey water, either within or without their district, and any rights, powers, and privileges of any water company; and (3) contract with any person for a supply of water." Then comes the 52nd section: "Before commencing to construct waterworks;" that means under the previous section; and the question is whether what is being done by the defendants is the construction of waterworks under that previous section. In my opinion it is not. They are not providing their district or any contributory place therein, or any part of such contributory place, with a supply of water proper and sufficient for public and private purposes. They are only obtaining and putting into their own sewers which are their own property the water which is necessary for the purpose of flushing those sewers, and which is never intended to go out of those sewers at all. It is not supplied to anybody, but it is carried through those sewers till the contents of the sewers are discharged at the place where the matter discharged is chemically dealt with. Therefore, so far from supplying the water to their district or any contributory place therein, the defendants are getting the water themselves for their own purposes, and using it for their own purposes only. No doubt persons who use the sewers get the benefit of having the sewers purified and kept clean in this way, but that is all. Then the 52nd section says: "Before commencing to construct waterworks within the limits of supply of any water company empowered by Act of Parliament, or any order confirmed by Parliament to supply water, the local authority shall give written notice to every water company within whose limits of supply the local authority are desirous of supplying water, stating the purposes for which and (as far as may be practicable) the extent to which water is required by the local authority." These words seem to me to be very important, because they show exactly what this is intended to effect. The sanitary authority may provide waterworks to supply water to its district. If they are lucky enough to have a pure well with a sufficient quantity of water in it, they have nothing to do but to distribute it, otherwise they may have to take steps to procure it from a distance; but there may be another company already supplying that district, and they are not to be interfered with by a public board under the Act setting up rival works without having the chance of furnishing the supply themselves, and if they can supply what is required they are to have the option of doing so, and waterworks are not to be constructed to interfere with the supply of water by them. The supply of water by them is the supply by the water company to the persons and houses living and situate throughout the district, of the water they may use respectively upon their premises; and those words requiring written notice to be given to the water company within whose limits of supply the local authority are desirous of supplying water show clearly that what is contemplated is a local authority proceeding to supply water in the way in which the water company was in the habit of supplying it; and they are not to poach upon the preserves of the water company if the water company can do it. Then to proceed with the 52nd section: "It shall not be lawful for the local authority to construct any waterworks within such limits if and so long as any such company are able and willing to supply water proper and sufficient for all reasonable purposes for which it is required by the local authority." Then there is a provision as to the settlement of any difference as to the price to be charged by the local authority. Still the question remains as to what the construction of waterworks is, and, as I read these sections, they are waterworks for the supply of water—meaning to the persons who require the supply of water in the district, and not meaning to refer to what is merely taking water by the local authority for its own purposes as distinguished from supplying it to other persons. It is not disputed that under the Act anybody may dig a well on his own land and there pump water for his own purposes, and it is not really disputed

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that the defendants may, if they please, dig a well in the garden of the workhouse and pump water from that for the supply of the workhouse. I do not see why, if they do that, they should not do it also for the purpose of watering their roads. How it can be said that taking it from the Thames for their own purposes is supplying water in the sense in which that phrase is used in the Act, I do not understand. If one looks at the interpretation clause of the Act, we find that "waterworks" include "streams, springs, wells, and pumps," and so on, and "engines and all machinery, lands, buildings, and things for supplying or used for supplying water," thus again using the same phrase. Then, if we look at the subsequent sections under the head of "water supply," following upon the 51st and 52nd sections, I think it is clear that that is the meaning of the supply of water to which those sections relate. The 54th section is: "Where a local authority supply water within their district they shall have the same powers and be subject to the same restrictions for carrying water mains within or without their district as they have and are subject to for carrying sewers within or without their district respectively by the law for the time being in force." That is to say, they may enter upon land and so on. Then the 55th section is an important one: "A local authority shall provide and keep in any waterworks constructed or purchased by them a supply of pure and wholesome water." And it is contended that, under that section, the water to be used for cleansing the sewers must necessarily be of the same high class and quality as required to be supplied to householders for the purpose of domestic consumption; and I think it would be absurd to suppose that it was necessary for the defendants here not to use for the purposes of their works any water except pure and wholesome water, because that is what it comes to. Supposing that the plaintiffs could not supply the quantity, and therefore the defendants were authorised to make their works, then they are bound by the 55th section to keep up and supply pure and wholesome water. That must mean water not such only as is required for sewers, but for the purpose of supplying the district. That contention seems to me to be carrying matters to an absurd conclusion. I do not intend to go through them, but the subsequent sects. 56 down to 67 all contain various phrases, showing what is meant by the phrase "supplying water," viz., that it is supplying water to the general public in the whole district, or part of the district, in which it is supplied to everyone who requires it, and it has no reference to such a case as the present. In the present case I am of opinion that there is nothing in the Act which prevents the defendants from doing what they have done, or are proposing to do. I dismiss the action with costs, as this substantially disposes of the whole action.

Solicitors: *Batten, Proffitt*, and *Scott*; *Trinder* and *Capron*, for *Paine* and *Brettell*, Chertsey.

Tuesday, July 24.

(Before NORTH, J.)

Re PEAKE'S SETTLED ESTATES. (a)

Settled estate—Will—Trust for sale—Statutory powers of sale and management—Capacity of trustees.

A petition was presented, under the Settled Estates Act 1877 *and the Settled Land Acts* 1882 *to* 1892, *by the trustees of the will of a testator and his other surviving children and adult grandchildren, asking that his two daughters (the then trustees), or other the trustees for the time being of his will, might be authorised to sell for cash, or to grant at fee farm rents, the whole or any portion of the lands devised by the testator, with power to make proposals for separate sales, and subject to the approval of the court in each case to lay out any part of the lands for streets, open spaces, sewers, drains, or watercourses. The petition was heard on the* 29*th July* 1893, *on which occasion the judge held that he could confer the powers asked for, but declined to confer them upon the testator's two daughters, and ordered the petition to stand over, with liberty to amend, with a view to the appointment of other trustees. The petition now came on for rehearing. There was evidence that it had been found impossible to induce any capable and responsible person to consent to incur the responsibility of undertaking the onerous duties of the trusteeship, which included laying out land for building purposes, and carrying on the manufacture of bricks and tiles; and also that one of the daughters had been accustomed during the life of the testator to assist him in keeping the accounts of the business, and writing out cheques for the payment thereof, and had thus obtained a full and accurate knowledge of business and family affairs; and that since the testator's death both his daughters had taken an active part in the management of his business, and in checking the accounts thereof.*

Held, that, under these exceptional circumstances, the powers asked for should be granted to the testator's two daughters as the trustees of his will, during their joint lives.

THIS was a petition under the Settled Estates Act 1887 and the Settled Land Acts 1882 to 1892, asking that the then trustees of the will of Thomas Peake, deceased, or other the trustees for the time being of his will, might be authorised to sell for cash, or to grant at fee farm rents, the whole or any portion or portions of an estate called the Tileries, and other lands devised by the will, with power from time to time to make proposals for separate sales, and with power also, subject to the approval of the court in each case, to lay out any part or parts of the same estate and lands for streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses.

Thomas Peake, who died on the 23rd April 1881, by his will dated the 6th Oct. 1877, devised and bequeathed the residue of his real and personal estate to trustees upon trust, subject to the provisions thereinafter contained, for sale and conversion, and investment, and to stand possessed of the trust fund upon trust after the death of his wife, which had happened since his death, for his children and their issue as therein mentioned. And the testator expressed his will to be that the

(a) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

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trusts for sale contained in his will should not be exercised so far as they related to his mineral lands until after the decease of the survivor of his sons and daughters, and gave to his trustees power to postpone the sale and conversion so long as they thought fit, and to let and manage his property, and to carry on his business of a coal and iron master, and brick and tile manufacturer.

There were minerals under the testator's estate called the Tileries, but it had become impossible, owing to depression of trade since the testator's death and other causes, to work the minerals at a profit, and without great risk of injury to adjacent property, for which his trustees would be liable to neighbouring proprietors, and the mines which had become flooded were abandoned.

At the date of the petition there were living three of the testator's children, and the issue of the testator's fourth child. The testator's son, John Nash Peake, continued to manage the testator's businesses as he had done in the testator's lifetime, and the testator's two daughters, Mrs. Murly and Miss Peake, were the trustees of his will. Mrs. Murly, the elder, was a widow without children, and Miss Peake was forty-seven years of age.

The petition was presented by the trustees, Mrs. Murly and Miss Peake, and by John Nash Peake and the testator's adult grandchildren, the respondent being an infant grandchild. The object of the petition was to obtain power to lay out the Tileries as a building estate, and to sell it in plots for building purposes, for which it was well adapted, and also by this means to increase the demand for bricks and tiles manufactured by the trustees.

The petition was heard by North, J., on the 29th July 1893, when it was held that the direction in the testator's will did not prevent the court from exercising its statutory powers and authorising the sale of the estate by the trustees, but that the wider powers of sale and management asked for ought not to be given to the two ladies; and the petition was ordered to stand over, with liberty to amend with a view to the appointment of new trustees (69 L. T. Rep. 281; (1893) 3 Ch. 430).

The petition now came on for hearing. There was evidence, which had not been obtained on the previous occasion, that Mrs. Murly and Miss Peake had obtained an intimate acquaintance with the details of the testator's business, one of them. Miss Peake, having assisted the testator in his lifetime in carrying on the business; and that no capable and responsible persons outside the testator's family were willing to take upon themselves the onerous duties and responsibilities involved in the trusteeship; and also that all the persons interested had confidence in the two ladies as trustees.

The following is a portion of the fresh evidence by affidavit produced in support of the petition:

The said Eliza Fanny Peake is now of the age of forty-seven years or thereabouts, and for some years prior to 1878 she was the confidant of the said testator in business matters, and was in the habit of assisting him in examining the trade accounts, all of which were sent to him at his residence, at Malvern, weekly, for examination and payment. In the year 1878 the testator became paralysed, and from that time to the date of his death, in 1881, this deponent Eliza Fanny Peake took the entire superintendence of the work formerly done by him in examining and checking all accounts, and drawing and writing out cheques for the payment thereof, and in this way she gained a very full and accurate knowledge both of the testator's business and of his family affairs.

From the date of the retirement of the said John Nash Peake up to the time of the death of the said Samuel Bate, this deponent Eliza Fanny Peake continued to take an active part in the management of the said business and the working of the trust estate, and after the death of the said Samuel Bate she continued to do this in conjunction with her sister, this deponent Harriet Nash Murly, and the trade accounts and all cheques relating thereto are forwarded weekly to the present trustees, and carefully scrutinised and passed by them before payment.

Owing to the complicated nature of the trusts of the will of the said testator, and of the businesses directed to be carried on by his trustees, these deponents have found it impossible to induce anyone outside the family to accept the office of trustee, and all members of the family have every confidence in the present trustees, assisted as they are, and will continue to be, by the said John Nash Peake, and are most anxious that they should be allowed to continue to act, and that the powers asked for in this petition should be vested in them.

Swinfen Eady, Q.C. and *Tyssen* for the petition.—It is absolutely necessary, in order to avoid loss to the estate, that the trustees should have the powers asked for, as the minerals cannot be worked except at a loss, and without great risk of injury to the adjacent land and houses, for which the trustees would be responsible; and a considerable sum would first have to be raised to free the mines from water with which they are flooded. The fresh evidence shows that the testator's two daughters are capable of exercising the powers asked for, and no other competent persons can be found willing to undertake the responsibility of the trusteeship.

R. F. Norton, for the respondent, took no part in the discussion.

NORTH, J.—As regards these trustees a very exceptional case has been made out, of which I heard nothing when the matter was before me on a former occasion. I am satisfied with the evidence that the unmarried lady is of exceptional capacity, and well fitted for the position of trustee. As regards the married lady the evidence is not so strong; but, as the two are associated as trustees of the will, I think I may do what is asked. But the words "subject to the approval of the court in each case" must apply to the whole of the order, and the authority must be given to the trustees by name, and not to the trustees for the time being of the will, and must be limited to the joint lives of the two ladies.

Solicitors for the petitioners, *Cronin, Orgill*, and *Cronin*, for *Llewellyn* and *Ackrill*, Tunstall.

Solicitors for the respondent, *Field, Roscoe*, and *Co.*, for *Saunders, Bradbury*, and *Saunders*, Birmingham.

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Wednesday, July 25.

(Before NORTH, J.)

Re A. H. HYSLOP (deceased); HYSLOP *v.* CHAMBERLAIN. (*a*)

Will—Construction—Loan by testator—Appointment of debtor as executor—Release of debt.

A testator, who had lent his brother-in-law 100*l.*, *appointed the brother-in-law one of the executors of his will, and after giving certain legacies proceeded: "I give to my brother-in-law the sum of* 500*l. in consideration of his undertaking to be my executor, and carrying out my instructions and wishes to the best of his ability. The instructions are contained in letters addressed to him." And after making another bequest proceeded: "I give, devise, and bequeath all my real and personal property, of what nature or kind soever, not hereinbefore otherwise disposed of, to E. C. H., to be by her used according to her discretion (as regards the interest) during her lifetime for the benefit of such members of the H. family as may from time to time most require it, and at her death the principal sum is to be divided (at her discretion) with the above idea in view. She is responsible to no one for the use of the interest of the money, and can retain what sum she wishes for her own use; but I wish that, in case of her marriage or death, the sum should be reserved for the above object, and that no husband she may marry shall have any control over the same." The testator left a document headed "general instructions" to his brother-in-law, which was undated and unsigned, and contained the following passage: "The hundred pounds I lent you does not form part of the money left you; it is cancelled." The document had not been communicated to the brother-in-law in the testator's lifetime. On summons:*

Held, that the debt of 100*l. due from the testator's brother-in-law was not cancelled; and that E. C. H. was absolutely entitled to the testator's residuary estate for her life free from any trust, with a power to appoint the principal among those members of the H. family living at her death who most required it.*

ALEXANDER HARLEY HYSLOP, by his will dated the 16th Oct. 1889, appointed his brother-in-law the Rev. Henry Hart Chamberlain and his sister Emma Charlotte Hyslop executors, and after giving certain legacies proceeded as follows: "I give to my brother-in-law the Rev. Henry Hart Chamberlain the sum of 500*l.* in consideration of his undertaking to be my executor and carrying out my instructions and wishes to the best of his ability. The instructions are contained in letters addressed to him." And after making another bequest the testator proceeded:

I give, devise, and bequeath all my real and personal property, of what nature or kind soever, not hereinbefore otherwise disposed of, to Emma Charlotte Hyslop, to be by her used according to her discretion (as regards the interest) during her lifetime for the benefit of such members of the Hyslop family as may from time to time most require it, and at her death the (principal) sum is to be divided (at her discretion) with the above idea in view. She is responsible to no one for the use of the interest of the money, and can retain what sum she wishes for her own use, but I wish, in case of her marriage or death, that the sum should be reserved for the above object, and that no husband she may marry may have any control over the same.

Three letters of instructions in the testator's hand-writing with reference to the administration of his property were found inclosed in a tin box with the testator's will. Two were addressed to Chamberlain, and the third to Emma Charlotte Hyslop. They were not communicated in the testator's lifetime to the persons to whom they were addressed, and were intended as testamentary documents, but not properly executed as such. Most of the directions contained in the three letters of instructions were incapable of being carried out by the executors, who, however, were willing to carry out the testator's wishes as far as they lawfully could.

The testator had about the month of Aug. 1880 lent the defendant, Chamberlain, 100*l.* for which he paid interest at 4 per cent., the last payment of interest being made in Sept. 1890. In one of the two letters of instructions left by the testator addressed to the defendant, which bore no date, the testator wrote:

The hundred pounds I lent you does not form part of the money left you; it is cancelled.

Upjohn for the plaintiff.—With respect to the debt of 100*l.* due from the defendant, Chamberlain, at the time of the testator's death, the debt is not cancelled, and the debtor must account for it to the testator's estate. As to what the plaintiff takes under the testator's will, she has an absolute life estate in the interest, with a power of appointment over the principal among the members of the Hyslop family living at her death who most require it. She has an absolute right to the interest, and no one can question her use of it. He referred to

Bull v. *Vardy*, 1 Ves. jun. 270.

The words used in the testator's will confer an absolute right. He referred to

Meredith v. *Heneage*, 1 Sim. 542;
Knight v. *Knight*, 3 Beav. 148;
Eaton v. *Watts*, L. Rep. 10 Eq. 151.

Theobald for the defendant, Chamberlain.—The debt of 100*l.* is cancelled. The appointment of Mr. Chamberlain as executor operates at law as a release of the debt, and equity will not make him liable for the debt under the circumstances and in face of the statement that the debt is cancelled, contained in the general instructions written out and left by the testator. He referred to

Strong v. *Bird*, 30 L. T. Rep. 745; L. Rep. 18 Eq. 315;
Re Applebee; Leveson v. *Beales*, 65 L. T. Rep. 406; (1891) 3 Ch. 422.

Gore Browne for the defendant Adelaide Annie Hyslop.—The "general instructions" left by the testator are undated, and appear to be intended as a testamentary document. It was not communicated to the debtor in the testator's lifetime. The plaintiff takes an absolute life estate in the interest, but does not take the principal, which she must appoint according to the testator's will.

NORTH, J.—With regard to the question whether the sum of 100*l.* due to the testator from his brother-in-law has been released or not, the appointment of him by the testator as his executor is not sufficient to operate in equity as a release of the debt. He is still liable for the

(*a*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

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debt in equity unless he can show some reason for not being made liable. But there may be evidence of a continuing intention on the part of the testator to forgive the debt which is enough in equity to release him from the liability, as in *Strong* v. *Bird* (*ubi sup.*). If there was a letter from the testator intended to take effect in his lifetime containing a release to the executor of the debt, and delivered to him, it might be enough to release him from his debt. But the document relied upon in this case was intended as a testamentary document instructing the executor how to deal with the testator's property, and, as it was not properly executed, it cannot be looked at at all. Therefore the debt owing to the testator is not cancelled. As to the interest taken by the plaintiff in the testator's residuary estate, she takes an estate for life in the residuary estate; but I think there is no trust engrafted on her life estate, particularly having regard to the more recent cases on the point. Although the earlier words of the gift to her direct that the interest is to be used by her according to her discretion for the benefit of such members of the Hyslop family as most require it, the subsequent words of the gift give her full power to retain what sum she wishes for her own use, and provide that she is to be responsible to no one for the use of the interest of the money. There is therefore no trust engrafted on her life estate. But, although she takes the interest absolutely and irresponsibly, I do not think that she takes the principal in the same way. There is a marked distinction between the words of the gift which apply to each case. [His Lordship read the words of the will referring to the principal and continued:] These words clearly show that the principal is not to go to her absolutely; but at her death is to be divided at her discretion "with the above idea in view," that is, for the benefit of such members of the "Hyslop family" as may for the time being most require it; that is, only for those living at her death who most require it. I cannot tell her what she is to do; but she has a power to appoint the principal in the manner indicated. I do not think that she ought to have the funds forming the residuary estate transferred into her own name now. The costs of all parties as between solicitor and client must come out of the estate.

Solicitors: *Campbell, Reeves,* and *Hooper; Cunliffe* and *Davenport.*

QUEEN'S BENCH DIVISION.

Aug. 7, 8, 9, *and* 10.

(Before Hawkins and Lawrance, JJ.)

Lovejoy v. Cole. (a)

Costs—County Court—Jurisdiction—Action in High Court—Credit given on writ—Admitted set-off—Whether such credit is an admitted set-off—County Courts Act 1888 (51 & 52 *Vict. c.* 43), *s.* 57.

Sect. 57 *of the County Courts Act* 1888 *gives jurisdiction to the County Court to try an action where "the debt or demand claimed consists of a balance not exceeding fifty pounds, after an admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff."*

Held, that a credit given by the plaintiff on his writ for money paid to him by the defendant is an admitted set-off within the meaning of the section, although such credit has not been assented to by the defendant, and that therefore if in an action of contract in the High Court, the plaintiff recovers a sum which, after the deduction of such credit, does not exceed 50*l.*, *the action is one which might have been brought in a County Court, and the plaintiff is entitled only to costs on the County Court scale, unless he gets a special certificate for costs.*

To be an admitted set-off it is not necessary that the set-off should be admitted by both parties before action; it is sufficient if it be admitted by the person against whose interest it is to admit the same.

Percival *v.* Pedley (18 *Q. B. Div.* 635) *followed.*

Appeal from an order made by Grantham, J., at chambers, directing a master to review and tax the costs in the action on the County Court scale.

The action was brought to recover for work done as an architect and surveyor in the years 1890-91.

The particulars indorsed on the writ were as follows:

1890, April 17, to 1891, May 9. To fees for work done as an architect and surveyor for the defendant at his request, between these dates, full particulars whereof have been delivered, 148*l.* 1*s.* Cr. By payments on account from time to time and *contrà*, 25*l.* Amount due, 123*l.* 1*s.*

The plaintiff applied for judgment under Order XIV., but was unsuccessful. In the affidavit filed by the defendant in answer to this application he denied that he was indebted to the plaintiff in the sum of 123*l.* 1*s.*, or any other sum; but that if he was liable at all to the plaintiff the sum of 75*l.* was a fair and reasonable sum for the work.

By an order of a master, the action was referred to an official referee, before whom the whole cause was tried. The referee found that the plaintiff was entitled to recover from the defendant in respect of his claim the sum of 50*l.*, and he directed judgment to be entered for the plaintiff for such sum of 50*l.* and costs.

The plaintiff's costs were prepared and carried in on the High Court scale, and were taxed by master Macdonell on that scale, after objection by the defendant that they should be taxed on the County Court scale, as the plaintiff, in an action on contract, had recovered a sum not exceeding 50*l.*, and was therefore by Order LXV., r. 1, entitled to County Court costs only.

The master stated in his report that the plaintiff having recovered 50*l.* it was conceded before him that the costs ought to be taxed on the County Court scale if the action could have been brought in the County Court: (*Millington* v. *Harwood*, 66 L. T. Rep. 576; (1892) 2 Q. B. 166.) He also stated that by the words "and *contrà*" on the writ the plaintiff meant that this 25*l.* consisted of goods supplied by the defendant to the plaintiff, and mentioned in letters put in at the trial, and he added that it was not suggested that at or before the trial the defendant ever agreed or admitted this set-off, though it was argued before him that there must be deemed to be an admitted set-off. He further added that under the circumstances it appeared to him, on the authority of

(a) Reported by W. W. Orr, Esq., Barrister-at-Law.

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Hubbard v. *Goodley* (62 L. T. Rep. 736; 25 Q. B. Div. 156) and *Goldhill* v. *Clarke* (68 L. T. Rep. 414), it was proper to tax the costs on the High Court scale.

Upon appeal Grantham, J. reversed this order of the master, and directed the master to tax the costs on the County Court scale.

The plaintiff now appealed.

Sect. 116 of the County Courts Act 1888 provides:

With respect to any action brought in the High Court which could have been commenced in a County Court, the following provisions shall apply:—(1) If in an action founded on contract the plaintiff shall recover . . . . a sum of twenty pounds or upwards, but less than fifty pounds, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a County Court.

Sect. 57 provides:

Where in any action the debt or demand claimed consists of a balance not exceeding fifty pounds, after an admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff, the court shall have jurisdiction to try such action.

Ritter for the plaintiff.—The master was right in taxing the costs on the High Court scale. I contend that the plaintiff has really recovered 75*l.* upon his claim, which sum, reduced by the credit of 25*l.*, makes up the amount of 50*l.* for which the judgment was given. For the purpose of settling as to the taxation of the costs, we must look to the state of the facts immediately before the issuing of the writ, and we must look at the matter as if the sum finally found due to the plaintiff were in the first instance inserted on the writ. That sum was, as I contend, 75*l.*, and that being the sum in effect upon the writ, the claim was beyond the County Court jurisdiction, and an action for the same could not have been commenced in the County Court, unless it was reduced by an admitted set-off to the 50*l.* There was here no admitted set-off so to reduce it. The credit of 25*l.* given by the plaintiff was not an admitted set-off, as it was quite clear that neither the plaintiff nor the defendant had agreed or admitted this amount as a set-off before action brought. It did not appear that 25*l.* was the right sum to which the defendant was entitled, nor did the plaintiff know when he issued his writ that 25*l.* was the right amount. A set-off to be an admitted set-off within the meaning of the 57th section, must be a set-off admitted by both parties before action brought:

Hubbard v. *Goodley*, 62 L. T. Rep. 736; 25 Q. B. Div. 156;
Goldhill v. *Clarke*, 68 L. T. Rep. 414.

The case of *Hubbard* v. *Goodley* (*ubi sup.*) is exactly in point here, and was decided on the same section that applies to the present case. There the plaintiff claimed on his writ the sum of 56*l.*, and he gave the defendant credit for a set-off of 14*l.* which reduced the claim on the writ to 42*l.*, and the court held that the County Court had no jurisdiction, although the sum really claimed was only 42*l.*, inasmuch as the credit or set-off of 14*l.* was not admitted by the defendant before action. That case therefore shows that a plaintiff cannot, merely by giving credit on the writ for a certain sum, bring his case within the section. The decision of Charles, J., in *Goldhill* v. *Clarke* (*ubi sup.*), is to the same effect. In *Hodgson* v. *Bell* (62 L. T. Rep. 481; 24 Q. B. Div. 525) the Court of Appeal held that a "payment" to reduce a claim below 100*l.* within sect. 65 of the Act, must be a payment before action, and the principle of that case applies precisely to the present case. He also referred to pp. 52-53 of the Annual County Courts Practice 1894, as showing the meaning of the words "balance of account," and set-off.

Herbert Reed, Q.C. and *E. Clayton* for the defendant.—The learned judge at chambers decided the case on the ground that if this was a set-off it must be taken to have been an admitted set-off. We submit the learned judge was right in the view he took. This sum of 25*l.* was either a payment—in which case it would be a payment before action—or it was a set-off, and if a set-off, it was an admitted set-off before action. The plaintiff's claim, therefore, consisted of a balance of 50*l.* after a payment as we contend of the 25*l.*, and the claim could therefore have been brought in the County Court. To be an admitted set-off within the meaning of the section it is not necessary that the set-off should be admitted by both parties; it is sufficient if it be admitted by the plaintiff, and it is not necessary that it should be admitted by the defendant:

Percival v. *Pedley*, 18 Q. B. Div. 635.

In that case the writ was specially indorsed with a claim for 89*l.*, and credit was given on the writ for about 51*l.*, thus leaving a balance claimed of 38*l.*, and the court there held that the County Court had jurisdiction, as the balance claimed was 38*l.*, and it was not necessary for the defendant to have admitted the payment or set-off of the 51*l.* before action. That case was decided on sect. 7 of the County Courts Act 1867 (30 & 31 Vict. c. 142), which was identical in terms with sect. 57 of the present Act, and is therefore conclusive of the present case. [LAWRANCE, J.—*Percival* v. *Pedley* (*ubi sup.*) is of the highest importance. The words of the section on which it was decided are precisely the same as the words here, and that case is conclusive.]

Ritter in reply.

Cur. adv. vult.

Aug. 10.—The judgment of the Court was delivered by

HAWKINS, J.—In this case the plaintiff brought his action for 148*l.* 1*s.*, and indorsed his writ for that amount for work and labour done, and indorsed also on the writ was a memorandum giving the defendant credit for 25*l.* As to the meaning of those words on the writ "and *contrà*" no explanation has been given, but that credit reduced the amount claimed to 123*l.* 1*s.* The action was ultimately referred and the case went down to an arbitrator, who found that the amount due was 50*l.* only, and thereupon the question arose whether the costs should be taxed on the High Court scale, or on the County Court scale. The master found that the plaintiff ought to have the costs taxed on the High Court scale, but the learned judge thought otherwise, and hence the appeal to us. Now the questions which arise are whether 50*l.* was the sum recovered, and whether the action was one which could have been brought in the County Court. If it was an action which could have been brought in the County Court, then the whole argument for the plaintiff fails, and if there be no objection on other grounds

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there would be no reason why more than County Court costs should be allowed. But it was said that, in giving credit for the 25*l.*, thereby reducing the claim to 123*l.* 1*s.*, the plaintiff was doing what he had no right to do, and as the words "and *contrà*" ought to be construed as a set-off for goods sold, that it was not an agreed set-off, and could not therefore have been given credit for. The question then is, what is an agreed set-off? It was contended for the plaintiff that, unless a set-off was agreed to by the defendant, it was not an agreed set-off, and no credit could be given for it. It struck me as revolting to common sense that in such a case a man could not give credit even to the defendant without the assent of the defendant. With regard to the old cases on the subject, I think those cases are hardly sufficiently understood. One of the oldest cases is the case of *Woodhams* v. *Newman* (7 C. B. 654), where the marginal note states that "a defendant was not entitled to enter a suggestion to deprive a plaintiff of costs under the 129th section of the County Courts Act (9 & 10 Vict. c. 95), where the debt or demand, originally exceeding 20*l.*, is reduced below that sum by a claim of set-off. The words 'on balance of account or otherwise,' have reference to a debt reduced by payments, or a balance settled and ascertained before action brought." Upon the facts of that case it was held that the plaintiff had a right to bring his action in the Superior Court for the total amount of his claim without any deduction by reason of set-off, because he could not compel the defendant to accept a set-off or to plead it in that action, unless he wished to do so. That was a case where the defendant claimed a set-off which was not admitted before action by the plaintiff, and therefore neither that case, nor any of the other old cases on the point at all settles this matter. The question here is, whether this is a matter which can be given credit for. I think it is on these grounds: In the first place, I think an admitted set-off means a set-off admitted by the person against whose interest it is to admit the same. If the plaintiff chooses to say to the defendant, "You need not trouble yourself to plead set-off; I give you credit for a certain sum which I owe you," then I think that, unless there is some application made at the instance of the defendant to strike out this credit or alter it, the defendant must be taken to have assented to it, and if he goes down to trial he does so with the credit given as appears on the writ. That would be evidence of his assent to it, but I think that evidence of assent is not necessary in such a case, and that has been determined by the case referred to of *Percival* v. *Pedley* (*ubi sup.*). In that case the writ was specially indorsed with a claim for 89*l.* for money paid by the plaintiff for the use of the defendant, and credit given for a sum of nearly 51*l.*, money received by the plaintiff, leaving a balance of 38*l.* When the case came before the court, Mathew, J. said: "Is this a case of admitted set-off? Counsel for the plaintiff says that it is not, because the defendant does not admit the set-off for which the plaintiff gives him credit, and it is argued that, unless there is an agreement between the plaintiff and the defendant as to the set-off, it is not admitted by both. But I am clearly of opinion that sect. 7 means payment or set-off admitted by the plaintiff; because otherwise the plaintiff might make his claim for a sum far above 50*l.*, give credit for a set-off which he knew the defendant would not admit, reducing the claim below 50*l.*, and thereby enable himself to proceed in the Superior Court. That cannot have been the meaning of the provision, and I think the learned judge had jurisdiction to transfer the action to the County Court." Cave, J. in his judgment says the same thing. For these reasons I think the set-off may be given in the way it has been given here. I can understand that it may be against the interest of the defendant to have the set-off dealt with in this action. In such a case, however, he might apply to have it struck out He did not do so in this case, but from the time of the service of the writ he had notice that credit had been given to him, and with such notice he tries the case and thereby assents to such credit, although, as I have said, I do not think assent to a credit necessary. I agree with the judgment of Mathew, J., in *Percival* v. *Pedley* (*ubi sup.*), that the assent of both parties is not necessary in such a case. I may also add as to the case of *Goldhill* v. *Clarke* (*ubi sup.*) that it does not seem to me to apply to this case at all.

Appeal dismissed.

Solicitors for the plaintiff, *Taunton* and *Dade*.

Solicitors for the defendant, *H.* and *G. Keith*, for *Camp* and *Ellis*, Watford.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

DIVORCE BUSINESS.

Monday, June 4.

(Before the President (Sir F. H. Jeune.)

Beauclerk v. Beauclerk. (a)

Restitution of conjugal rights—Delay.

Delay is no bar to a suit for restitution of conjugal rights.

This was a petition for restitution of conjugal rights. The petitioner, the wife, was married to the respondent in 1858, and, with some absences by the husband and returns to cohabitation, finally separated from him in 1870 under a deed, which contained a covenant not to institute proceedings, and which remained in force until the wife, in 1889 or 1890, filed a petition for dissolution of marriage on the grounds of cruelty and adultery. That suit was undefended, and Butt, J., who heard it, directed that the Queen's Proctor should have notice, and, after argument, decided that cruelty in law had not been made out. Upon this he dismissed the petition. Subsequently the Court of Appeal also held that the wife's claim for a divorce must fail; but the Lords Justices based their decision on the ground of unreasonable delay, and did not decide whether the petitioner had, or had not, made out a case of cruelty in law against her husband: (*Beauclerk* v. *Beauclerk*, 64 L. T. Rep. 35; (1891) P. 189.) The wife now prayed for a decree of restitution of conjugal rights, and it was suggested, on her behalf, that she had not had a proper opportunity of explaining the reasons for the delay in bringing the former suit, and, further, that the question of delay did not arise in the present case, whatever might be its effect hereafter, upon any proceedings which might be founded upon a refusal to

(a) Reported by H. Durley Grazebrook, Esq., Barrister-at-Law.

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return to cohabitation. The requisite formalities as to demand and service having been proved,

Searle, for the petitioner, submitted that she was entitled to a decree. The court will not take notice of the separation deed, that being a matter between the parties themselves, and the respondent not having chosen to set it up:

Tress v. *Tress*, 57 L. T. Rep. 501; 12 P. Div. 128.

[The PRESIDENT.—Does the question of delay arise in regard to restitution of conjugal rights?] No. It is confined to suits for dissolution of marriage. Even in cases of judicial separation, it is not really a bar, though it may in such cases be taken into consideration by the court in deciding whether the suit is *bonâ fide* or not. There is nothing in the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68) about delay. No amount of delay can bar a claim for restitution of conjugal rights.

The PRESIDENT.—Even supposing there is great delay, I do not see why, in aid of matrimony, any such question as that can arise. I pronounce a decree for restitution of conjugal rights.

Solicitors: *Leman, Groves*, and *Leman*.

Judicial Committee of the Privy Council.

Wednesday, July 18.

(Present: The Right Hons. the EARL of SELBORNE, Lords WATSON, HOBHOUSE, MACNAGHTEN, and MORRIS.)

PLOMLEY v. RICHARDSON AND OTHERS. (a)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Law of New South Wales—Appointment of new trustees by court—Vesting order—Practice—Stat. 16 *Vict. No.* 19. *ss.* 30 *and* 32—*Parties.*

The statute 16 *Vict. No* 19 *by sect.* 30 *empowers the Supreme Court of New South Wales, upon the application of any person beneficially interested, to appoint new trustees in certain cases, and by sect.* 32 *provides that "it shall be lawful for the court upon making any order for appointing a new trustee, either by the same or by any subsequent order, to direct that any land subject to the trust shall vest in the person or persons" so appointed. By the practice of the court, embodied in rules of procedure, the appointment of a new trustee was referred to the master with directions "that upon such appointment the trust property and effects be vested in the" new trustee.*

Held, that an order so made upon a reference to the master was sufficient to vest the legal estate in the new trustee, and that a subsequent order by the court was unnecessary. The Act does not require that all persons interested should be made parties to the suit, but leaves a discretion to the petitioner and to the court.

Judgment of the court below affirmed.

THIS was an appeal by the defendant against a decree dated the 20th Feb. 1893 made by Owen, J., the Chief Judge in equity of the Supreme Court of New South Wales, in a suit brought by the respondents against the appellant for specific performance of an agreement dated the 6th July 1891 for the purchase by the appellant from the respondents of land and buildings in Elizabeth-street, Sydney.

The property sold consisted of two freehold houses, Nos. 67 and 69 in Elizabeth-street, with the yards and outbuildings behind the same. The plaintiffs sold as mortgagees under a power of sale in a mortgage dated the 22nd Dec. 1890, the power arising on default of payment of a promissory note which fell due on the 25th April 1891, and was not paid or renewed. The mortgage contained a clause that purchasers should not be bound to inquire whether default had been made, nor be affected by notice to the contrary. The sale was to be completed on the 6th Oct. 1891, but there was nothing to make time of the essence of the contract.

The plaintiffs in due course delivered a full abstract of title, and on the 3rd Aug. 1891, defendant's solicitors sent requisitions in writing which were replied to by plaintiffs' solicitors on the 12th Aug. 1891. Further requisitions were sent by defendant's solicitors on the 2nd Sept. 1891, and replies to them were sent by plaintiffs' solicitors on the 10th Sept. 1891. The defendant's requisitions or objections on title were by this time reduced to the three following (all of which had, as the plaintiffs said, been satisfactorily answered), viz.:—(1) Legal estate (alleged to be outstanding); (2) Identity of parcels. (This point was not argued on the appeal); (3) Alleged right of contribution in respect of a paid-off mortgage.

The respondents (plaintiffs) on the 23rd Aug. 1892 filed their statement of claim against the appellant (defendant) for specific performance of the contract for sale, alleging that they had shown a good title, and on the 28th Sept. 1892 the appellant filed his statement of defence. On the 4th Oct. 1892 the respondents filed their replication and joined issue.

The suit was fully heard by Owen, J. on the 14th, 15th, 19th, and 20th Dec, 1892 and the 20th Feb. 1893, and on the last-mentioned day his Honour delivered judgment in favour of the plaintiffs and made a decree for specific performance, and for the execution by the defendant of a proper conveyance, with costs of suit, as prayed by the statement of claim.

The present appeal was brought from the decree of the 20th Feb. 1893.

Crackanthorpe, Q.C. and *Serrell* appeared for the appellant.

Cozens-Hardy Q.C. and *Vaughan Hawkins*, who appeared for the respondents, were not called upon to address their Lordships.

At the conclusion of the arguments for the appellant, their Lordships' judgment was delivered by

The EARL of SELBORNE.—Their Lordships do not think it necessary to hear further argument in this case. They are satisfied that the court below was right in holding that a good title was shown upon both the points which have been argued. First, as to the supposed equitable charge arising out of the transaction of the 15th Aug. 1864. Their Lordships start, first, with a transaction out of which such an equity would arise; secondly, with a course of action pursued for years on the footing of that equity, and with a view to work it out and satisfy it. They then come to a suit instituted in 1889, twenty-five years after the transaction, a period of time which,

(a) Reported by C. E MALDEN, Esq., Barrister-at-Law.

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to say the least, would lead, under circumstances favourable to a presumption, to the presumption that the equity might have been worked out during that time. But it is not upon any such presumption that the matter now stands; because that was a suit against the persons who, as long as this equity was in existence, were entitled to the benefit of it, and the just inference is that the claim had, to their knowledge, ceased to exist, and that the means taken to work out the right to contribution had been sufficient and effectual for that purpose. A decree was made absolutely exclusive of any such claim, whether brought forward or not, binding those parties. Their Lordships think that this is a complete answer at this distance of time to the idea that any such claim can now be made. Upon the other point, as to the legal estate, the court below was satisfied that, by the order made in another suit or proceeding on the 9th June 1868, a gentleman named Charles McDonald was legally appointed a new trustee in the place of George Levien, who had been absent for more than a year from the colony; and that the legal estate was vested in him, which McDonald has conveyed to the vendors, or at all events to their mortgagor; and as McDonald had the legal estate, that put an end to all question upon the subject. Had he the legal estate or not? That depends upon the statute (16 Vict. No. 19) under which a new trustee could be appointed in place of a former trustee. The points which are important in the order making the appointment are these: it purports to remove George Edward Levien from being a trustee of the will of Thomas Roberts, deceased; and if it did not appear that there were circumstances which justified that part of the order, possibly the question which their Lordships might have to consider would be different from what it is now. But in point of fact Levien was in a situation, in which under the terms of the trust the parties to whom a power to appoint new trustees was given would have been entitled to do so; because the testator declared, that upon any vacancy in the trust by the death, resignation, residence out of the colony or absence therefrom for a twelvemonth, insolvency, or other incapacity or inability to act in the trust, it should be lawful to appoint new trustees. Levien was in one of these situations. He had been absent from the colony for more than a twelvemonth, and therefore the court could have no difficulty in regarding him as having ceased to be able to act as a trustee. Whether the word "remove" was the proper word, or the best way of expressing it or not, is wholly immaterial, if upon the facts of the case it was plain that the Court was right in treating him as a person who could no longer be retained as the trustee. The occasion on which the order was made was manifestly a proper one, because there was a legatee unpaid for whose benefit a proper investment had been made, doubtless in the names of both trustees; and until the difficulty with regard to the absent trustee was in some way removed there might be a difficulty in dealing with the investment, and making the payment which the acting trustee, the defendant in the suit, was perfectly ready to make. It has been suggested that the court ought not, in a suit so constituted, to have exercised the power of appointing a new trustee. The court had before it the acting trustee. The tenant for life, who would have had a voice in the matter if she had not died, died in 1863. It does not appear that any of the children who were beneficially interested were adults, and the acting trustee, by the terms of the will giving the power, would have been at least a necessary concurrent party. Therefore, there is nothing to lead to the conclusion either that it could have been exercised without his concurrence, or that there was any adult person who ought to have been consulted. But even if that were so, the Act of Parliament, which in other respects authorises the order to be made, clearly did not require that all persons interested should be made parties under such circumstances to the suit. By the 35th section it provides, that the application for the appointment of new trustees might be made by any person beneficially interested, and it was so made. And the effect of the succeeding sections is, that as to parties, in the first instance, the petitioner might judge for himself whom he would or would not serve, and that the court, if it thought fit, might let the case stand over for notice to be given to any person or persons; plainly leaving those matters in the discretion, first of the petitioner, and afterwards of the court. Therefore, even if the court might have done better in exercising that discretion, as a matter of fact in this case it did not think it necessary to serve other parties, and their Lordships are of opinion that unless the order was *ultra vires* it took effect, whether or no it might have been better for the court to have done or required something which it did not do or require. Then, had the court under the Act power under the circumstances to do what it did; and was the effect of what it did to vest the legal estate? These are the only remaining questions. Their Lordships think that those questions are really determined, without going into anything else, by the 30th, taken in connection with the 32nd section. The 30th section says: "Whenever it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the Supreme Court, it shall be lawful for the court to make an order appointing a new trustee or new trustees, either in substitution for or in addition to any existing trustee or trustees." That those circumstances existed in this case their Lordships have no difficulty in assuming. That section by itself does not enable a vesting order to be made, but the 32nd section does. It provides as follows: "It shall be lawful for the court, upon making any order for appointing a new trustee, either by the same or by any subsequent order to direct that any lands subject to the trust, shall vest in the person or persons who upon the appointment shall be the trustee or trustees for such estate as the court shall direct, and such order shall have the same effect as if the person or persons who before such order were the trustee or trustees (if any) had only executed all proper conveyances and assignments of such lands for such estate." Now, before noticing the argument which has been addressed to their Lordships, it seems well to observe that by the pratice of the Supreme Court, now embodied in the rule 318 mentioned in the judgment of the court below, the course was, when any reference was made to the master with a view to the appointment of new trustees, to direct the appoint-

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ment to be made by the master in the first instance unless the court should otherwise order. Accordingly, by this order the court referred it to the master to appoint some fit and proper person to be trustee in the place of George Edward Levien and went on to direct "that upon such appointment"—that is by the master, evidently,—"the trust property and effects be vested in the defendant Richard Driver and the said new trustee upon the trusts of the will or such of them as are capable of being carried into effect." The learned judge in the court below rightly observed that that means necessarily, for the estate proper to be in the trustees, which was an estate in fee simple. The intention of that order, and of the practice of which it is an example, was, evidently, to avoid the necessity of coming again for a subsequent order, when an appointment which nobody challenged was made. The only question is whether it was competent. But the Act of Parliament expressly says that this may be done upon making any order for appointing a new trustee. It was argued that that must mean, not on appointing, as in this case by the master, but actually appointing by the court itself; and, therefore, that in a colony, where the practice prevailing was embodied in the rule to which reference has been made, it could only be done by a subsequent vesting order. Their Lordships think that would be placing upon the words used by Parliament an unnecessarily narrow construction, the effect of which in a colony like this, where such a rule and such a practice prevails, would be to make it absolutely necessary in every case that the vesting should be effected, not by the same order but by a subsequent order. But the words of this section, which are the same as those in the English Act, seem to be expressly intended to enable the court to make an order which is to have a prospective effect; because not only is it "upon making any order for appointing a new trustee"—surely this is and must be an order for appointing a new trustee, since it directs the master to appoint one,—but it may by the same order, as well as by a subsequent order, direct that the lands shall vest in the persons, who, upon the appointment, shall be the trustees. If the order itself appointed the trustee it would be in the person appointed. The language seems expressly adapted to such a practice as that of the Colonial Court, whether that practice prevails or prevailed in England or not. Then, when that is done, if the court thinks fit so to do, and makes no other direction (and in this case it has made no other direction), the effect is to be the same as if the persons who before the order were trustees, had executed all proper conveyances. There is not a word which is not apt to authorise the thing which in this case was done, and done according to the rule and practice in the colony, namely, not merely an inquiry who shall be appointed but an actual appointment by the master. That seems to be the most natural and convenient way of accomplishing the object and saving expense, and their Lordships do not think it does any injustice. If the persons were in contest about the fitness of the person to be appointed, there would be an appeal to the court against the decision of the master. The decision of the master would temporarily take effect, and no doubt with the consequence of vesting; but that consequence, as well as the appointment, would come to an end if the court thought fit to discharge the appointment. The very object being to avoid legal formalities and the expenses connected with them, no injustice of any sort would arise in such a case. Their Lordships, therefore, agree with the learned judge of the court below that there was a complete and legally effectual exercise of the power of appointing a new trustee, and that the legal estate was by means of such appointment vested in Driver and McDonald. Driver died and McDonald survived, and the title is good by McDonald's conveyance. Their Lordships will therefore humbly advise Her Majesty that the decree appealed from is right, and that the appeal should be dismissed with costs.

Solicitors for the appellant, *P. J. Gordon* and *Son*.

Solici ors for the respondents, *Want* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, July 10.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

DAKIN (app.) *v.* PARKER AND OTHERS (resps.). (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Licensing Acts — Licence — Renewal — General annual licensing meeting—No previous notice of intention to oppose—Objection made in court—No grounds stated—Jurisdiction to adjourn—Licensing Act 1872 (35 *&* 36 *Vict. c.* 94), *s.* 42—*Licensing Act* 1874 (37 *&* 38 *Vict. c.* 49), *s.* 26.

A verbal objection to the renewal of a licence, made in open court, though no grounds of objection are then stated, gives to the justices power to adjourn the granting of the licence, and to hear and consider the objection upon a future day, under sect. 42, *sub-sect.* 2, *of the Licensing Act* 1872.

THIS was an appeal by the appellants, Birch and others, from the judgment of the Divisional Court (Charles and Bruce, JJ.), quashing the order of quarter sessions, upon a case stated.

SPECIAL CASE.

1. Prior to the general annual licensing meeting no notice of intention to oppose the renewal of the license had been served on the applicant.

2. At the general annual licensing meeting held on the 24th Aug. 1893, the chief constable in open court said, "I object to the renewal of the license to the King's Head," and thereupon the justices adjourned the consideration of such renewal to the adjourned meeting to be held on the 21st Sept. following.

3. The clerk to the justices, on their behalf, gave the applicant Dakin (the appellant to the quarter sessions) a notice in writing as follows:

Take notice that the adjourned general annual licensing meeting for the said city will be held . . . on the 21st Sept. next, at 10 a.m., for the purpose of grant-

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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ing and renewing licences for the following purposes: First, for the sale by retail in inns, alehouses, or victualling houses, of intoxicating liquors under the Alehouse Act 1828. . . . You are hereby required by the licensing justices to attend the said meeting personally to make your application for the renewal of your licence, an objection to such renewal having been made in open court at the general annual licensing meeting, held on the 24th Aug. inst., by Joseph Farndale, chief constable of the said city.

The chief constable gave the appellant a notice in writing of the grounds of his objection as follows:

I hereby give you notice that should it be your intention to apply at the forthcoming adjourned general annual licensing meeting for the said city, fixed to be holden on the 21st Sept. next . . . for the renewal of any licence held by you authorising the sale of intoxicating liquors by retail, I intend to appear for the purpose of opposing such renewal. And the grounds on which I shall oppose are in general terms as follows:

(1.) That the said licence is not necessary, and is not required to supply the wants of the neighbourhood.

(2.) That your said house has been kept in a disorderly manner, and that George Baker, a previous licensee, was on the 7th Dec. 1892, convicted of an offence against the provisions of the Licensing Act—namely, for suffering the said licensed house to be used on the 17th Nov. 1892, in contravention of the Act for the Suppression of Betting Houses (16 & 17 Vict. c. 119), and was fined 5*l.* and costs. And he was also charged on the 7th Dec. 1892, with the like offences alleged to have been committed on the 11th, 15th, and 16th Nov. 1892, when the informations were withdrawn.

Both notices were served personally on the appellant, on the 29th Aug. last, at the same time.

4. At the adjourned annual licensing meeting held on the 21st Sept. the appellant appeared with his counsel and made his application for the renewal of the licence. At such meeting the whole of the grounds contained in the chief constable's notice were inquired into upon oath, and no objection was made by the appellant or his counsel to the jurisdiction of the justices, or to any omission or irregularity in the procedure at the general annual licensing meeting, but the witnesses were examined upon oath and cross-examined by counsel, who addressed the court on the merits on behalf of the appellant Dakin, after which the justices refused to grant the licence by way of renewal.

5. Notice of appeal to the general quarter sessions was given. The grounds were as follows:

(1) That the renewal of the said licence would have been a convenience to the public and an accommodation to the neighbourhood. (2) That the said King's Head was not a house of disorderly character. (3) That the appellant Dakin was a man of good character and respectability. (4) That there was no sufficient cause or reason arising out of the character or conduct of the appellant Dakin, or any other just and sufficient reason why such licence should not have been renewed. (5) That such licence ought to have been renewed, and ought not to have been refused. (6) That the said refusal was illegal and contrary to law.

6. At the hearing of the appeal the respondents opened their case and called witnesses, and at the close of their case counsel for the appellant contended that at the general annual licensing meeting no sufficient objection had been made to the renewal of the licence of the King's Head as required by the provisions of the Licensing Acts, and that the chief constable at the general annual licensing meeting, in giving the verbal notice hereinbefore set out in paragraph 2, ought at the same time to have stated the general grounds of his objection, or at least what the nature of his objection was.

7. Counsel for the respondents contended that if there had been any omission it had been waived by what took place at the adjourned licensing meeting. They also contended that the said statement made by the chief constable was sufficient to justify the justices in adjourning the application, and in subsequently at the adjourned meeting dealing with the objections to the renewal of the licence.

8. The Court of Quarter Sessions were of opinion, after referring to the case of *Reg.* v. *Merthyr Tydvil* (14 Q. B. Div. 584), that no valid notice of objection had been given on the 24th Aug. 1893 within the meaning of the Licensing Acts 1872, s. 42, and 1874, s. 26, and consequently that all the subsequent proceedings were void. They accordingly considered themselves bound to renew and did renew the licence, and allowed the appeal.

The question for the opinion of the High Court was whether they were right. If the court should be of opinion that the decision was wrong, and that an objection was sufficiently made at the annual licensing meeting, or, if insufficiently made, that the objection to such insufficiency was waived, the decision of the Court of Quarter Sessions was to be reversed and the appeal to them dismissed. If the decision was right, it was to be confirmed.

The Queen's Bench Division (Charles and Bruce, JJ.) reversed the decision of Quarter Sessions.

Dakin appealed.

Alfred Young and *Disturnal* for the appellant.—The objection made by the chief constable was not a valid objection under the proviso to sub-sect. 2 of sect. 42 of the Licensing Act 1872, because no grounds or reasons for the objection were stated. It has been decided that an objection under that part of sect. 42 must be made in open court, and cannot be made in the justices' private room:

Reg. v. *Justices of Merthyr Tydvil*, 14 Q. B. Div. 584.

That case shows that the grounds of the objection must be stated, because, unless the grounds must be stated, it is quite immaterial where the objection is made. The last part of the proviso says that, on the adjourned day, "*the* objection" will be considered; "*the* objection" must be an objection of which the grounds have been stated, otherwise there will be nothing to consider, or at any rate the justices cannot tell whether they are considering the same objection as was made at the annual general licensing meeting. It must be necessary for the grounds of the objection to be stated, for the justices have to exercise a judicial discretion whether they will adjourn the hearing of the application, and they cannot exercise that discretion if they do not know what is the nature of the objection. If this is not the true construction of sect. 42 of the Act of 1872, the matter is made quite clear by the provisions of sect. 26 of the Licensing Act 1874. By reason of the pro-

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visions of that section the objection must be for some cause personal to the applicant himself, and the grounds of that objection must be stated.

Poland, Q.C. and *Russell Griffiths*, for the respondents, were not heard

Lord Esher, M.R.—The point here is as simple as it can be. It is, as stated by Charles, J., as follows: The Act of 1872, if the later Act of 1874 had not been passed, would have to be construed by itself; the later Act has altered parts of the earlier Act, and has left other parts unaltered; as to the parts wh ch have been altered we must consider the later Act, but the part which has not been altered must be construed by itself. This part of sect. 42 of the earlier Act has not been altered by the later Act, viz., the proviso to sub-sect. 2, which says: "Provided that the licensing justices may, notwithstanding that no notice has been given, on an objection being made, adjourn the granting of any licence to a future day, and require the attendance of the holder of the licence on such day, when the case will be heard and the objection considered as if the notice hereinbefore prescribed had been given." That part of the earlier Act has not been altered at all by the later Act. We have then to consider this question as if the later Act had not been passed. It is said that, upon the true construction of the proviso to sub-sect. 2 of sect. 32 of the Act of 1872, an objection must state the grounds of the objection; and that the licensing justices had no jurisdiction to adjourn the granting of this licence, because, according to the true meaning of the proviso, the objection ought to have stated the grounds thereof and did not do so. There is no such provision in the proviso. It is argued that the policy of the Act of Parliament requires that such a construction shall be given to the proviso. There is no such rule of construction, and we cannot read into this provision any such words as "Upon reasons being given for the objection." If "an objection" need not state the grounds, then "the objection" to be considered will be the same objection, the grounds of which need not be stated. Those reasons are quite sufficient to dispose of this appeal. Several other points have been adverted to, but I will not go into them. Each one of them can be answered so as not to cause any injustice or absurdity. For the reasons given by Charles, J., I think that the appeal fails upon that point. I think that Charles, J., towards the end of his judgment has unnecessarily gone out of his way to say that certain things ought to be done, and I do not agree with that part of his judgment. The appeal fails and must be dismissed.

Kay, L.J.—This appeal fails. The point taken is one of the utmost technicality. At the general annual licensing meeting, the licensing justices heard the chief constable of the city make an objection to the renewal of a particular licence. The chief constable did not state the grounds of his objection in court. Thereupon the licensing justices adjourned the granting of the license and the hearing of the objection, and notice of the adjournment was given to Dakin, and the chief constable gave him a formal notice in writing stating the grounds of his objection. It is now argued that the licensing justices had no power to adjourn the granting of this license because the chief constable did not state the grounds of his objection in court. Unless there is to be found in sect. 42, of the Act of 1872, something which provides that the grounds of an objection must be stated, in my opinion the appeal must fail. There is nothing of the kind to be found in sect. 52. The meaning of the section is, that if an objection is made in court, of which no previous notice has been given, the licensing justices may adjourn the granting of the licence, and require the attendance of the licensed person at the adjournment and then hear the case and consider the objection, "as if the notice hereinbefore prescribed had been given." In this case, after the objection made, everything was done in order to inform the licensed person of the grounds of the objection before the adjourned hearing. The appeal, therefore, fails and must be dismissed. The argument founded upon the later Act of 1874, is entirely a mistaken argument; the later Act does not alter the earlier Act.

Smith, L.J.—I am of the same opinion. As to the effect of sect. 42 of the Act of 1842, I entirely agree with the other judgments which have been given. I will, however, say something about the argument that sect. 26 of the Act of 1874 has altered the proviso to sub-sect. 2 of sect. 42 of the Act of 1872. Sect. 42 deals with the application of a licensed person for the renewal of his licence, and enacts that he need not attend in person, as he had formerly to do, unless required by the justices to attend. Then sect. 26 of the Act of 1874 simply says that the requisition to attend shall only be made for some special cause, personal to the licensed person. And sect. 26 further says that the notice in writing of intention to oppose the renewal of a licence, provided for in the first part of sub-sect. 2 of sect. 42 must state in general terms the grounds on which the renewal will be opposed. Those provisions are merely an addition to sub-sect. 1 and to the first part of sub-sect. 2 of sect. 42 and mean no more. They do not apply at all to the proviso at the end of sub-sect. 2 of sect. 42. The appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellant, *Steadman, Van Praagh, Sims*, and *Co.*

Solicitors for the respondents, *Sharpe, Parker, Pritchards*, and *Barham*, for *C. A. Carter*, Birmingham.

Friday, Aug. 3.

(Before Lord Esher, M.R., Kay and Smith, L.JJ.)

Re Sleet; *Ex parte* Sleet. (a)

APPEAL IN BANKRUPTCY.

Bankruptcy—Deceased debtor—Petition for administration of estate in bankruptcy—Presentation of petition before grant of letters of administration—Bankruptcy Act 1883 (46 & 47 *Vict. c.* 52), *s.* 125.

A petition for the administration in bankruptcy of the estate of a deceased debtor may be presented, under sect. 125 *of the Bankruptcy Act* 1883, *before there is a duly constituted legal personal representative of the deceased debtor.*

(a) Reported by J. H. Williams, Esq., Barrister-at-Law.

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This was an appeal by H. A. Sleet from an order made by Mr. Registrar Linklater for the administration in bankruptcy of the estate of W. Sleet, deceased.

W. Sleet died intestate on the 8th May 1894.

On the 8th June creditors presented a petition for the administration in bankruptcy of the estate of the deceased. Leave was given to serve this petition upon H. A. Sleet, the widow of the intestate, who was alleged to have possessed herself of his assets; and the petition was served upon her.

On the 22nd June H. A. Sleet gave notice of her intention to dispute the allegations made in the petition.

On the 23rd June letters of administration of the estate of W. Sleet were granted to H. A. Sleet.

The Bankruptcy Act 1883 (46 & 47 Vict. c. 52) provides:

Sect. 125, sub-sect. 1. Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against such debtor, had he been alive, may present to the court a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor according to the law of bankruptcy.

Sub-sect. 2. Upon the prescribed notice being given to the legal personal representative of the deceased debtor, the court may, in the prescribed manner, on proof of the petitioner's debt, unless the court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in bankruptcy of the deceased debtor's estate, or may upon cause shown dismiss such petition with or without costs.

Sub-sect. 9. Notice to the legal personal representative of a deceased debtor of the presentation by a creditor of a petition under this section shall, in the event of an order for administration being made thereon, be deemed to be equivalent to notice of an act of bankruptcy, and after such notice no payment or transfer of property made by the legal personal representative shall operate as a discharge to him as between himself and the official receiver; save as aforesaid nothing in this section shall invalidate any payment made or any act or thing done in good faith by the legal personal representative before the date of the order for administration.

The Bankruptcy Rules provide:

Rule 276. The petition shall, unless the court otherwise directs, be served on each executor who has proved the will, or, as the case may be, on each person who has taken out letters of administration. The court may also, if the court thinks fit, order the petition to be served on any other person.

On the 28th June, after hearing the parties, the registrar made an order for the administration in bankruptcy of the estate of W. Sleet.

H. A. Sleet appealed.

Herbert Reed, Q.C. and *Gregson Ellis* for the appellant.—A petition for the administration in bankruptcy of the estate of a deceased debtor cannot be presented until there is a legal personal representative of the deceased. Here the petition was presented before letters of administration were granted to the widow. The court, therefore, had no jurisdiction to make an order upon that petition. It is clear from the provisions of the various sub-sections of sect. 125 of the Bankruptcy Act 1883 that there must be a legal personal representative of the deceased debtor before such a petition can be presented.

Muir Mackenzie and *F. M. Abrahams*, for the respondents, were not heard.

Lord Esher, M.R.—This case comes directly within the provisions of sect. 125, sub-sects. 1 and 2, of the Bankruptcy Act 1883. No objection can be taken to the petition upon the ground that, at the time it was presented, there was no legal personal representative of the deceased duly appointed. The registrar, therefore, had to perform his duty under sub-sect. 2, the prescribed notice having been given to the legal personal representative, who was appointed before the hearing of the petition. The registrar, then, was entitled to make an order unless he was satisfied that there was a reasonable probability that the estate would be sufficient for the payment of the debts owing by the deceased. He was not so satisfied, and the order was properly made.

Appeal dismissed.

Solicitors for the appellant, *Cooper* and *Bake*.
Solicitor for the respondents. *E. H. Quicke*.

Tuesday, Aug. 8.

(Before Lord Esher, M.R., Kay and Smith, L.JJ.)

Anderson v. Gorrie and others. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Action—Action against judge—Judge of Supreme Court of Colony—Acts done in judicial capacity—Malice.

No action will lie against a judge in respect of any acts done by him in his judicial capacity, even if such acts are done maliciously.

This was an appeal by the plaintiff from the judgment of Lord Coleridge, C.J., in favour of the defendant Cook, after the trial with a jury in Middlesex.

The plaintiff was a resident in the island of Tobago in the British West Indies; and the three defendants were judges of the Supreme Court of Trinidad and Tobago.

The plaintiff, believing that he had a grievance against the defendants in respect of certain suits brought against him in Tobago, petitioned Her Majesty in respect of those grievances.

The plaintiff was served with a rule, issued by the defendants in the Supreme Court of Trinidad and Tobago, calling upon him to show cause why he should not be dealt with for contempt of that court for having presented the above petition.

This rule was not applied for by any person, and no one ever appeared to support it or gave any evidence as to the alleged contempt of court.

The plaintiff appeared to show cause against the rule, and the defendants adjourned the hearing from time to time, and ultimately discharged the rule.

The plaintiff attended before the defendant Cook to be examined as to his means of satisfying certain judgments amounting to 42*l*. The plaintiff was ordered to produce certain accounts, and the defendant Cook adjourned the examination for seven days, and directed the plaintiff to find bail forthwith in the sum of 500*l*. with a surety for the same amount. In default of finding such bail the plaintiff was committed to prison.

A colonial statute gave power to order a defendant to give bail when such an examination was adjourned.

(a) Reported by J. H. Williams, Esq., Barrister-at-Law.

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The defendant Cook refused to issue a writ of *habeas corpus*, upon the application of the plaintiff, in order that it might be determined whether he was lawfully detained in prison.

The plaintiff complained of these and certain other acts, and alleged that they were done maliciously and without jurisdiction, and with knowledge of the absence of jurisdiction. He claimed 10,000*l.* damages.

The defendant, Sir John Gorrie, died before the hearing of the action.

During the hearing of the action the jury found a verdict for the defendant Lamb, and judgment was entered in his favour.

The jury found that the defendant Cook "had overstrained his judicial powers, and had acted in the administration of justice oppressively and maliciously to the prejudice of the plaintiff and to the perversion of justice;" and they assessed the damages at 500*l.*

Lord COLERIDGE, C.J. ordered judgment to be entered for the defendant Cook upon the ground that no action would lie against a judge for acts done in his judicial capacity.

The plaintiff appealed.

The plaintiff in person.—The immunity enjoyed by a judge only extends to acts done by him judicially, not acts done by him ministerially. The rule *nisi* for a committal for contempt, which was ordered by the defendant, and the subsequent proceedings thereon, were in the nature of a criminal prosecution, and were not a judicial proceeding by the court. A judicial act is one which requires an exercise of the judicial faculties of the mind, and which is done by virtue of the judicial office which has been given to the judge. He cited

Dawkins v. *Lord Frederick Paulet*, 9 B. & S. 768.;
Thomas v. *Churton*, 6 L. T. Rep. 320; 2 B. & S. 475;
Kendillon v. *Maltby*, Car. & M. 402; 2 M. & Rob. 438;
Kemp v. *Neville*, 10 C. B. N. S. 523;
Floyd v. *Barker*, 12 Rep. 23;
Reg v. *Picton*. 30 Howell's State Trials, 225;
Ex. parte Fernandez, 10 C. B. N. S. 3;
Miller v. *Seare*, 2 W. Bl. 1141;
Houlden v. *Smith*, 14 Q. B. 841;
Calder v. *Halket*, 3 Moo. P. C. 28.

[KAY, L.J. referred to *Fray* v. *Blackburn*, 3 B. & S. 576.]

Adam Walker and *H. Hodge* for the respondent.—All the acts complained of were judicial acts done in court by this defendant in his judicial capacity, they were done in the course of proceedings which were within his jurisdiction. There is a long series of authorities in which it is laid down that no action will lie against a judge for acts done or words spoken in his judicial capacity, though done or spoken maliciously:

Haggard v. *Pélicier Frères*, 65 L. T. Rep. 769; (1892) A. C. 61;
Hamilton v. *Anderson*, 3 Macq. 363;
Scott v. *Stansfield*, 18 L. T. Rep. 572; L. Rep. 3 Ex. 220;
Yates v. *Lansing*, 5 Joh. 282, American;
Fray v. *Blackburn*, 3 B. & S. 576;
Kemp v. *Neville*, 10 C. B.; 523;
Dicas v. *Brougham*, 6 C. & P. 249.

Lord ESHER, M.R.—In this case the plaintiff has brought an action against several judges of the Supreme Court of a colony for damages for wrongful acts done by them in committing him for contempt of court, and in holding him to excessive bail. What the judges did was done in respect of a question whether the plaintiff had been guilty of contempt of court, and in respect of holding him to bail. These judges were judges of the Supreme Court. The first question is, whether those two matters were matters which the judges had jurisdiction to deal with. Now it cannot possibly be said that they had no jurisdiction to inquire whether there had been a contempt of court, or that they could not hold a person to bail in the cases provided for by the colonial statute. These two matters were obviously within the jurisdiction of the court. If any judge exercises such a jurisdiction dishonestly and with malicious motives, I hope that it cannot be denied that he is guilty of a gross dereliction of duty. Then comes the question whether, if a judge does such a scandalous thing, to the injury of a private person, such person can maintain an action against him. The judge can be removed from his office; and it is for the sovereign authority to consider whether he ought to be removed. In the case of a colonial judge an address by the Houses of Parliament is not necessary. If the governor of the colony makes a representation to the Secretary of State the judge can be removed. Such conduct, then, by a judge may not go unpunished. This power to remove a judge does not, however, of itself, deprive a private person of any right of action. The question, therefore, is whether a private person can maintain an action against a judge for doing something which is within his jurisdiction as a judge, but which he has done maliciously and contrary to good faith and honesty. Now, if it were not necessary on the grounds of public policy, and for furthering the better administration of justice, and for the benefit of the public generally, considerations which override any *primâ facie* right of an individual, that it should be otherwise, the common law of England would have permitted such an action to be brought. The question now is, whether it is the common law that no such an action can be maintained. The reasons which have been stated by the judges from the earliest time against permitting such an action are that, if such an action would lie, the judges would lose their absolutely independent position and power, and would be left subject to great pressure. The collective wisdom of the judges has asserted that the absolute freedom and independence of the judges is, upon the whole, for the general benefit, and is necessary for the free administration of justice. That has been so laid down very many times, and many authorities have been cited where this principle has been asserted. In 1824, in the case of *Miller* v. *Hope* (2 Shaw. App. Cas. 125) in the House of Lords, it was held that an action for damages was not maintainable against a judge for words spoken by him in his judicial capacity, although it was alleged that the words were spoken from motives of private malice. And in 1892, in *Haggard* v. *Pélicier Frères* (*ubi sup.*), Lord Watson says: "It is due to the appellant to state that the respondents, in their pleadings, make no imputation of dishonesty, although their Lordships do not mean to suggest that such an imputation, if it had been made and proved, would have deprived him of the immunity which the law accords to a judge in his position. The remedy, when such a case does occur, does not lie in an action for damages against the

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offending judge, but by making a representation to the authorities whose duty it is to see that justice is administered with due care and attention." Then, in the case of *Fray* v. *Blackburn* (*ubi sup.*), the question was whether a declaration in an action against Blackburn, J. for acts done as a judge, which had omitted to state that he had acted maliciously, could be amended upon demurrer, and Crompton, J. said: "It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly. The public are deeply interested in this rule, which indeed exists for their benefit, and was established in order to secure the independence of the judges, and prevent them being harrassed by vexatious actions." The reasons for this rule were more fully stated by Kelly, C.B. in *Scott* v. *Stansfield* (*ubi sup.*), where a declaration for slander stated that "the defendant falsely and maliciously" spoke the words complained of, and Kelly, C.B. said: "A series of decisions uniformly to the same effect, extending from the time of Lord Coke to the present time, establish the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice. It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favour and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences. How could a judge so exercise his office if he were in daily and hourly fear of an action being brought against him, and of having the question submitted to a jury whether a matter upon which he had commented judicially was or was not relevant to the case before him? Again, if a question arose as to the *bona fides* of the judge, it would have, if the analogy of similar cases is to be followed, to be submitted to the jury." The only difficulty ever raised upon this question was that raised by Cockburn, C.J., in *Thomas* v. *Churton* (*ubi sup.*), where he said: "I am reluctant to decide, and will not do so until the question comes before me, that if a judge abuses his judicial office by using slanderous words, maliciously and without reasonable and probable cause, he is not to be liable to an action." He was there speaking of a judge of the supreme court. I am confident that, if that question had come before him, he would have held that the action would not lie. The case of *General Picton* (*ubi sup.*) has been cited; but that case is no authority, for the argument there was that General Picton was not a judge. I have no doubt whatever but that the whole proposition is true that no action will lie against a judge for any acts done by him, or words spoken by him, while exercising his judicial office, even though done or spoken maliciously, or for the purpose of gratifying some malicious feeling, or dishonestly. The only difference between judges of the superior courts and other judges consists in the largeness of the jurisdiction of the former. The finding of the jury, therefore, in this case being accepted, we must hold that the only punishment is that of removal from office, and that this action is not maintainable.

Kay, L.J.—I am of the same opinion. This action is brought to recover damages for wrongful acts in proceeding against the defendant for contempt of court and holding him to excessive bail. It was tried before the Lord Chief Justice and a jury, and a verdict was given against the defendant Cook that he acted maliciously, the damages been assessed at 500*l*. Nothwithstanding the verdict the Lord Chief Justice ordered judgment to be entered for the defendant, because no action would lie against a judge even under such circumstances. There is, indeed, a sufficient remedy in such cases, which has been applied here. by the removal of the judge from his office. The question now is, whether a judge is liable to an action even under such extreme circumstances as those of this case. I entirely agree that the law is well settled that a remedy by action cannot be obtained. That is the result of the cases. For any act done by a judge in his capacity of a judge he is not liable to an action, though it may be done maliciously and to gratify his private spite or anger. It has been argued that the judge in this case did not do the acts complained of in his judicial capacity. The two acts complained of were clearly acts within his jurisdiction. It cannot be denied that all the acts complained of were done by the judge in his capacity of a judge. Whether he acted rightly or wrongly cannot be questioned in an action of this kind. Agreeing entirely with what the Master of the Rolls has said, and with the reasons given by Kelly, C.B., in *Scott* v. *Stansfield* (*ubi sup.*), I come to the conclusion that in a case like this, where a judge is sued for acts done by him in his judicial capacity and a verdict has been found that he acted maliciously and dishonestly, no action will lie against the judge. This appeal, therefore, fails and must be dismissed.

Smith, L.J.—I concur. I entirely agree with what the Master of the Rolls has said as to the law, which is well settled. If a judge of a supreme court, in the course of his office, does an act even maliciously, no action will lie against him at the suit of an individual to recover damages for any injury he may have sustained by such act. The appellant has argued that the acts complained of were not done by the judge in the course of his office. That argument is not well founded. In the statement of claim all the acts are alleged to have been done by the defendants as judges. and the jury have found that this defendant was guilty of misconduct in his office. The appeal must be dismissed.

Appeal dismissed.

Solicitor for the appellant, *H. Anderson.*
Solicitor for the respondent, *W. T. G. Hooper.*

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HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

July 13 *and* 20.

(Before CHITTY, J.)

LAMBTON *v.* MELLISH.

LAMBTON *v.* COX. (*a*)

Injunction—Nuisance from noise—Noise by two or more persons acting independently.

If the acts of two or more persons acting independently of each other amount in the aggregate to a nuisance, each is separately liable to be restrained by injunction in respect of his own share in the nuisance, although the acts of each alone would not constitute a nuisance.

THE plaintiff in these actions was the owner and occupier of a house adjoining Ashtead Common, Surrey, and the actions were brought to restrain the defendants by injunction from playing organs so as to cause a nuisance to the plaintiff. The defendants, Mellish and Cox, catered for school children and excursionists visiting Ashtead Common on the occasion of school treats, bean feasts, and other events of a similar nature, a large number of which took place on the common during the summer months. The defendants were rivals in business, and each had a merry-go-round on his premises, which was worked with an organ as an accompaniment. The organ used by the defendant Mellish was a small one, making, as was alleged by him, comparatively little noise, whilst that used by the defendant Cox was a much larger one. The plaintiff's house was about seventy yards from the organ of the defendant Mellish, and about 130 yards from that of the defendant Cox. The evidence showed that the intention of the defendants was to play the organs continuously from about 11 a.m. until about 7 p.m. during the three summer months, and the plaintiff alleged that the noise made by the organs when played together was maddening. Evidence was filed by each of the defendants for the purpose of showing that the noise made by his organ was not sufficient to constitute a nuisance.

Motions were made by the plaintiff against the defendant in each action asking for an injunction restraining him from playing any organs so as to cause a nuisance or injury to the plaintiff or his family, or other the occupiers of the plaintiff's property.

Farwell, Q.C. and *Borthwick* for the plaintiff.

Whitehorne Q.C., and *Butcher*, for the defendant Mellish, argued that the noise made by his organ did not constitute a nuisance, and that he was not responsible for the noise made by the defendant Cox.

Moloney for the defendant Cox.

CHITTY, J. (after stating the facts and referring to the evidence) said:—Notwithstanding the conflict of evidence, I am of opinion that the plaintiff is entitled to the injunction he asks for as against the defendant in each action. A man may tolerate a nuisance for a short period. A passer-by would not find any nuisance in these organs, but the case is very different when the noise has to be continuously endured: under such circumstances it is scarcely an exaggeration to term it "maddening," going on as it does hour after hour, day after day, and month after month. It was said for the defendant Mellish that two rights cannot make a wrong—by that it was meant that if one man makes a noise not of a kind, duration, or degree sufficient to constitute a nuisance, and another man, not acting in concert with the first, makes a similar noise at the same time, each is responsible only for the noise made by himself, and not also for that made by the other. If the two agreed and acted in combination, each would be a wrong-doer. If a man shouts outside a house for most of the day, and another man who is his rival (for it is to be remembered that these defendants are rivals) does the same, has the inhabitant of the house no remedy? It is said that that is only so much the worse for the inhabitant. On the ground of common sense, it must be the other way. Each of the men is making a noise, and each is adding his quantum until the whole constitutes a nuisance. Each hears the other, and is adding to the sum which makes up the nuisance. In my opinion, each is separately liable, and I think it would be contrary to good sense, and indeed contrary to law, to hold otherwise. It would be contrary to common sense that the inhabitants of the house should be left without remedy at law. I think the point falls within the principle laid down by James, L.J. in *Thorpe* v. *Brumfitt* (L. Rep. 8 Ch. 850). That was a case of obstructing a right of way, but such obstruction was a nuisance in the old phraseology of the law. He says: "Then it was said that the plaintiff alleges an obstruction caused by several persons acting independently of each other, and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to show this. Nor do I think it necessary that he should show it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, though the amount caused by them all may be a serious injury. Suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience; but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent, and it is no defence for any one person among the hundred to say that what he does causes of itself no damage to the complainant." There is, in my opinion, no distinction in these respects between the case of a right of way and the case, such as this is, of a nuisance by noise. If the acts of two persons amount in the aggregate to what is remediable by injunction, each is amenable to the remedy against the aggregate cause of complaint. The defendants here are both responsible for the noise as a whole so far as it constitutes a nuisance affecting the plaintiff, and each must be restrained in respect of his own share in making the noise. I therefore grant an interim injunction in both the actions, in the terms of the notices of motion.

Solicitors: *Miller, Smith*, and *Bell*; *Carr* and *Son*; *F. Rudall.*

(*a*) Reported by G. WELBY KING, Esq., Barrister-at-Law.

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July 20 *and* 25.

(Before CHITTY, J.)

Re APPLICATION TO REGISTER TRADE MARK BY SIR TITUS SALT, BART., SONS AND CO., LIMITED. (*a*)

Trade mark—Invented word—Geographical name —Patents, Designs, and Trade Marks Act 1883 (46 & 47 *Vict. c.* 57), *s.* 64—*Patents, Designs, and Trade Marks Act* 1888 (51 & 52 *Vict. c.* 50), *s.* 10.

The word "Eboline" is not an invented word within the meaning of sub-sect. 1 (*d*) *of sect.* 64 *of the Trade Marks Act* 1883, *as amended by sect.* 10 *of the Trade Marks Act* 1888, *there being a town in Italy called "Eboli," and the word is a geographical name within the meaning of sub-sect.* 1 (*e*) *of the same section, which sub-section applies not only to the use of the noun substantive, but applies also to the adjectival form of a geographical name. The word "Eboline" cannot therefore be registered.*

IN Feb. 1894 an application was made by Sir Titus Salt, Bart., Sons and Co., Limited, for the registration of the word "Eboline," as a trade mark in respect of silk piece goods in Class 31.

The Registrar of Trade Marks, acting for the Comptroller-General, refused to proceed with the registration on the ground that the word proposed to be registered was a geographical name within the meaning of sub-sect. 1 (*e*) of sect. 64 of the Patents, Designs, and Trade Marks Act 1883, as amended by sect. 10 of the Patents, Designs, and Trade Marks Act 1888. The applicants thereupon appealed to the Board of Trade, who referred the appeal to the court.

The applicants' manager made an affidavit alleging that he had invented the word "Eboline," and had never heard before the date of the refusal to register that Eboli was the name of a state or town in Italy, but that he had since learnt that Eboli was a town in the south of Italy, containing about 11,000 inhabitants, it being a place where silk piece goods were not manufactured, or anything commercially manufactured except wine and oil.

Byrne, Q.C. and *John Cutler*, for the applicants, contended that the word was an invented word, and that it was not a geographical name within the meaning of the sub-section.

Ingle Joyce for the Comptroller-General.

CHITTY, J.—This is a motion for an order directing the Comptroller to proceed with an application to register as a new trade mark the word "Eboline," in Class 31, for silk piece goods. The question depends on the 64th section of the Patents, Designs, and Trade Marks Act 1883, as amended in 1888, which requires that a trade mark must consist of or contain at least one of the enumerated essential particulars amongst which are: sub-sect. (*d*), an invented word; and sub-sect. (*e*), a word having no reference to the character or quality of the goods, and not being a geographical name. The applicants' manager says that he invented the word "Eboline," and no doubt he is speaking honestly according to his belief. But it appears that "Eboli" is the name of an Italian town of 11,000 inhabitants, mentioned in the gazetteer. The mere addition of the common English termination "ne" is not sufficient to make the word an invented word—a word already in existence cannot properly be said to be an invented word, because the person claiming to have invented it was not aware of its existence. If it were otherwise, the fewer words a man knows, the more readily he could invent. What the Act requires is that the word should be an invented word in fact, and not merely in the belief of the person claiming to register it as a trade mark. "Eboline" therefore is not an invented word within sub-sect. (*d*). This point was not much pressed, but it was urged that "Eboline" was not a geographical name within sub-sect. (*e*). The prohibition, however, is not confined to the use of the noun substantive; it extends, in my opinion, to the adjective, and to the name of a place to which an ordinary English suffix has been added, so as to impart to it an adjectival form. To hold the contrary would be to reduce the prohibition to a dead letter for all practical purposes. For instance, it is plain that America, Asia, Africa, Europe, China, Japan, Argentina, Circassia, Anatolia, Rome, Paris, Florence, and Venice, fall within the prohibition; it is equally plain, I think, that the adjectival forms of these places cannot be used—*i.e.*, American, Asiatic, African, European, Chinese, Japanese, Argentine, Circassian, Anatolian, Roman, Parisian, Florentine, or Venetian. This reasoning applies to "Eboline;" it is merely "Eboli" with the addition of the ordinary English suffix "ne." The object of the Legislature was to prevent a trader from acquiring a monopoly in the name of a place, and from thereby suggesting that the goods had a local origin, or a local connection which in fact they might not have. The enactment practically overrules Lord Westbury's decision in *M'Andrew* v. *Bassett* (4 De G. J. & Sm. 380), where he held that the geographical expression Anatolia, which had been used for a short time in connection with liquorice, was a good trade mark. For these reasons I hold that the word "Eboline" cannot be registered.

Solicitors: *Salaman; Solicitor to the Board of Trade.*

(*a*) Reported by G. WELBY KING, Esq., Barrister-at-Law.

July 25 *and* 26.

(Before CHITTY, J.)

Re ISAACS; ISAACS *v.* REGINALL. (*a*)

Conversion — Option to purchase freeholds — Intestacy.

The owner of a freehold house granted a lease thereof for his life at a yearly rent, and the lease provided that, after the decease of the owner, the lessee, his heirs and assigns, should have the option of purchasing the premises for 750*l.*, *such option to be declared in writing within six months from the decease of the owner. The owner died intestate, and within six months after his decease, the lessee gave notice in writing to the heir-at-law, and also to the administrator of the owner, declaring his intention to exercise the option.*

Held (*following* Lawes *v.* Bennett, 1 *Cox*, 167), *that, on the exercise of the option, the property devolved as personal estate, and that the administrator, and not the heir-at-law of the owner, was entitled to receive the purchase money.*

(*a*) Reported by G. WELBY KING, Esq., Barrister-at-Law.

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ISAAC ISAACS, who died intestate on the 9th Jan. 1894, was at his death entitled to a freehold house in Abergavenny, subject to a lease thereof dated the 13th Aug. 1880, by which the said Isaac Isaacs demised the premises for the term of his life to Thomas Arthur Cadle, at the yearly rent of 40*l.* The lease contained a covenant by Isaac Isaacs with Thomas Arthur Cadle that, after the decease of Isaac Isaacs the said Thomas Arthur Cadle, his heirs or assigns, should have the right and option of purchasing the premises at the price of 750*l.*, such option to be declared in writing by the said Thomas Arthur Cadle, his heirs or assigns, within six calendar months from the time of the decease of the said Isaac Isaacs, and that the heirs, executors, and administrators of the said Isaac Isaacs should convey and assure the premises to the said Thomas Arthur Cadle, his heirs or assigns, or as he or they should direct, free from incumbrances.

On the 25th April 1894 Thomas Arthur Cadle gave notice in writing to both the heir-at-law and to the administrator of Isaac Isaacs, declaring his intention of purchasing the premises in pursuance of the said option.

The question which had arisen, and which was to be determined by the court upon an originating summons, was whether the purchase money of 750*l.* was payable or belonged to the plaintiff, Charles Isaacs, as the administrator of the said Isaac Isaacs, or to the defendant, Reginald Macauley Reginall, as his heir-at-law.

Byrne, Q.C. and *Solomon*, for the plaintiff, contended that the purchase money was payable to the plaintiff as being personal estate of the intestate, upon the authority of

Lawes v. *Bennett*, 1 Cox, 167;
Townley v. *Bedwell*, 14 Ves. 591;
Collingwood v. *Row*, 3 Jur. N. S. 785;
Weeding v. *Weeding*, 1 J. & H. 424.

Farwell, Q.C. and *R. B. Phillpotts*, for the defendant, argued that the doctrine of *Lawes* v. *Bennett* did not apply to the case of an intestacy, and ought not to be extended. They referred to

Ripley v. *Waterworth*, 7 Ves. 425;
Emuss v. *Smith*, 2 De G. & Sm. 722;
Edwards v. *West*, 38 L. T. Rep. 481; 7 Ch. Div. 858;
Re Adams and The Kensington Vestry, 51 L. T. Rep. 382; 27 Ch. Div. 394.

CHITTY, J.—Isaac Isaacs died intestate, entitled to real estate, but it appears that he had in his lifetime granted a lease of the property for his life, and had agreed that the lessee should, after his (the intestate's) death, have the option of purchasing the property, the option to be declared by the lessee within six calendar months from the time of the intestate's death. Within the six calendar months the lessee gave the proper notice, and the question now is, whether the heir is entitled to the purchase money of 750*l.* paid by virtue of the exercise of the option, or the administrator; in other words, whether, after the exercise of the option, this property is to go as part of the real or as part of the personal estate of the intestate. It appears to me that the case is covered by the well-known authority of *Lawes* v. *Bennett* (*ubi sup.*), a case which has been approved of and followed in numerous subsequent authorities. It may be open to question whether *Lawes* v. *Bennett* could not have been decided otherwise than it was; but the question, decided now more than a century ago, has stood the test of time, and (I will mention presently some of the subsequent authorities) stands as a landmark upon this question. The option in *Lawes* v. *Bennett* was exercised after the death of the person who granted it, and Lord Kenyon, who decided the case, was aware of what he terms a possible difficulty; the only possible difficulty in that case is, that it is left to the election of the person to exercise the option whether it shall be real or personal property. It seems to me to make no distinction at all, nor did Lord Kenyon think that there was any distinction in the lapse of time that occurred after the death and before the option was exercised. Lord Eldon, who argued that case, made observations on it in the case of *Ripley* v. *Waterworth* (*ubi sup.*), which I need not cite, but he had a similar case before him in *Townley* v. *Bedwell* (*ubi sup.*), and what he said in reference to *Lawes* v. *Bennett* was, that he did not mean to say that anything might not be argued against it, but where there is a decision precisely in point it is better to follow it, and so he followed it. But there was a question as to who was entitled to the rents which had accrued after the testator's death and before the exercise of the option, and he held that the rents went to the heir; in other words, that it was a conversion, by virtue of the contract, of the testator's real estate into personal estate as between his real representative and his personal representative, but that the conversion operated for all purposes only from the time when the option itself was exercised. That was necessarily the principle of his decision, because he held that the rents went to the heir. Now, a similar point came before Kindersley, V.C. in *Collingwood* v. *Row* (*ubi sup.*), and he followed *Lawes* v. *Bennett*; and also before Wood, V.C. in *Weeding* v. *Weeding* (*ubi sup.*). That was a case of a will where there was a devise of specific estate and a bequest of personal estate, and subsequently a contract by which the testator gave an option to purchase, which was exercised after his death, and the Vice-Chancellor held (following *Lawes* v. *Bennett*) that the property was converted not, as is argued by Mr. Farwell and Mr. Phillpotts, from the date of the contract, but from the date of the exercise of the option, and consequently that the purchase money went, not to the devisee, but to the residuary legatee. That was the case of a will. I am told that *Lawes* v. *Bennett* has never been applied to the case of an intestacy, and that I ought not to extend the doctrine of *Lawes* v. *Bennett*. The argument really means that I ought not to apply *Lawes* v. *Bennett*, but notwithstanding any subsequent case, it appears to me to apply without any possible limitation or qualification to the case of an intestacy. In *Weeding* v. *Weeding* there is no intention (of course the testator could have manifested it on the face of his will) that the purchase money derivable from and payable under the option which he had granted, should go to the person to whom he gave the real estate, which was the subject-matter of the contract. The Vice-Chancellor deals with the case thus: "What indication have you on the will of the quality which the testator intended this property to possess? He only says, 'I wish A. to take the land, and B. to take what is money.'" That case appears to

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me, if any authority is wanted besides *Lawes* v. *Bennett* itself (which I do not think is the case), to show that *Lawes* v. *Bennett* does apply even to an intestacy, because it did apply to a will where there was no intention manifested one way or the other on the face of the will. Then the case of *Emuss* v. *Smith* (*ubi sup.*) was cited. There the option was exercisable only after the death of the person granting it, and that circumstance is relied on for the heir here as ground for my not applying in this case the doctrine of *Lawes* v. *Bennett*. But *Emuss* v. *Smith* is only a case of ascertaining the testator's intention. It is plain that a man may either before or after his will have given an option to somebody which will have the effect of converting his realty into personalty as between his real and personal representatives, but may show on the face of his will an intention that the devisee of the land should take all the testator's interest in the land including the purchase money which would arise from exercising the option, and that is the explanation, if explanation be required, of *Emuss* v. *Smith*. The Vice-Chancellor said: "As the case stands, taking together the particular language of the will, and the particular language and the nature of the contract, upon which no option was expressed during the life of the testator, coupled with the fact of the republication of the codicil, I am of opinion that it is consistent with the true construction of the testator's testamentary instruments and the effect that ought to be given to republication—that it is consistent with law and justice and reason, and consistent also with the cases of *Lawes* v. *Bennett* and *Knollys* v. *Shepherd*, to say that the purchase moneys of Williams' farm and Nash's own farm belong to those who would have enjoyed them if Mr. Galton had not exercised the option of buying." It is a case which was decided entirely upon the testator's intention. I cannot see that I should be extending *Lawes* v. *Bennett* if I say that that decision applies to a case where the option arises only after the death. It seems to me to be an immaterial circumstance, and I should be under the pretence of distinguishing *Lawes* v. *Bennett*, and declining to follow it, if I adopted this argument. In *Lawes* v. *Bennett* the option was exercisable as well before as after the death. It was in fact exercised after the death. I can see no substantial ground for saying that the circumstance that the option was so limited, and only exercised after the death, creates a material distinction. If I had adopted, which I do not, the principle contended for in the argument on behalf of the heir-at-law that the decision of *Lawes* v. *Bennett* and the subsequent cases involved this proposition that the conversion related back to the contract, then I might have thought there was something in the distinction; but in my opinion that is not the result of the authorities. As I have pointed out during the course of the argument, I think this judgment in the case of *Townley* v. *Bedwell* alone is a decision on the point that the option does not operate completely to convert the property until it is exercised, because the rents in the interval after the testator's death go to the heir-at-law. The other cases cited (such as, for instance, *Re Adams* (*ubi sup.*) are not in point. In *Re Adams* the question arose with reference to the estate of the person to whom the option was granted, and the option being found in a lease which was personal property in the lessee, it was held that his administrator, who was also the heir, could not exercise the option so as to convert the leasehold interest which would devolve upon him as administrator, and for the benefit of the next of kin, into real estate which he would have taken as heir, and, in substance, that the option and all that followed from it was part of the lessee's personal estate. The other case mentioned for the heir, of *Edwards* v. *West* (*ubi sup.*), is plainly distinguishable. No doubt it was said there by Fry, J. that the principle of *Lawes* v. *Bennett* was not to be extended, and that an attempt was made by the argument in that case to extend it to a very considerable degree, and Fry, J. said that he did not think he was at liberty to extend it (that is, the doctrine in *Lawes* v. *Bennett*) so as to imply that there is a conversion from the date of the contract giving the option, as between the vendor and purchaser who claim under it. *Edwards* v. *West* therefore was a case arising between the vendor and the purchaser, and not a case arising between the real and personal representatives of a man who had granted the option. For that reason I am of opinion that the purchase money here forms part of the personal estate of the intestate, and consequently it goes to the plaintiff as his personal representative.

Solicitors: *H. J. Coburn*; *Mear* and *Fowler*.

May 24 and Aug. 2.

(Before NORTH, J.)

Re WILSON AND STEPHENS' CONTRACT. (a)

Vendor and purchaser — Conditions of sale — Delay in completion of purchase — Wilful default of vendors — Interest on unpaid purchase money — Compensation to purchaser for delay in completion — Vendor and Purchaser Act 1874 (37 & 38 *Vict. c.* 78), *s.* 9.

Mortgagees acting under their statutory power of sale entered into a contract for the sale of property, partly freehold and partly copyhold, subject to the conditions that, if from any cause whatever other than wilful default on the part of the vendors, completion should be delayed beyond the 29*th Sept.* 1893, *the purchaser should pay interest on the unpaid purchase money from that day until the day of actual completion, and that the purchaser, paying her purchase money, should be entitled to possession from the* 29*th Sept.* 1893. *On the* 15*th Sept. the purchaser discovered from a search of the court-rolls of the manor that neither the vendors nor their mortgagor had been admitted to the copyhold portion of the property, and required the vendors to procure admittance so that she might obtain the legal estate therein. Correspondence followed: and it was not until the* 10*th Oct. that the vendors took steps to obtain admittance, and, owing to differences with the steward of the manor, their admittance did not take place until the* 14*th Dec. Meanwhile the vendors had refused the purchaser's offer to complete on the vendors giving an undertaking to get themselves admitted so that the purchaser might be admitted on their surrender, and had refused to permit the purchaser to enter into possession until*

(a) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

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completion took place, thereby causing her inconvenience and loss. The purchaser had on the 29th Dec. 1893 *deposited the unpaid purchase money at a bank and given notice to the vendors that she should refuse to pay interest thereon and also should claim compensation for the delay. Completion actually took place on the 17th Jan.* 1894. *On a summons under the Vendor and Purchaser Act* 1874:

Held, that the delay up to the 17th Dec. 1893 *was caused by wilful default on the part of the vendors, and the purchaser was liable to pay interest only from that day to the day of actual completion, but that the compensation claimed by the purchaser could not be recovered on a summons under the Vendor and Purchaser Act* 1874.

ON the 3rd July 1893 Caroline Stephens, a widow, became the purchaser of an estate known as Holmbush, situate at Hendon, in the county of Middlesex. It consisted of a dwelling-house and surrounding property, a small portion of which was copyhold, and the rest freehold. The price was 8500*l.*, and the purchaser paid a deposit of 850*l.*, leaving a balance of 7650*l.* to be paid on completion. The vendors were mortgagees selling under their statutory power of sale. The contract was a private one, after an abortive attempt to sell by public auction. The day fixed for completion of the purchase was the 29th Sept. 1893, and the third condition provided that, if completion should be delayed from any cause whatever other than wilful default on the part of the vendors, the purchaser should pay interest at 5 per cent. on the balance of her purchase money until the contract was completed, and that the purchaser paying her purchase money was to be entitled to possession from the 29th Sept. 1893.

On the 15th Sept. the purchaser's solicitors discovered, by inspecting the court-rolls of the manor, that neither the vendors nor their predecessors in title had been admitted to that portion of the purchased property which was copyhold, and on the 18th Sept. wrote to the vendors' solicitors requiring that the vendors should take steps to obtain admittance to the copyhold portion without delay, to enable them to surrender to the use of the purchaser. On the 26th Sept. the purchaser's solicitors wrote, stating that the purchaser would be prepared to pay the balance of the purchase money on the 29th Sept., and would object to pay interest. On the 29th they wrote that the purchaser was very anxious to complete, and offered to do so at once upon receiving an undertaking that the vendors would get properly admitted to the copyhold portion, so that the purchaser could be admitted on their surrender; adding that they had received that morning the balance of the purchase money from the purchaser, who would, therefore, refuse to pay interest; that they proposed to deposit the amount at Messrs. Prescott, Dimsdale, and Co.'s Bank on a separate account, and that the vendors would receive any interest the bank might allow, and asking the vendors whether they could suggest any better mode of investment. On the 3rd Oct. the vendors' solicitors wrote declining to give the undertaking.

The vendors' solicitors also refused to allow the purchaser to enter upon the property in order to do some necessary repairs to the house, which she had arranged should be commenced on the 29th Sept. 1893, and finished so as to enable her to get into the house at Christmas 1893. On the 6th Oct., and again on the 26th Oct., the purchaser's solicitors, in writing to the vendors' solicitors, stated that the purchaser would claim compensation for the delay in completion.

On the 10th Oct. 1893 the vendors' solicitors first wrote to Messrs. Woodbridge and Sons, the solicitors of the lord of the manor, with a view to the vendors obtaining admittance to the copyhold portion; but, owing to disagreement as to the amount of the fines and fees due to the lord of the manor and his steward, the vendors' admittance did not take place until the 14th Dec.

From the 16th Dec. 1893, correspondence took place between the solicitors of the vendors and the purchaser on the question of the liability of the latter to pay interest at 5 per cent. on the balance of the purchase money from the 29th Sept. 1893, which the purchaser refused to do, and ultimately the purchase was completed on the 17th Jan. 1894, on the terms that the vendors should accept the interest allowed by the bank on the balance of the purchase money, and the purchaser should take out a summons under the Vendor and Purchaser Act 1874 for the decision of the question.

The present summons was taken out by the purchaser, asking for a declaration, (1) that she was not liable to pay interest on the balance of the purchase money from the 29th Sept. 1893, and (2) that she was entitled to compensation for the delay in completion of the purchase.

It was in evidence that the purchaser had been prevented, by the delay in the completion of the purchase, from concluding an arrangement for getting rid of the remainder of her tenancy of the house in which she resided at the date of the purchase, which continued until the 24th Sept. 1894, and from accepting a very advantageous offer from a club to take on lease a part of the purchased property, and also that she had been put to considerable expense, trouble, and inconvenience by the delay.

It was admitted that there was no wilful default on the part of the vendors after the 17th Dec., and it was not denied that the purchaser was liable to pay interest on the balance of the purchase money for the period which elapsed between that day and the completion of the purchase on the 17th Jan. 1894.

The rest of the material facts are stated in the judgment of the court.

Martelli for the purchaser.—The purchaser is not liable to pay interest on the unpaid purchase money from the 29th Sept. 1893, under the third condition, since the delay in completion arose from the wilful default of the vendors in not getting admitted to the copyhold portion of the property until the 14th Dec. Although they sold under a condition fixing the 24th Sept. 1893 as the day for completion, they did not take any steps to get admitted until the 10th Oct. They knew that part of the property sold was copyhold, and that, in order to be able to surrender to the use of the purchaser so as to vest in her the legal estate of that part, they must be admitted themselves first. He referred to

Re Young and Harston's Contract, 53 L. T. Rep. 837; 29 Ch. Div. 691; 31 Ch. Div. 168;

Re Hetling and Merton's Contract, 68 L. T. Rep. 749; (1893) 3 Ch. 269.

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The purchaser also asks for compensation for the delay caused by the wilful default of the vendors in the completion of the purchase. She had made arrangements with a builder for the necessary repairs of the house to be commenced on the 29th Sept. 1893, and to be completed so as to enable her to move into it at Christmas, and had provisionally arranged for the assignment of the remainder of her tenancy of the house in which she now resides from Christmas 1893. She also received a very advantageous offer from a club to take a lease of part of the purchased land which she desires to let. In consequence of the delay, however, all these advantages have been lost by her, and she has been put to considerable expense and inconvenience. There is a contract between the vendors and purchaser that the purchase should be completed by a certain day, and the purchaser be let into possession on that day. The vendors caused delay in completion by their wilful default, and refused to allow the purchaser to begin the necessary repairs until the purchase was completed. Compensation for delay in making a good title differs from damages for not making a good title, and may be obtained on a summons under the Vendor and Purchaser Act 1874. He referred to

The Vendor and Purchaser Act, sect. 9;
Royal Bristol Permanent Building Society v. *Bomash*, 57 L. T. Rep. 179; 35 Ch. Div. 390.

Daniel Jones for the vendors.—The delay in completion was not caused by the wilful default of the vendors. The abstract, which was delivered on the 14th July, shows that the vendors were not admitted, and the purchaser should have made that objection on or before the 26th July, the day fixed by the conditions for the purchaser's objections and requisitions to be sent in, but the objection was not made until the 18th Sept. The purchaser was, however, insisting on a claim for compensation for a right of way alleged to have been discovered; and the vendors were entitled to wait until this claim had been given up before they incurred the expense of getting admittance. If the contract had been broken off on the question of compensation for the alleged right of way, the expense thus incurred by the vendors would have been useless. The purchaser cannot claim compensation for the delay. The completion of the purchase by the conveyance of the property to the purchaser settles all claims except matters which by the nature of the case are reserved. There is no jurisdiction to give compensation for delay in completion on a summons under the Vendor and Purchaser Act. He referred to

Clarke v. *Ramuz*, 65 L. T. Rep. 657; (1891) 2 Q. B. 456.

Martelli in reply.—On a summons under the Vendor and Purchaser Act 1874 the court has jurisdiction to award compensation. It has the same jurisdiction to give damages or compensation as in an action for specific performance. The vendors refused to allow the purchaser to begin the repairs to the house until the purchase was completed, and in letters of the 6th and the 26th Oct. we gave notice to the vendors that we should claim compensation for the delay in completion. The purchase was completed on the understanding that all questions in dispute should be determined on summons under the Vendor and Purchaser Act 1874. There was a clear contract that possession should be given on completion, and the case of *Royal Bristol Permanent Building Society* v. *Bomash* (*ubi sup.*) is in point. With regard to payment of interest on the unpaid purchase money from the 29th Sept. 1893, the title was accepted on the 14th Aug., and the requirement that the vendor should do what was necessary to enable the purchaser to obtain the legal estate on the copyhold portion of the property was not a requisition. The necessary admittance of the vendors was merely a matter of conveyance. It is the usual practice to delay searching the court-rolls until shortly before completion, in order to prevent the necessity of having to search twice. The vendors were guilty of wilful default in not taking any steps to obtain admittance until the 10th Oct. When they were admitted on the 14th Dec. the wilful default was at an end; but the time which elapsed from that day until the purchase was completed on the 17th Jan. was a consequence of their not having been admitted until the 14th Dec. He referred to

Re Hetling and Merton's Contract (*ubi sup.*).

Cur. adv. vult.

Aug. 2.—NORTH, J. (after stating the facts proceeded):—The purchase was actually completed on the 17th Jan. 1894, and all questions have been settled between the parties except those mentioned in the summons; the first being whether the purchaser is bound to pay interest at 5 per cent. on the purchase money according to the conditions from the 29th Sept. down to the middle of December, it not being disputed that such interest is payable from that date; and the second question being whether the purchaser is not entitled to some compensation by reason of the great delay that has occurred in completion, possession having been refused to her in the meantime. The purchaser can only escape the payment of interest if this delay in completion was occasioned by wilful default on the part of the vendors, and it clearly has not been caused by any default of the purchaser. The title was accepted on her behalf long before the 29th Sept., and she was anxious to complete on that day; and her purchase money was ready, and, completion not having then taken place, was actually deposited at a bank. The vendors, on the other hand, were not then able to complete; they had to give a legal conveyance of the copyhold as well as the freehold, and were not then in a position to do so; and, in fact, it was not until the 10th Oct. that—by the letter of that date which I have read—they first approached the lord of the manor on the subject, although that letter shows that they had been in communication with him as to this property so far back as the previous May. It was suggested that no requisition had been made on this subject; but the point seems to me one of conveyance rather than of title, and it is not disputed that the vendors were bound to procure the legal estate to be vested in the purchaser by a surrender from them. It was suggested that they were justified in postponing all steps for that purpose until they knew whether the purchaser would complete or whether this sale would go off; but this seems to me an idle excuse. There was no reason for doubting that the sale would go through. Moreover, as the vendors were desirous of realising their mortgage, their admittance was essential, as they would have sold to

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someone else even if this sale had gone off; but from May until October they allow the matter to sleep, having in the meantime fixed to complete the purchase on the 29th Sept., and having bound the purchaser to pay high interest from that date, although not in default in any way. Was this wilful default on the part of the vendors? In my opinion it was. I have carefully considered the judgments in *Re Young and Harston's Contract* (*ubi sup.*), *Hetling and Merton's Contract* (*ubi sup.*), and the more recent case of *Tubbs and The Corporation of London* (70 L. T. Rep. 719); and, following the example there set, I do not attempt to define precisely what is, and what is not, wilful default in the abstract. But I find the following observations of Lindley, L.J. in *Re Hetling and Merton's Contract* very much in point. [His Lordship read the observations referred to and continued:] In the present case the vendors knew the material facts, that the purchaser was entitled to have the legal estate in the copyholds transferred to her; that this could only be accomplished by the vendors being themselves admitted by the day fixed for completion; that this was a matter which must take some time; yet the vendors abstained (not from forgetfulness, for that is not suggested, but deliberately) from taking any steps to qualify themselves to transfer this legal estate until nearly a fortnight after the time fixed for completion, and then spontaneously take a step which they might have taken, and ought to have taken, many weeks before, the neglect of which did not arise from any unforeseen occurrence, and for which no reasonable excuse is given; and I hold that such conduct on their part was most unreasonable and improper, and is attributable to their wilful default, in the sense in which that phrase is used in such contracts as the present, and that it relieves the purchaser from the condition to pay interest from the 29th Sept. Then for what period is the purchaser relieved from interest. It is said that in any case interest should run from Oct. 10; but I see no sense in this. The vendors could not then complete, nor could they have done so before the 14th Dec.; and I think that the purchaser was entitled to three days' notice of the vendors' admission when she had been delayed by the vendors' default for nearly twelve months. Therefore I fix the 17th Dec. as the date from which the interest under the conditions should run. The delay between the 10th Oct. and the 14th Dec. is said to have been caused by default of the lord of the manor, and not of the vendors; but I do not think that this is so. Some lapse of time was necessary, as the advisers of the lord could not be expected to put everything else aside and take up this matter at once. Some delay was caused by an unsuccessful attempt on the part of the vendors to get the lord's fines reduced, and some delay arose from an attempt to cut down the fees of the steward, who assented to an abatement of 25 per cent. But I cannot fix any time between the two dates at which I can say that the vendors ceased to be in default arising from their own spontaneous omission to get their title to surrender complete by the 29th Sept. I say that the purchaser ought to begin to pay interest from the 17th Dec.; it is not disputed that she is bound to do so, and she has, in fact, done it. There might be a serious question to whom the interest on the deposit belonged during the time the vendors persisted in resisting the purchaser's proposal as to completion and refused to let her repair the property; but, as the purchaser has from the first offered to pay the bank interest to the vendors, and has actually paid it over, I will not go behind that arrangement. What the purchaser therefore has to pay is the difference between the interest paid by the bank from the 17th Dec. to the 17th Jan. and the interest at 5 per cent. on the balance of the purchase money between the same dates. The purchaser also claims compensation for the delay in completion, and she was, no doubt, put to a considerable inconvenience and loss thereby, owing to the unreasonable conduct of the vendors. But what is sought to be recovered under this head is not sought to be deducted from the purchase money which has been paid in full; it is really unliquidated damages arising out of non-delivery of possession according to the conditions, and is made up of claims for damages for three months delay in completing repairs necessary before going into occupation; for the loss of an opportunity of getting rid of the purchaser's former residence on advantageous terms; and for the loss of an opportunity for advantageously letting part of the property purchased. Even assuming (a very strong assumption as to parts of the claim) that the purchaser could have recovered such damages in an action for damages, I am of opinion that she cannot do so on a summons under the Vendor and Purchaser Act. In *Re Hargreaves and Thompson's Contract* (32 Ch. Div. 454), where a purchase went off for want of title, the court did give the purchasers interest on the deposit and the costs of investigating the title, which certainly do savour of damages; but some difficulty was felt even in going to that extent, and it was pointed out that there is not jurisdiction under the Act to give such damages as I am asked for here. [His Lordship then read passages from the judgments of Cotton and Lindley, L.JJ. and continued:] This is a direct authority in favour of my view, that such damages as are here claimed cannot be recovered by a summons under the Vendor and Purchaser Act. The vendor relied upon the decision of Kekewich, J. in *Royal Bristol Permanent Building Society* v. *Bomash* (*ubi sup.*) as a decision to the contrary; but it is not so. Assuming that there was no difference between the two cases in other respects, that case was totally different from this in the very point I am now considering; for the damages were recovered by the purchaser in a cross action for specific performance with compensation brought by the purchaser by counter-claim, and were not recovered on a summons under the Vendor and Purchaser Act 1874. The order will therefore be, that the applicant is liable to pay such interest as I have mentioned, and no more; and I dismiss the summons so far as it seeks compensation, but without prejudice to any action for damages for delay in completion which the purchaser may be advised to bring. It is not a case for giving costs to either party.

Solicitors: *Warburton* and *De Paula*; *Nicol, Son*, and *Jones*.

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Saturday, June 16.

(Before STIRLING, J.)

Re JOHNSTON; MILLS *v.* JOHNSTON. (*a*)

Will—Construction—Discretion in trustees to apply legacies for benefit and advancement—Legatees entitled to sole beneficial interest—Right to payment of legacies.

A testator by his will gave to his executor and trustee a sum of 1200*l.* *and three sums of* 1000*l.* *in these terms: "I desire that* 1200*l.* *sterling shall be invested for the benefit of my eldest son J. A. on his attaining the age of twenty-one years . . . such sum to be applicable to his professional or other advancement, at the discretion of my executors and trustees." He gave very similar directions as to the investment and application of the three sums of* 1000*l.* *for the benefit of his sons C. S., Y., and W. A., and proceeded: "The sums specified in the four preceding paragraphs should be very judiciously invested, as they are intended specially for the advancement and promotion in life of the respective recipients." J. A. and C. S. having attained twenty-one:*

Held, that they were entitled to insist upon payment of the sums of 1200*l.* *and* 1000*l.* *to themselves.*

THESE were two summonses asking for the determination by the court of the question (*inter alia*) whether certain legatees under the will of James Johnston were entitled to their legacies absolutely so that the money ought to be paid to them, or the persons deriving title under them, or whether the trustees had a discretion as to the application of such money.

James Johnston, the testator, by his will dated the 23rd June 1890, gave all his property to Robert Mills, whom he thereby appointed his executor and trustee, upon certain trusts thereby declared, and proceeded as follows:

I desire that 1200*l.* sterling shall be invested for the benefit and advantage of my eldest son James Annandale on his attaining the age of twenty-one years, or as soon after as practicable, such sum to be applied to his professional or other advancement at the discretion and judgment of Robert Mills, my executor and trustee. I desire that 1000*l.* sterling shall be invested for the benefit and advancement of my second son Charles Spread on his attaining his majority, namely, twenty-one years, such sum to be applied as my executors and trustees in their discretion may think fit. I desire that 1000*l.* sterling shall be invested for the benefit of my third son Yelverton on his attaining the age of twenty-one years, which sum shall be for his advancement, and applied as my executors and trustees in their judgment think best. I desire that 1000*l.* sterling shall be applied for the personal advancement of my fourth son Weynton Alexander upon his attaining his twenty-first year as my trustees and executors in their discretion may think fit. The sums specified in the four preceding paragraphs, viz., 1200*l.*, 1000*l.*, 1000*l.*, 1000*l.* should be very judiciously invested, as they are intended specially for the advancement and promotion in life of the respective recipients.

The testator died in the month of April 1891, and his will was proved by the plaintiff Robert Mills, the executor and trustee therein named.

James Annandale Johnston attained twenty-one on the 3rd Oct. 1892. He had created incumbrances on his interest under the testator's will.

(*a*) Reported by J. SANDERSON, Esq., Barrister-at-Law.

The plaintiff on the 29th Jan. 1894 took out a summons for the determination of (among other questions in the administration of the testator's estate) the question whether the sum of 1200*l.* directed by the testator's will to be invested for the benefit of James Annandale Johnston, as mentioned above, or any and what part thereof, ought to be raised out of the estate, and, if raised, whether the said James Annandale Johnston or his incumbrancers were entitled to have the amount, if any, raised and paid over to him or them, or whether the plaintiff had a discretion in the application thereof.

On the 17th May 1894 Charles Spread Johnston attained the age of twenty-one years, and took out a summons to obtain the opinion of the court whether the sum of 1000*l.* directed by the testator's will to be invested and applied for his benefit was payable to him, he requiring the trustee and executor to pay the same to him, and not to apply it for his benefit. After this latter summons was issued, Charles Spread Johnston created incumbrances on his share.

The two summonses now came on for hearing together.

Grosvenor Woods, Q.C. and *Percival* for James Annandale Johnston on the first summons.

Grosvenor Woods, Q.C. and *Philpotts* for Charles Spread Johnston on the second summons.—There does not appear to be any case in which a discretionary power has cut out a gift where there has been an absolute disposition of a sum of money in favour of a sole object of the power. Charles Spread Johnston has a right to have raised the sum, which if he were to die would pass to his executors:

Gough v. *Bult*, 16 Sim. 45.

In the event of his bankruptcy, the trustee in bankruptcy would be entitled to the fund, and the trustee would be in no better position than the bankrupt:

Snowdon v. *Dales*, 6 Sim. 524;
Younghusband v. *Gisborne*, 3 L. T. Rep. O. S. 375; 1 Coll. 400;
Piercy v. *Roberts*, 1 My. & K. 4;
Barnes v. *Rowley*, 3 Ves. jun. 305;
Green v. *Spicer*, 1 Russ. & My. 395.

If the purpose for the gift had been assigned, and the purpose had failed, the beneficiary would still be entitled to receive the fund, and so he would be if the executor renounced the discretion given to him:

Presant v. *Goodwin*, 2 L. T. Rep. 57; 29 L. J. 115, P. & M.; 6 Jur. N. S. 404, Prob.

The discretion relates only to the mode of enjoyment by the testator's sons. They referred also to the following cases:

Re Sanderson's Trust (or *Re Sanderson's Will*), 30 L. T. Rep. O. S. 140; 3 K. & J. 497;
Cope v. *Wilmot*, Amb. 704;
Re Skinner's Trust, 3 L. T. Rep. 177; 1 J. & H. 102;
Re Coleman; Henry v. *Strong*, 60 L. T. Rep. 127; 39 Ch. Div. 443; 58 L. J. 226, Ch.;
Holmes v. *Penney*, 28 L. T. Rep. O. S. 156; 3 K. & J. 90.

C. E. E. Jenkins for the executor and trustee.—The testator has given the discretion to the executor for the purpose of protecting the beneficiaries. The facts of the case make it evident

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that such a discretion was very necessary, and the executor is desirous of exercising it:

Twopeny v. Peyton, 10 Sim. 487.

Here the gifts are in the nature of special trusts for the advancement of the beneficiaries. They are distinguishable from general trusts. *Younghusband* v. *Gisborne* (*ubi sup.*) and *Green* v. *Spicer* (*ubi sup.*) were cases of trust for the general benefit of the *cestui que trust*, and are not applicable here.

Graham Hastings, Q.C. and *Upjohn*; *Buckley*, Q.C. and *Bardswell*; *Morshead*, *Fooks*, and *M. L. Romer* for other parties.

STIRLING, J., in giving judgment, after stating the terms of the testator's will, as set out above, continued:—Now two of the sons have attained twenty-one, and the question is, in substance, whether they are entitled to insist on payment of the sums of 1200*l.* and 1000*l.* to themselves, or whether the trustee has vested in him a valid discretion as to the application. In dealing with that question, in the first place, it must be borne in mind that the only persons who are to take any benefit from these two sums of 1200*l.* and 1000*l.* are the legatees themselves. There is no gift over, and there is no discretion as to applying the whole or a part of the sums in question for the benefit of the legatees. The whole sums are to be so applied. Again, the sums are to be taken out of the rest of the testator's estate upon each son attaining twenty-one, and according to his direction are to be invested, and, being so taken apart and invested, the sole person who has any beneficial interest in any one of them is the son or legatee himself. The question is, is that a discretion which the law permits the testator to vest in his trustee or executor? I have no doubt that the discretion was intended to be conferred by the testator for most excellent reasons, as, indeed, the events seem to justify, and I should be very glad to uphold it, if I could; but it does seem to me that it is really an attempt by the testator to fetter the free enjoyment of a person who has absolutely become entitled to a benefit under his will. The testator might have effectually (if he had been well advised) provided for the same object by making the gift entirely dependent upon the discretion of the trustee. For example, he might have given to the legatees such sum only as the trustee in the absolute exercise of his discretion thought ought to be given to them. That would be one way. Another mode of effectually doing it would have been to provide, for example, in some shape or form for a gift over so as to benefit other persons, and in such a way that the legatee in question could not be deemed to be the sole person interested in the fund. He has not chosen to take advantage of any such mode, but has made, in each case, the son in question the sole person to take the benefit of the fund which he has directed to be set apart. Under these circumstances it really seems to me to fall within the class of cases to which I have been referred, in which the law has been laid down that a testator is not to be allowed to fetter the mode of enjoyment of persons absolutely entitled to a fund. One class of cases to which that applies is that in which the testator has attempted to postpone the payment of a sum of money to which a person is absolutely entitled to a later date than the attaining of his majority, as in *Saunders* v. *Vautier* (Cr. & Ph. 240) and other such cases. I think also that my decision might be rested on the ground which Mr. Philpotts, in his argument, said applied, namely, that really when you look at the words of the will the testator is simply pointing out the mode in which this sum of 1200*l.*, which he has actually given to his son, should be enjoyed by him. In that class of cases, of which *Re Skinner's Trusts* (3 L. T. Rep. 177; 1 J. & H. 102; 8 W. R. 605) is an example, the court has said that it will not insist on the benefit intended for the legatee being taken by him *modo et formâ* as the testator prescribes, on the ground that, if the court attempted to do such a thing, then it would be in the option of the legatee, the day after this election had been made, to sell in the particular mode the property which had been bought in pursuance of the testator's will, and that therefore effect could not be given to the testator's intention. On both these grounds it seems to me that, in the events which have happened, the discretion cannot be exercised. It is rather surprising that there should be such an absence of authority on a point of this sort, but I think the case of *Re Skinner's Trusts* (*ubi sup.*) and the observations of Hatherley, L.C., to which Mr. Grosvenor Woods referred, support the view which I take, that the sons are absolutely entitled to their legacies.

Solicitors: *Mears* and *Fowler*; *G. S.* and *H. Brandon*; *Sole*, *Turner*, and *Knight*; *Robert Parker*; *R. Chapman*.

July 6, 7, and 24.

(Before STIRLING, J.)

POWELL v. BIRMINGHAM VINEGAR BREWERY COMPANY. (a)

Trade name—Avoidance of registration as trade mark—Right to restrain manufacture of similar article under the same name—Limits of right to name apart from registration—Form of injunction.

The plaintiff and his predecessors in title had for thirty-four years manufactured and sold a sauce called "Yorkshire Relish," which name was conspicuous on the wrappers of the bottles of sauce. In 1884 *the plaintiff registered the words as a trade mark, having previously successfully restrained their user in connection with sauces not made by him. In* 1893 *the defendants obtained an order removing the mark from the register: (see* Re Powell's Trade Marks, or Powell *v.* Birmingham Vinegar Brewery Company, 69 *L. T. Rep.* 60; 70 *L. T. Rep.* 1; (1893) 2 *Ch.* 388; (1894) *A. C.* 8.) *Until Nov.* 1893 *there had been no other sauce of the same name, but the defendants then commenced to sell a sauce called "Yorkshire Relish." The plaintiff thereupon brought an action, and moved in it to restrain the defendants from passing off sauce not of the plaintiff's manufacture as the plaintiff's goods by the term "Yorkshire Relish" or otherwise. The labels of this sauce did not in general resemble the plaintiff's, and analysis showed the two sauces to be quite different. The Court found that dealers previous to the appearance of the defendants' sauce knew that "York-*

(a) Reported by J. SANDERSON, Esq., Barrister-at-Law.

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shire Relish" was made by the plaintiff, and was of opinion that an unwary purchaser might have taken the defendants' label for a new one of the plaintiff's.

Held, that, according to Reddaway *v.* Bentham Hemp Spinning Company (67 *L. T. Rep.* 301; (1892) 2 *Q. B.* 639), *an injunction could be obtained without proving fraud if the plaintiff showed (as in the opinion of the court he had shown) that "Yorkshire Relish" meant a sauce manufactured by him as distinguished from that made by others, and that the defendants so described their sauce as to be likely to mislead purchasers; that the defendants had not taken such precautions as were incumbent on them by the decision in* Seixo *v.* Provezende (14 *L. T. Rep.* 314; 1 *Ch. App.* 192) *and other cases. An injunction was therefore granted, following the form approved by Lords Watson and Macnaghten in* Montgomery *v.* Thompson (64 *L. T. Rep.* 750, 751; (1891) *A. C.* 221-224).

THIS was a motion by the plaintiff, who trades under the name of Goodall, Backhouse, and Co. at Leeds, to restrain the defendant company from passing off, or attempting to pass off, and from enabling others to pass off, sauce not of the manufacture of the plaintiff as or for the goods of the plaintiff by the use of the term "Yorkshire Relish," or in any other way.

The motion raised the question whether a person who has for many years been the sole manufacturer of an article under a name which has become well known to the public and the trade, and which has been registered as a trade mark (but which registration has been avoided) is entitled to restrain a rival manufacturer from making and selling a similar article under the same name.

The plaintiff and his predecessors in title had for upwards of thirty-four years manufactured and sold a sauce (the composition of which was a trade secret) under the name of "Yorkshire Relish." This sauce had been so sold in bottles with a distinctive label of which the words "Yorkshire Relish" formed a conspicuous part. These bottles had been sent out to the trade in wrappers on which also appeared conspicuously the words "Yorkshire Relish." Under that name the sauce had been extensively advertised.

Previously to the year 1884 the plaintiff and his predecessors at various times successfully took legal proceedings to restrain the use of the words "Yorkshire Relish" in connection with any sauce not being his or their manufacture.

In 1884 the words were registered as a trade mark under the statutes. The result was that down to November last there had not been in the market any sauce under the name of "Yorkshire Relish" except the plaintiff's.

In 1893, however, proceedings were successfully taken by the defendant company for the removal from the register of the plaintiff's mark: (*Re Powell's Trade Mark*, or *Powell* v. *Birmingham Vinegar Brewery Company*, 69 L. T. Rep. 60; 70 L. T. Rep. 1; (1893) 2 Ch. 388; (1894) A. C. 8.) Soon after the decision of the House of Lords in that case the defendants began to place on the market a sauce which they described as "Yorkshire Relish," and thereupon the plaintiff brought the present action.

The defendants' sauce was sold in bottles on which was placed a label which did not, in its general appearance, resemble the plaintiff's, but contained at the top the words "Yorkshire Relish" in large letters, and the statement "Manufactured by the Birmingham Vinegar Brewery Limited," successors to Holbrook and Co., London and Birmingham." These bottles were placed in wrappers, on which also appeared the words "Yorkshire Relish," accompanied by the like statement. The sauces of the plaintiff and the defendants had been analysed by a chemist, who stated that there was a wide difference between them, and that they were decidedly different sauces; and, there being no evidence to the contrary, it was assumed by his Lordship for the purposes of the present motion that they were different.

From the evidence adduced in the case, the Court further came to the conclusion that, until the defendants entered the field, the wholesale and retail dealers who ordered sauce under the designation of "Yorkshire Relish" knew that it was manufactured by the plaintiff, and relied on its being so manufactured; and that many of the consumers probably knew nothing of the manufacturer, but when they ordered sauce under that name expected to get that which they had been accustomed to buy, viz., sauce of the plaintiff's manufacture. From the evidence given as to the result of the defendants' placing their goods on the market under the name of "Yorkshire Relish," the Court formed the opinion that an unwary purchaser who observed the words "Yorkshire Relish" prominently on the defendants' label and bought the defendants' article, although the label was different, might very well be deceived into thinking that the label was a new one, and that he was getting the plaintiff's sauce.

The question was whether, under the circumstances, the plaintiff was entitled to the injunction which he claimed, notwithstanding that he had no exclusive right to the use of the term "Yorkshire Relish."

Sir *R. Webster*, Q.C., *Graham Hastings*, Q.C., and *John Cutler* for the motion.—We rely on *Powell's Trade Mark* (or *Powell* v. *Birmingham Vinegar Brewery Company* (69 L. T. Rep. 60; 70 L. T. Rep. 1; (1893) 2 Ch. 388; (1894) A. C. 8). The words "Yorkshire Relish" signify a sauce made by the plaintiffs, as distinguished from sauces made by other manufacturers. The defendants are selling a different article as Yorkshire Relish. But even if it were the same it would be unlawful:

Montgomery v. *Thompson*, 64 L. T. Rep. 748; 41 Ch. Div. 35; (1891) A. C. 217; 60 L. J. 757, Ch.

Even assuming they had a right to use the words, they could not use them on a substance not Yorkshire Relish. There is really no attempt to distinguish the labels. It is not necessary for us to prove fraud. Purchasers are likely to be misled and purchase the defendants' sauce under the belief that it is of the plaintiff's manufacture.

Buckley, Q.C., *Fletcher Moulton*, Q.C., and *Vernon R. Smith*.—We rely on the cases cited on behalf of the plaintiff. In *Powell* v. *Birmingham Vinegar Brewery Company*, in the House of Lords Lord Herschell, L.C. said (1894) A. C. at p. 10; 70 L. T. Rep. at p. 2): "In the present case I do not think it can be doubted that the rights of any person who was in the trade and who might desire

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to make use of the words "Yorkshire Relish" would be less if this mark were upon the register than they would be if he were only subject to the common law liability of being restrained from making any attempt to pass off his goods as the goods of another person. The plaintiffs are setting up a right to a monopoly of the words. [STIRLING, J.—As the others were in many years before you, is it not your duty to distinguish your goods? His Lordship referred to *Montgomery* v. *Thompson* (*ubi sup.*).] Yes; we have done so. It is clear from the plaintiff's own evidence that not a single person was misled. The plaintiff's right expired at the end of last year; therefore any person may make Yorkshire Relish so long as he does not sell it as the plaintiff's. As to the labels, it is impossible to mistake one for the other. If the defendants are not entitled to the words Yorkshire Relish they have taken precautions to prevent anyone being misled into purchasing sauce of the defendants in the belief that it is manufactured by the plaintiff. [STIRLING, J. referred to *Reddaway* v. *Bentham Hemp Spinning Company* (67 L. T. Rep. 301; (1892) 2 Q. B. 639; 8 Times L. Rep. 734, C. A., and the judgment of Smith, L.J. at 67 L. T. Rep., p. 306; (1892) 2 Q. B., at 648-652.] The making of goods gives no monopoly in manufacture; the defendants are therefore entitled to make and sell the same article, or a different one, and call it by that name. Our clients have done nothing more than make and say they are making the article. Are we saying it in such a way as clearly to distinguish it from the others? We submit we are. The Stone Ale case (*Montgomery* v. *Thompson*, *ubi sup.*) is distinguishable, because there it was a case of the name of the place at which the goods were made. Here the issue turns on the get up of the article.

Cur. adv. vult.

July 24.—STIRLING, J., in delivering judgment, said:—The decision of the House of Lords in *Powell* v. *The Birmingham Vinegar Brewery Company* conclusively establishes that the words "Yorkshire Relish" do not constitute a trade mark of the plaintiff's capable of registration under the Patents, Designs, and Trade Marks Act of 1883. The plaintiff, nevertheless, may be entitled to such rights in respect of the words as enable him to sue. In *Singer Manufacturing Company* v. *Loog* (48 L. T. Rep. 3; 8 App. Cas. 15; 52 L. J. 481, Ch.) Lord Blackburn says: "A name may be so appropriated by user as to come to mean the goods of the plaintiffs, though it is not, and never was, impressed on the goods, or on the packages in which they are contained, so as to be a trade mark, properly so called, or within the recent statutes. Where it is established that such a trade name bears that meaning, I think the use of that name, or one so nearly resembling it as to be likely to deceive, as applicable to goods not the plaintiffs', may be the means of passing off those goods as and for the plaintiffs' just as much as the use of a trade mark; and I think the law (so far as not altered by legislation) is the same." It is not necessary to consider whether, in cases of this class spoken of by Lord Blackburn, it is possible that the plaintiff may have an absolute or exclusive right to the name; ordinarily, at all events, his right is not so extensive, and is limited to preventing anyone from so using the name as to pass off his goods as the goods of the plaintiff. It is one of the grounds of the decision of the Court of Appeal and the House of Lords that the right of the present plaintiff is of the latter kind. Evidence of a very similar nature to that which is now before me was adduced in the former litigation. Lindley, L J. says (69 L. T. Rep. 64; (1893) 2 Ch. 401): "The evidence shows that this term 'Yorkshire Relish' has been used by the firm which the applicant represents to denote a sauce made by them ever since 1862, and they have got a reputation for it; but what is most important to observe is this, that they have no exclusive right to the use of the words 'Yorkshire Relish' unless they can maintain the particular registered mark. Their right, apart from that, is to prevent anybody from selling 'Yorkshire Relish' in such a way as to pass off his goods for the appellant's. That is the whole of their right." Bowen, L.J. says (69 L. T. Rep. 66; (1893) 2 Ch. 407): "In this particular case it is perfectly true that 'Yorkshire Relish' denotes the article which is made by, and has been made for many years by, the appellant's firm, and it looks extremely unlikely that any person, even the respondents, could now use the term 'Yorkshire Relish' without running great risks. But if 'Yorkshire Relish' is not a term to which the appellant has the exclusive right, it is conceivable that the respondents or any other persons in the trade might, by an honest and strong endeavour, carried out effectually, so distinguish the sale of the article which they are selling from the sales of the appellant's sauce or so distinguish the manufacture of the article which they manufacture from the manufacture of the appellant's sauce, as to prevent the possibility of the outside customer being deceived. It is impossible for a court of law to say that it might not be done, and if it can be done the trade have a right to have that door left open to them." The same view is expressed in the House of Lords by the Lord Chancellor, where he says (70 L. T. Rep. 2; (1894) A. C. 10): "I do not think it can be doubted that the rights of any person in the trade who might desire to make use of the words 'Yorkshire Relish' would be less than they would be if he were only subject to the common law liability of being restrained from making any attempt to pass off his goods as the goods of another person." Now the case of *Reddaway* v. *Bentham Hemp Spinning Company* (67 L. T. Rep. 301; (1892) 2 Q. B. 639; 8 Times L. Rep. 734, C. A.) shows that, in order to entitle the plaintiff to an injunction, it is not necessary for him to make out a case of fraud or intention to mislead on the part of the defendants, but that it is sufficient if he establishes two things—first, that the words "Yorkshire Relish" mean a sauce manufactured by the plaintiff as distinguished from sauce made by other manufacturers; and, secondly, that the defendants so describe their sauce as to be likely to mislead purchasers and to lead them to buy the defendants' sauce as and for the sauce of the plaintiff. It is contended on behalf of the defendants that the plaintiff fails to make out either. As regards the former of these two things, it is said that the name "Yorkshire Relish" has been simply used to designate or describe the article manufactured by the plaintiff, and could not before November last mean the manufacture of the plaintiff as distinguished from that of other manufacturers, because down to that time the plaintiff was the sole manufacturer

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It is urged that the plaintiff has no monopoly in the manufacture, and that the defendants consequently have a right to make and sell the same, or even a different article, and call it by the name of "Yorkshire Relish." A similar point was considered in the case of *Siegert* v. *Findlater* (38 L. T. Rep. 349; 7 Ch. Div 801; 47 L. J. 233, Ch.), where the plaintiff sought to restrain the use of the word "Angostura" in connection with a secret preparation, known as "Angostura Bitters," it being admitted that the defendant's preparation was different from the plaintiff's. [His Lordship referred to the report of that case, and continued:] It therefore appears that, although the learned judge held that the plaintiff had no exclusive title to the name "Angostura Bitters," he nevertheless had such a right or an interest in the name as to entitle him to an injunction to restrain the use of the words so as to induce the belief that the article was made by the plaintiff. It is true that the case was one of fraud, but, as I have said, *Reddaway* v. *Bentham Hemp Spinning Company* shows that the plaintiff may succeed without proving fraud. [His Lordship then referred to the *Linoleum Manufacturing Company* v. *Nairn* (38 L.T. Rep. 448; 7 Ch. Div. 834; 47 L. J. 430, Ch.) and *Re J. B. Palmer's Trade Mark* (50 L. T. Rep. 30; 24 Ch. Div. 504; 32 W. R. 306), where Cotton, L.J. made the following observations: "It is very true (and although this was not mentioned in argument I mention it to show that it has not been overlooked) that if anyone during the existence of the patent had applied the name which the patentee had given to his article to an article not an infringement of the patent he would probably have been stopped by injunction, but only because, although it would not have been an infringement of the patent, it would have been a false representation that what he was selling was the patented article."] These cases appear to me to show that the maker of a secret preparation or patented article may, while the secret remains undiscovered or the patent is unexpired, obtain an injunction to restrain the sale of the goods under the name by which the preparation or article is known. Down to November last the plaintiff was the sole manufacturer of "Yorkshire Relish," and he still is the sole manufacturer of the article which prior to that time was so designated; for, upon the evidence before me, it must be taken that the article manufactured by the defendants differs from that made by the plaintiff. He stands, therefore, in a similar position to the plaintiff in *Siegert* v. *Findlater*, or to persons who during the continuance of a patent apply the name of the patented article to something not made in accordance with the patent. In my opinion, the defendants, if they desire to use the words "Yorkshire Relish" in connection with their sauce, are bound to take similar precautions to those which the law imposes on persons who desire to employ in connection with their goods designations to which a plaintiff has no exclusive title, but which by use in a secondary sense have come to denote the plaintiff's manufacture: (see *Seixo* v. *Provezende*, 14 L. T. Rep. 314; 1 Ch. App. 192; 12 Jur. N. S. 215; *Massam* v. *Thorley's Cattle Food Company*, 42 L. T, Rep. 851; 14 Ch. Div. 748; and *Montgomery* v. *Thompson*, 64 L. T. Rep. 748; (1891) A. C. 217; 60 L. J. 757, Ch.) The question then arises, have the defendants so done? In my opinion, they have not. It is quite true that the plaintiff's and defendants' labels are very different, and that the name of the defendants or their predecessors appears as that of the manufacturer. The words "Yorkshire Relish," however, form so conspicuous a part of the defendants' label that, in my judgment, the unwary purchaser, who either knows nothing about the manufacturers or does not happen to remember the name of the manufacturer of the article which he has been accustomed to buy, is extremely likely to be misled into purchasing the defendants' sauce when he means to buy the plaintiff's, and the plaintiff's evidence appears to me to show that this has actually happened. It is not for me to say how the defendants are effectually to distinguish their goods. I take the law to be as laid down in *Montgomery* v. *Thompson* by the Lord Chancellor. In my opinion, therefore, the plaintiff is entitled to an injunction in the form approved of by Lords Watson and Macnaghten in *Montgomery* v. *Thompson* (see 64 L. T. Rep. 750, 751 (1891) A. C. 221-224)—that is, restraining the defendants from using the words "Yorkshire Relish" as descriptive of, or in connection with, any sauce or relish manufactured by them, or sauce or relish (not being of the plaintiff's manufacture) sold or offered for sale by them, without clearly distinguishing such sauce or relish from the sauce or relish of the plaintiff.

Solicitors: *Salaman; Thorowgood, Tabor,* and *Hardcastle,* for *Cooper* and *Co.,* Newcastle, Staffordshire. (*a*)

July 3, 4, *and* 12.

(Before STIRLING, J.)

BUNNING *v.* THE LYRIC THEATRE LIMITED. (*b*)

Contract—Breach—Engagement as musical director—Measure of damages—Implied term in contract.

By an agreement of the 18*th Aug.* 1892 *the defendant company engaged the plaintiff as musical director of their theatre until the* 1*st Oct.* 1895, *upon certain terms as to salary, with a provision that the plaintiff's name should be announced in certain daily newspapers, and on bills and programmes. It appeared that the most important duty of a musical director is to conduct the orchestra. The plaintiff had conducted three pieces at the defendants' theatre with perfect success, when a piece was brought out which was conducted by the composer. Since that time the plaintiff had not been called on to conduct or perform the duties of his office, but his salary had been paid under the agreement, and it was common ground that he was still musical director of the theatre.*

Held, that the stipulation that the plaintiff's name should appear as musical director meant, having regard to the observations of Lord Esher, M.R. in Hamlyn and Co. *v.* Wood and Co. (65 *L. T. Rep. at p.* 290; (1891) 2 *Q. B. at p.* 491), *that such a state of things should exist that the*

(*a*) An appeal from this decision came on for hearing on the 8th Aug., when the Court (Lindley, Lopes, and Davey, L.JJ.), after hearing counsel for the appellants, said that, as it was not the trial of the action, they were not disposed to alter the order, and dismissed the appeal, the costs to be costs in the action.

(*b*) Reported by J. SANDERSON, Esq., Barrister-at-Law.

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defendants should be in a position truly to make such an announcement; or, in other words, that they should employ him in that capacity, and the plaintiff, though it had not been shown that his non-employment had interfered with his obtaining another post, was entitled to more than nominal damages.

THIS was an action by Mr. Herbert Bunning, a musical director, to restrain the defendant company from employing any person other than the plaintiff as musical director of their orchestra until the 1st Oct. 1895, and to restrain the defendant company from announcing that any person other than the plaintiff is engaged as such musical director in breach of an agreement dated the 18th Aug. 1892, and for damages in respect of such breach.

The terms of the agreement, so far as material, were as follows:

Memorandum of agreement made this 18th day of August 1892, between the Lyric Theatre Limited (hereinafter called the management) of the one part, and Herbert Bunning, . . . musical director, of the other part. Whereas the management is desirous of obtaining the permanent services of a musical director and whereas the said Herbert Bunning is agreeable to fill this post, it has been agreed between the parties hereto as follows, namely: The said Herbert Bunning agrees to act as musical director of the orchestra for London, Brighton, or Crystal Palace, in consideration of the management paying him a weekly salary of 8*l.*, commencing on the 1st Oct. 1892, this salary to be increased by the management to 10*l.* per week on and after the 1st April 1893, and to 12*l.* per week on and after the 1st Oct. 1894, and to be continued at that rate until the 1st Oct. 1895, thus making the total engagement for three years. . . . The above payments are to be on the usual playhouse rules—namely, that salary is paid only for performances which have actually taken place, and that no salary shall be paid for any part of the time of this agreement during which the theatre is closed, the management having the right to close the theatre at any time they think fit. . . . The said Herbert Bunning undertakes faithfully to perform all duties which fall to the lot of the musical director, such as adapting music, composing small additions, &c., all of which duties are included in the above salary. The said Herbert Bunning having had no experience in conducting a theatre orchestra in England, it is agreed that he shall give his services up to the 1st Oct. free of charge, in order to enable the management to judge as to his capabilities as a musical director. . . . Name to be announced in *Standard* and *Telegraph*, and on bills and programmes.

The plaintiff, upon the execution of the agreement, entered upon the duties of his office, and gave complete satisfaction during the preliminary trial, in the course of which it was agreed he should give his services. After that he conducted three pieces at the theatre with complete success.

After a time a piece called "Little Christopher Columbus" was brought out, which met with considerable success, and was still running. The performances of this piece were, however, conducted by the composer. Since that time the plaintiff had not conducted at the theatre, nor had he been called upon to perform the duties of his office. He had, however, obtained payment of his salary under the agreement.

It was stated by the plaintiff's witnesses, and corroborated by the sole witness for the defendants, that the most important duty of the musical director of a theatre was to conduct the orchestra.

The defendants stated that the reason for the non-employment of the plaintiff was the engagement of the composer to conduct his own piece, and the reason for not advertising the plaintiff's name as musical director, that if it were so advertised the public would expect to find him in the conductor's seat.

It was not alleged by either party that the plaintiff had been dismissed from his office.

Graham Hastings, Q.C., *Lockwood*, Q.C., and *E. C. Macnaghten*, for the plaintiff, contended that he was entitled to substantial damages for the damage to his reputation arising from his non-employment as musical director, and his not being advertised as musical director according to the stipulation in the agreement.

Grosvenor Woods, Q.C. and *A. à B. Terrell* for the defendant company.

Cur. adv. vult.

July 12.—STIRLING, J., in delivering judgment, after considering the facts of the case and the agreement of the 18th Aug. 1892, remarked that the plaintiff's want of experience was taken notice of upon the face of the agreement, and referring to the stipulation as to advertising said that that of course meant that the plaintiff was to be advertised as occupying the post of musical director. His Lordship proceeded:—The plaintiff complains of breach of the agreement in two particulars: first, the non-advertising of his name; and, secondly, his non-employment as conductor. As to the first, the agreement contains an express stipulation. At the date of the agreement the plaintiff had no experience as a conductor of a theatre, and had not acquired any fame in that capacity; the stipulation was therefore obviously inserted for his benefit. It has not been complied with, and I fail to see any reason for such non-compliance. It is an undenied fact that the plaintiff has not ceased to be musical director of the theatre, and it might have been so stated in the advertisements, coupled with the addition of some reason for his not occupying the conductor's chair. There has therefore been a clear breach of an express term of the agreement. As to the second ground of complaint, there is no express stipulation in the agreement that the defendants would employ the plaintiff as conductor, and the court is always cautious in implying such a stipulation where none is expressed. [His Lordship referred to the observations of Lord Esher, M.R. in *Hamlyn and Co.* v. *Wood and Co.* (65 L. T. Rep., at p. 290; (1891) 2 Q. B., at p. 491), to the effect that the rule as to implications in a contract is, that it is not sufficient for the purpose of importing a stipulation into a written contract that the implication is a reasonable one to make under the circumstances, but it must be such a stipulation as both parties looking at the matter in a reasonable and business-like way intended should be a binding stipulation upon both parties. He then continued:] In the present case the recitals in the agreement show that the post which the plaintiff was to fill was that of permanent musical director. The defendant company have protected themselves by reserving a power to close the theatre. It is expressly stipulated that the plaintiff's name shall appear as musical director, and what is in-

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tended is, that such a state of things shall exist that the defendants shall be in the position truly to make such an announcement, or, in other words, that they shall employ him in that capacity. I think, therefore, that the defendants have broken the agreement in this particular also. The relief claimed is, first, an injunction; and, secondly, damages. A motion has been made for an injunction, but that has not been granted, and the costs have been made costs in the action. At the bar an injunction is not now asked for. No doubt in the absence of an express negative stipulation it is felt to be a hopeless application, and the claim is limited to damages. The question, then, is as to the amount of the damages which ought to be awarded. At the present time the direct pecuniary loss which the plaintiff has suffered is little or nothing. He must be taken, for the purposes of this action, to have received all the salary to which he is entitled under the agreement, and it is not shown that his non-employment has interfered with his obtaining another post. But he complains of injury to his professional reputation. [His Lordship then referred to the evidence on this point, and continued:] The plaintiff has succeeded in showing that his non-employment by the defendant company is not due to any incapacity on his part, and that he is not in fault in any way. He therefore has a substantial grievance, and is entitled to come to this court for redress. That being so, he is entitled to more than mere nominal damages. Taking all the circumstances into consideration, I assess the amount of the damages at fifty guineas.

Solicitors: *Bedford, Monier-Williams,* and *Co.*; *A. A. Hannay.*

Wednesday, May 23.

(Before KEKEWICH J.)

Re BROOKE; BROOKE *v.* BROOKE. (*a*)

Mortgage—Fixtures—Bill of sale—Business—Executor's right to indemnity—Creditors—Priority.

An executrix of a will, in which the testator gave no power to his executors to carry on his business, did carry it on with the knowledge of the creditors.

Held, that the principle of Dowse *v.* Gordon (64 L. T. Rep. 809; (1891) App. Cas. 190) *applied, and the executrix was entitled to be indemnified.*

In 1887, *by indenture of mortgage, which was not registered as a bill of sale, the above testator, a paper manufacturer, granted and conveyed his mill and the fixed machinery and fixtures in and upon the said premises to C. D. to secure* 10,000*l.* *and interest.*

Held, that the mortgage deed was valid as to fixed machinery and fixtures.

ON the 24th Nov. 1887 John Brooke and Jane Elizabeth Brooke, his wife, conditionally surrendered out of court, to the use of Thomas Owen, his heirs and assigns, a piece of land with the mill messuage or tenement thereon, known as Soyland Mill, with the four messuages and cottages, and all other buildings erected or standing on the said piece of land, and the fixed machinery and fixtures in and upon the said premises together with the appurtenances to secure the repayment of 10,000*l.* and interest.

By indenture of mortgage of even date, John Brooke granted and conveyed unto the said Thomas Owen the lands, premises, machinery, and fixtures (the machinery and fixtures being specified in a schedule) comprised in the above-mentioned conditional surrender. And it was provided that the loan should continue until the 1st Aug. 1894, but that John Brooke, or those claiming under him, should be at liberty to pay off the loan on giving six calendar months' notice in writing, and John Brooke covenanted that he and others claiming under him, would, during the continuance of the security, "keep the said mill, messuage or tenement, cottages and other buildings, machinery and fixtures comprised in and subject to this security, and all buildings, machinery, fixtures, and property which may from time to time be so comprised or subject, in good and substantial repair, and in perfect working order, and also insured."

The mortgage security was transferred to Thomas Owen, Edward Jewitt Robinson, and John Reeves Brown. The mortgage deed was not registered as a bill of sale. John Brooke died on the 6th Sept. 1888, having by his will given his residuary real and personal estate to his trustees and executors upon trust for his wife for life, and after her death to sell and divide the proceeds among his children. There was no power given to carry on the business. Jane Elizabeth Brooke proved the will and carried on the business. She sold some of the fixed machinery for 400*l.*, and bought new machinery in its place. The mortgagees consented to the sale, but stipulated that the proceeds of sale should be employed in reduction of the mortgage debt. An administration action was commenced by two daughters of the testator, and the widow was appointed receiver and manager.

On the 20th Jan. 1890 the mortgagees obtained leave to attend the proceedings, and another receiver and manager was appointed, and the widow paid 400*l.* into court.

Thomas Owen was a separate creditor, as well as a mortgagee.

On the 22nd July 1891 the Court appointed David Scott to represent the class of creditors of the defendant Jane Elizabeth Brooke since the death of the testator, and gave David Scott liberty to attend the proceedings. The chief clerk by his certificate found that the testator's personal estate was insufficient for payment of his debts, and that the widow had properly incurred debts and liabilities in carrying on the business. On further consideration the questions arose (1) whether the defendant, the widow, was entitled in priority to other creditors to be indemnified out of the estate for debts and liabilities properly incurred in carrying on the business; (2) whether or not the mortgage deed was a bill of sale of the machinery.

Charles Macnaghten for the trustees.

Renshaw, Q.C. and *Whitaker* for Thomas Owen.—This case differs from *Dowse* v. *Gordon,* (64 L. T. Rep. 809; (1891) A. C. 190). Here the will contains no power to carry on the business. Mr. Owen is a separate creditor as well as a mortgagee, and had no notice of the business being carried on; if he had he could not have interfered with the officer appointed by the court.

Warmington, Q.C. and *Upjohn,* for David Scott, were not called on.

(*a*) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

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KEKEWICH, J.—To my mind this case is concluded by *Dowse* v. *Gorton*. No doubt in that case there was a direction in the will to carry on the business, but, as pointed out by Lord Macnaghten, the direction in the will to carry on the business, though binding on the executors in their relation to the beneficiaries, and also binding on the beneficiaries, was not binding on the creditors, and therefore, when you come to consider the rights of the creditors, the direction to carry on the business, although a circumstance not to be overlooked, is of very little moment. The view which I understand both Lord Herschell and Lord Macnaghten to take is what I will presently mention. But I pause for a moment to point out that this is not an opinion of Lord Macnaghten expressed independently, advising the House, but the opinion of the House, and for this reason: Lord Herschell gives no doubt particular cases, but by no means negatives the views expressed by Lord Macnaghten, and says at p. 201 of (1891) App. Cas.: "Since writing my opinion, I have had the advantage of reading the opinion prepared by my noble and learned friend, Lord Macnaghten. . . . I am disposed to concur in the view which he has expressed as to the right of a creditor." So it was a reserved judgment in which the Lord Chancellor did not say all that is said by Lord Macnaghten because he knew already that it was to be said by that learned lord. Lord Hannen concludes the debate at p. 209: "I have had the advantage of reading the opinions which have just been delivered by my noble and learned friends who have preceded me, and I concur in their opinion that the judgment of the Court of Appeal with the modifications suggested should be affirmed." So that it is a case in which the judgments of all the learned lords who took part in the decision are really part of one entire judgment. Now, what I understand them to decide as regards a case of this kind is this: where after the death of a trader a business is carried on by the executors for some time, and then ultimately there is a conflict between the creditors of the testator, properly so called, and the creditors of the business, that is the creditors of the executors, it is for the creditors of the business, if they can, or for the creditors of the testator, if they can, to show that it was not done with their assent. If a business was not carried on with the assent of the creditors of the testator they have their own remedy. They can step in at any time. They must be presumed to know the death of the testator, they must, after a reasonable time has elapsed, be presumed to know that the business is being carried on by the executor, and the law says that that cannot be done properly without their assent. The inference is that if they do not interfere they have assented, and then the result of the indemnity to the executors follows from their assent. I repeat I have put my own views in expressing what I understand the result of *Dowse* v. *Gorton* to be with respect to a case like this. It cannot be a matter in every case for the court to determine what is the proper inference to be drawn, and therefore occasionally I have found the question one of great difficulty. I find none here, because here the only creditor who is opposing this indemnity is a creditor who knew perfectly well, but a very short time after the judgment, that the business was being carried on in this way. I should infer that this creditor knew long before the judgment—eighteen months after the death of the testator, that the business was being carried on by the executor; he certainly knew within two months after the judgment. It is said that he was then only attending in his character of a mortgagee. But a man cannot have notice as a mortgagee and say he does not know as a creditor. He did know at any rate in Jan. 1890 that a business was being carried on, so that I have no difficulty in this case in inferring that so far as this creditor was concerned the business was carried on with his assent. But then there is here a circumstance which I do not remember occurring in any other case. From the month of Nov. 1890, that is from the expiration of eighteen months after the death of the testator, the business was not carried on by the executors, but was carried on by the officer of the court appointed on the application of the plaintiffs. It is said that that makes all the difference. It is asked by the counsel for the creditor, "how could we interfere with the officer of the court, how could we intervene? In the first place, the business being carried on by the officer of the court did nothing at all to affect the position of the other parties. An order of the court might be necessary, but persons coming in would have been examined *pro interesse suo*. The receiver appointed at the instance of the creditors was no less appointed by the creditors because accountable to the court. The creditor who now objects is all the more bound because he did know that the business was carried on with this solemn sanction. There was really not the slightest difficulty in his intervening; what proceedings would have been most convenient to take I need not pause to consider. But a creditor setting up the case he now sets up, that friendly creditors obtained a judgment to his prejudice and carried on a business whereby he should lose his lien, I say that should have put him on his guard. He might have taken proceedings by injunction or obtained the appointment of a receiver of his own to have his claims properly recognised. There is not the slightest difficulty about it. The court has never allowed a friendly judgment to prevent the assertion of rights by those who deem themselves injured by a friendly judgment. In this case it seems to me abundantly clear that this particular creditor must be regarded as assenting to the business being carried on first by the executrix and subsequently by the receiver; and it being found that the executrix is not in default she is entitled to an indemnity, and through her the creditors of the business are entitled to the benefit of that indemnity according to the principle of *Dowse* v. *Gorton*.

As to the 400*l*.

Macnaghten for the trustees.

Renshaw, Q.C., and *Whitaker* for the mortgagees.—In this case there is no separate assignment of the chattels; the case is distinguished from *Small* v. *The National Provincial Bank of England* (70 L. T. Rep. 492; (1894) 1 Ch. 686), and falls within *Re Yates*; *Batcheldor* v. *Yates* (59 L. T. Rep. 47; 38 Ch. Div. 112).

Warmington, Q.C. and *Upjohn* for the representatives of the mortgagor.—We did what we were entitled to do, that is, we removed the worn-out rollers and substituted new ones. We spent

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more money than the 400*l.*, that sum belongs to us. This is a separate assignment of chattels, and the case falls within *Small* v. *The National Provincial Bank of England.* [KEKEWICH, J.—Mr. Renshaw, I wish to hear you as to your claim for the 400*l.*]

Renshaw, Q.C.—The bargain was, that the proceeds of sale should be handed to us in reduction of the mortgage debt.

KEKEWICH, J.—It will be convenient to take the two points in reverse order to that in which they were argued by Mr. Warmington. First, as regards the question whether the present case falls within *Re Yates*; *Batcheldor* v. *Yates*, decided by the Court of Appeal, or *Small* v. *National Provincial Bank of England*, decided by Stirling, J. That these two cases are distinct is common ground. It was because there was a great distinction that Stirling, J. gave the case before him full consideration and pronounced an elaborate decision. My difficulty is that the case before me is not on all-fours with one or the other. In the case in the Court of Appeal, there was a mortgage of the lands and buildings carrying with it by force of the words used the fixtures attached. As regards the case before Stirling, J., there was an express conveyance of fixtures, but with conditions which I have not here; the words being "together with all and singular the fixed and movable plant, machinery, and fixtures, implements and utensils now or hereafter fixed to or placed upon or used in or about the said hereditaments and premises respectively." That is to say, still dwelling on the distinction in the case before Stirling, J., here there is only the conveyance of the property, "and the fixed machinery and fixtures in and upon the said premises, which said machinery and fixtures are specified in the said schedule hereto." There there was a conveyance not only of the fixed machinery attached to the buildings, but there was also "the movable plant and machinery," and, further, there purported to be a conveyance of what should be "hereafter fixed to, or placed upon, or used in or about the said hereditaments and premises;" two large descriptions to which some importance attaches. Now Stirling, J. goes through the reported cases in the first instance, but when he comes to explaining the *ratio decidendi*, his decision seems to me to rest entirely upon those words, and the meaning which he attached to those words. He says he must give effect to every word in the deed if he can, and must be satisfied that the object of the parties was "merely to secure by way of precaution that something should pass which would have passed under a conveyance of the land alone without any reference to the fixtures." And then, after criticising the words, he says, he cannot come to any such conclusion. He explains that he is satisfied that something more was purported to pass, was intended to pass, than would have passed if those words had not been used—that they were not an additional precaution to cover what the law would have given to the mortgagee without any additional words of conveyance, but were intended to pass what the conveyance would not have given to the mortgagee. I have no such case to deal with here. I have here to deal simply with the machinery and fixtures attached to the building at the date of the conveyance; therefore this case is not distinguishable in either of the points to which I have called attention from *Re Yates*. Then does it fall within the principle of *Re Yates*, there being the distinction I have already pointed out that there there was no conveyance of the fixtures by express words? To my mind, the principle of the decision in *Re Yates* is applicable where the fixtures are conveyed by express words quite as much as where they are conveyed as being attached to the freehold. The argument goes on this, that the mortgagee could, if he chose, sell the fixtures independently of the building to which they belonged, and that that is to be gathered or follows from the words of the power, which in this case, as in *Re Yates*, is contained in the 19th section of the Conveyancing and Law of Property Act 1881. A power is given thereby when the mortgage money becomes due "to sell . . . . the mortgaged property, or any part thereof . . . . either together or in lots," and so forth. The answer seems to me to be given in the plainest terms by Bowen, L.J., who deals with the question more fully and precisely than the other Lords Justices. He puts the case of a man having a mortgage of a house selling the chimneys without selling the rest of the house. He says at page 128 of 38 Ch. Div.: "I think the framers intended that what was sold should be a separable part of the mortgaged property in the state in which it was subjected to the mortgage." It seems to me that, apart from any criticism on the bounds of the particular instrument, which I will determine directly, you cannot say that machinery which is fixed machinery, and which is conveyed as part of the buildings to which it is affixed, is a separable part of the property. Unless, therefore, there is something to the contrary in a criticism of the document in question, it seems to me that the principle of *Re Yates* is applicable, notwithstanding the distinction I have mentioned, and it is not touched by Stirling, J.'s decision. There is certainly this observation on the deed; that it is somewhat unusual in form. I daresay it would be easy to find others of the same character, but it is not an old-established form; first, because there is a conditional surrender in which the fixtures are described precisely in the same way as the accompanying deed. Speaking from recollection, it is not usual in a conditional surrender to do more than describe the copyhold property, and that is generally done in the shortest possible form consistent with identity; still, there does not seem to me to be any very serious objection to those words being put in, nor do I see that any question can arise from their being included therein. But then beyond that there is a certain amount of unusual form because the contemporaneous deed purports to be not only a deed of covenant, but purports also to operate as a conveyance, not only of the land but also of the fixtures. It is asked, "Why have any conveyance, unless it were to pass something which did not pass by the conditional surrender?" One has to find in the conveyance, which is to some extent superfluous, an indication of the intention, which Stirling, J. saw, to pass something which would not have passed without it. The answer to that is, that the conditional surrender and the contemporaneous deed in precisely the same language does not pass, and does not purport to pass, any new machinery. If it passes by the conditional surrender, it does not pass by the

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contemporaneous deed, though, if it did not pass by the conditional surrender, at least what the parties intended by it was to have assured that which they purported to assure by the conditional surrender. In this case the conditional surrender and the contemporaneous deed are identical. The result to my mind is, that there is no intention here to pass anything other than that which would have passed if these words had not been inserted separately. I think the case in principle is not distinguishable from *Re Yates*, notwithstanding those differences incidental to a copyhold conveyance and accentuated by the particular form of these particular documents. *Re Yates* must govern my decision. Then comes this question about those particular rollers which were sold for 400*l*. That is a question of fact, but there is a little point of law upon it, on the covenant in the deed. There is a curious covenant in this contemporaneous deed, which does not purport to pass other than what was on the land. The mortgagor covenanted that he would, during the continuance of the present security keep the lands, cottages, and buildings &c., in good and substantial repair, and in perfect working order. If that had been the whole covenant there would have been no question on this part of the case. But there is added "and which may from time to time be so comprised or subject." It is is said that that implies a power in the mortgagor to take away any machinery or fixtures which are worn out or unsuitable to the business, exercising an honest discretion, provided he puts others on the land. I cannot raise the implication from the covenant. Perhaps the parties had it in their minds that from time to time new machinery and fixtures would be added or substituted, as is always the case in a large trading concern, and that by a memorandum or by a letter, without the necessity of any formal deed, the new property would be added to the security or substituted for it; that they would have that comprehensive covenant to cover that from time to time. I do not see the slightest reason for holding that large powers of substitution were given to the mortgagor. Beyond this there is one word which seems to me to be of vast importance. This covenant is extended not only to fixtures and machinery, but also to "all buildings . . . which may be so comprised or subject." If that argument is worth anything, then the mortgagor might from time to time, if he so pleased, take any building out of the mortgage security and put others in their place. I have no answer to that defect in the argument, which I have pointed out; it is answered by that. But there is also this to be said. The correspondence shows that the mortgagee was consulted, as was necessary he should be, in my view of the covenant, and he said he would consent to the sale of the property, provided that the money was made available for the reduction of the mortgage debt, which was not done. I do not see that he did so on any other terms, and I think he is entitled to have it paid over to him. It is said that this money was expended with further sums in substituting other machinery, and that he cannot take the proceeds of sale of what was in his mortgage, and insist on what is substituted. That seems good argument, but there is no evidence as to what was substituted. The affidavit speaks of plant and machinery, which are two different things. Plant is not mentioned in the deed, and the money may have been expended in what was not included in the mortgage. There is no occasion to reserve the question, but if it were decided to sell them, I think it must be upon those representing the mortgagor to show that to the extent of the substituted machinery the mortgagee has already been paid, and cannot have the proceeds of sale by reason of his having taken the proceeds of what was sold.

Solicitors: *S. Whitehead*; *Whitakers* and *Woolbert*, for *Simmons, Clark*, and *Co.*, Bath; *Woodcock, Ryland*, and *Parker*, for *Kimneir* and *Tombs*, Swindon.

June 13 *and* 28.

(Before KEKEWICH, J.)

Re HARMAN; LLOYD *v.* TARDY. (*a*)

Will—Power of appointment—Real estate—Conversion — Foreigner — Summons — Form of—Practice—Partition Act 1868 (31 *&* 32 *Vict. c.* 40), *s.* 8—*Leases and Sales of Settled Estates Act* 1856 (19 *&* 20 *Vict. c.* 120), *ss.* 23 *to* 25—*Settled Estates Act* 1877 (40 *&* 41 *Vict. c.* 18), *ss.* 34 *to* 36—*Wills Act* 1837 (1 *Vict. c.* 26), *ss.* 1, 27.

E. H., by will, vested one-ninth share of real estate in England in trustees upon trust for his daughter Emma for life, with remainder to her children, and in default of children, upon trust for such persons as she should by deed or will appoint, and in default of appointment upon trust for her next of kin. Emma H. married C., a domiciled Frenchman, who died in 1858.

In 1876 *the real estate was sold in a partition action, and the share of Emma C. was paid out to the trustees, and invested by them in Metropolitan Board of Works Stock.*

By her will, made in 1892 *in the French language, Emma C. gave and bequeathed to the defendant T. "all the personal property and rights* (tous les biens et droits mobiliers) *which I may have at my death, and which may constitute my estate, without any exception or reserve, in whatever place or locality the said property or rights may be situate, or due, or existing." Emma C. died in France in* 1892, *and without ever having had issue.*

On summons to determine who were entitled to the share of Emma C.:

Held, that the power was well exercised, and the fund in question passed by the operation of the will to the defendant T., the appointee; also that a summons of this nature should not be in a general form, but should be framed in the form of specific questions, to which the court could give categorical answers.

ORIGINATING SUMMONS taken out by Richard Borradaile Lloyd and Edgar James Paine, the trustees of the will of Ezekiel Harman to determine the following questions: (1) Who are, or is, now entitled to the funds in the hands of the plaintiffs representing the share of Emma Cazin, widow, deceased, in the Bowden Park Estate, devised by the said will and codicils, and in what shares and proportions. (2) That if and so far as may be necessary the trusts of the will may be administered by the court. (3) Costs.

(*a*) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

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The defendants were Antoinette Robillot Tardy, wife of Pierre Tardy; Walter Federau Nokes, the administrator with the will annexed of Emma Cazin, widow, deceased; and Frederick Mayo, Arthur Mayo, and Edward Mayo, who claimed to be interested as legatees or devisees under the will of Ezekiel Harman.

By his will, made the 26th Aug. 1843 Ezekiel Harman gave and bequeathed unto his trustees the sum of 15,000*l.* upon trust to invest the same, and out of the annual proceeds to pay an annuity, and subject to the payment of the said annuity to pay the dividends, interest, and annual proceeds of the said trust funds and securities to his daughter Emma Harman for and during her natural life for her sole and separate use and benefit independently of and free from the debts and control of any husband with whom she might thereafter marry, without power of anticipation, and after her decease in trust for her children as she should by deed or will appoint and in default of appointment for her children equally. And in default of children as to the said last mentioned trust funds and securities, and the dividends, interest, and annual income thereof in trust for such person and persons and in such manner in all respects as his said daughter Emma, whether covert or sole, should by deed or will direct or appoint, and, in default of such direction or appointment, in trust for her next of kin.

And the testator devised his mansion-house called Bowden Park House, and the messuages, farms, lands, and hereditaments to the same belonging or considered part of the Bowden Park estate, and all other his estate and hereditaments in the parish of Lacock, in the county of Wilts (subject to a term of 500 years created by the said will for raising the annuity and legacies given by his said will and his debts and testamentary expenses), to the use of his son Ezekiel Dickinson Harman, his heirs and assigns.

By a codicil, dated the 13th Aug. 1844, testator revoked the devise to his son Ezekiel Dickinson Harman of the Bowden Park estate and other hereditaments in the parish of Lacock, in the county of Wilts, and (subject to the term of 500 years) devised the same to his said son for life, with remainder to his children in tail, and in default of such issue then as to one-ninth part or share of the said estate to the use of his trustees upon such trusts, and under and subject to such powers, provisoes, and declarations for the benefit of his daughter Emma and her children, and for the appointees of his said daughter, as were in his will contained or expressed with regard to the legacy or sum of money thereby bequeathed or vested in the trustees for the benefit of his daughter and her children, so far as such trusts, powers, provisoes, and declarations could or might be applicable to real estate, each of his daughters respectively and her children respectively, or child or other issue, or her appointees, taking only one of such equal ninth parts or shares.

The testator died on the 28th May 1845, and his will was proved by his surviving executors. Emma Harman survived the testator and married Leopold Jean Pascal Cazin, a domiciled Frenchman.

By the Harman's Bowden Park Estate Act 1852, the Bowden Park Estate was vested in trustees for sale, and the surplus of the proceeds of such sale after payment of a mortgage of 8000*l.* were invested in the purchase of freehold land to be held upon the same trusts as the Bowden Park Estate were held.

On the 3rd July 1858 L. J. P. Cazin died leaving Emma Cazin him surviving.

Ezekiel Dickinson Harman died on the 7th Jan. 1876 without having had lawful issue. In June 1876 a partition action was commenced, and the freehold land was sold and the moneys arising from such sale were paid into court to the credit of the action "Proceeds of Sale of Real Estate."

The share of Emma Cazin was paid out to the trustees of the will and invested by them in 508*l.* 2*s.* 1*d.* Metropolitan Board of Works 3½ per cent. Stock. Emma Cazin died in France on the 22nd Oct. 1892, a widow, without having ever had issue.

On the 4th Oct. 1892 Emma Cazin executed a will in the French language, a translation of which was put in evidence. The translation so far as material to this report was as follows:—I give and bequeath to Madame Antoinette Robillot Tardy "all the personal property and rights (*tous les biens et droits mobiliers*) which I may have at my death and which may constitute my estate, without any exception or reserve, in whatever place or locality the said property and rights may be situate or due or existing."

On the 15th May 1893 letters of administration (having annexed thereto a copy of the English translation of the will of Emma Cazin) of the personal estate of the said Emma Cazin were granted to the defendant, Walter Federau Nokes, the lawful attorney of the defendant Antoinette Robillot Tardy.

Stock for the trustees.

Warmington, Q.C. and *C. T. Mitchell* for the appointee and Nokes.—Sect. 34 of the Settled Estates Act 1877 provides for the payment and application of moneys arising from sales. Sect. 36 provides for investment of money in court, and payment of the dividends to the person entitled to the rents and profits of the land. By sect. 8 of the Partition Act 1868, sects. 23 to 25 of the Leases and Sales of Settled Estates Act 1856 "shall extend and apply to money to be received on any sale effected under the authority" of the Partition Act 1868. The general gift and bequest in the will of Madame Cazin of all her personal property and rights operated as an exercise of the power of appointment over real estate given to her under her father's will:

Chandler v. *Pocock*, 44 L. T. Rep. 115; 16 Ch. Div. 648;
Mordaunt v. *Bennett*, 45 L. T. Rep. 585; 19 Ch. Div. 302.

[KEKEWICH, J. referred to *Di Sora* v. *Phillipps*, 10 H. L. C. 624.]

T. H. Carson for the next of kin.—First, there is the question whether this share is real or personal estate; secondly, there is the construction of the document. I say this is real estate:

Re Lloyd, 9 Prob. Div. 65;
Re Duke of Cleveland's Settled Estates, 69 L. T. Rep. 735; (1893) 3 Ch. 244;
Meek v. *Devenish*, 36 L. T. Rep. 911; 6 Ch. Div. 566;
Wallace v. *Greenwood*, 43 L. T. Rep. 720; 16 Ch. Div. 362.

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If this is personalty, this is a French will made by a French person, and the English Wills Act does not apply:

Bremer v. *Freeman*, 10 Moo. P. C. 306;
Freke v. *Lord Carbery*, 16 Eq. 461.

As to the evidence:

Shore v. *Wilson*, 9 Cl. & Fin. 355.

Warmington, Q.C. replied.

Cur. adv. vult.

KEKEWICH, J.—Treating this as an English will I am of opinion that it exercises the general power of appointment conferred on the testatrix by the will of Ezekiel Harman. The case seems to me to be governed by that of *Chandler* v. *Pocock*. But it is not an English will. It is the will of a Frenchwoman, and in construing it I must have regard to French law and to the rules of construction by which a French court would be guided in determining the meaning and effect of such an instrument. Here there is one difficulty so great as to affect the value of all the expert evidence and to suggest a doubt whether much of that evidence has any proper application to the matter in hand. The French law apparently knows nothing of the distinction between a general power of testamentary disposition and property. The distinction has in English law been largely affected by the enactment of 1 Vict., but it is familiar to English lawyers, and still influences the construction of wills, whereas in France it is not recognised at all. I have endeavoured to treat the case and regard the evidence as if I also saw no difference between a general power of disposition and property, and so treating it I have to determine whether a will in such language as has been used by the testatrix and pointing primarily if not altogether to what we term personal estate passes that which existed in the form of personal estate, but was liable to be invested in land, and therefore may, according to the language of English law, be properly described as real estate. It would be perfectly safe here again to refer to the principle of *Chandler* v. *Pocock* as judicial authority for the interpretation of language apart from technical rules of law. But I will not content myself with that. I am satisfied from the evidence that this will ought to be construed as disposing of everything in the form of personal estate over which the testatrix had a power of disposition, notwithstanding that by some technical rules another character might properly be attributed to it. I hold, therefore, that the power was well exercised, and that the fund in question passes by the operation of the will to the appointee. I have not said anything about the form of the order, because I think that that is a matter which deserves careful consideration. I observe that the summons is not framed as originating summonses ought to be framed. It only asks in a general form "who are or is now entitled to the funds in the hands of the plaintiffs representing the share of the said Emma Cazin deceased in the Bowden Park Estate, devised by the said will and codicils and in what shares and proportions." I object to that form of summons. I will not require an amendment. These summonses ought to be framed stating questions, and asking categorically for the decision of the court upon them. It is a common practice to require them to be reduced to a proper form before the order is drawn up; but, as the property is small, I shall not require that to be done here. I hope my remarks will not be thrown away, for this summons is certainly not in the form in which summonses are drawn up by those who understand how things are done in chambers.

Solicitors: *Paines, Blyth*, and *Huxtable*; *Nokes* and *Stammers*.

QUEEN'S BENCH DIVISION.

Monday, June 11.

(Before CAVE and COLLINS, JJ.)

Re MEUNIER. (*a*)

Criminal law — Habeas corpus — *Extradition— Political offence — Anarchism — Evidence of identity—Evidence of accomplice—Corroboration —One commitment on two charges—Extradition Act* 1870 (33 *&* 34 *Vict. c.* 52), *s.* 3, *sub-sect.* 1.

By the Extradition Act 1870 (33 *&* 34 *Vict. c.* 52) *the crimes of murder and manslaughter are with others made the subject of extradition, but by sect.* 3, *sub-sect.* 1, *it is provided that a fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character.*

One M., an Anarchist, and a fugitive criminal in England from France, had been committed to prison under the Extradition Act 1870, *by one of the police magistrates, at Bow-street, with a view to his extradition to France in consequence of a requisition by the French Government for his surrender to take his trial in that country on two charges of murder, and attempt to murder in Paris, one being that by means of an explosion he had attempted to wreck a government building, and the other of causing an explosion in a public* café. *An application was made on behalf of the prisoner for a writ of* habeas corpus *for his release on the ground that the offence charged with respect to the explosion at the government building was a political offence within the meaning of sect.* 3 *of the Extradition Act* 1870; *that there was no evidence as to identity; that the evidence against the prisoner was the evidence of an accomplice, and was uncorroborated; and that there had been only one commitment on the two charges.*

Held, that the prisoner being an Anarchist, did not belong to a party having a form of government of its own or which sought to impose a form of government upon another party, and that the offences with which he was charged, being directed in the main against citizens generally rather than against the government as a government, were not offences of a political character within the meaning of sect. 3 *of the Extradition Act* 1870, *and that consequently the writ ought not to go.*

Also, that there was sufficient evidence of identity to enable the magistrate to commit; that a prisoner is not entitled to be acquitted because the only evidence against him is that of an accomplice or accessory after the fact, and that the fact of whether there is corroborative evidence or not is not conclusive of the duty of a magistrate, but that he has to exercise a discretion in these cases; and further, that under the Act it is not necessary that there should be a separate commitment for each offence.

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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In this case leave to issue a summons had been given by Kennedy, J., in chambers, calling upon the Secretary of State and others to show cause why a writ of *habeas corpus* should not issue to bring up the body of one Theodore Meunier, in order that he might be discharged from custody. The summons was adjourned into court.

Theodore Meunier, a French anarchist, and a fugitive from France, was arrested in London, on a warrant under the Extradition Act 1870, on two charges of murder, and attempt to murder in Paris by means of explosive bombs. The two offences charged were committed on different occasions, one on the night of the 14th or 15th March 1892, by causing an explosion at the Lobau Barracks; the other by causing an explosion on the 22nd April 1894, at the Café Véry, whereby two persons were killed.

The prisoner was brought before Sir John Bridge, one of the metropolitan police magistrates, at Bow-street, who after hearing evidence on both sides, committed the prisoner under the Extradition Act 1870. The evidence contained in depositions sent from France, and in those taken in the Bow-street Police-court showed that Meunier, who was described as a carpenter and member of a syndicate, was at the Café Véry just before the explosion.

Evidence was given by a Madame Bricout, an acquaintance and an accomplice of Meunier, which showed that he was the author of the explosion at the Café Véry.

Evidence as to identity was also given.

Application was now made on behalf of Meunier for a writ of *habeas corpus*, to discharge him on the grounds: (1) That it was not shown that the Meunier to whom the depositions taken in France referred was the Meunier who was brought before the magistrate; (2) that the evidence as to the explosion at the Café Véry was that of an accomplice, and was uncorroborated in any material particular implicating the prisoner; (3) that as regards the explosion at the Lobau Barracks, that was a political offence; (4) that there were two substantive offences, and only one commitment.

Sect. 3, sub-sect. 1, of the Extradition Act 1870 (33 & 34 Vict. c. 52), provides as follows:

> A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate, or the court before whom he is brought on *habeas corpus*, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.

The *Solicitor-General* (R. T. Reid, Q.C.), the *Attorney-General* (Sir John Rigby, Q.C., and *Sutton* with him), appeared to show cause against the writ.—The evidence against the prisoner was amply sufficient to justify his commitment under the Extradition Act, and the evidence of the woman who was the prisoner's accomplice, was not only sufficient in itself, but was abundantly corroborated by the other evidence.

Burnie, for the prisoner, contended that there was nothing to show that the prisoner was the same Meunier of whom the woman spoke in her evidence. It was not enough to receive depositions taken against the prisoner abroad and in his absence that the prisoner is of the same name; he ought to be identified. There is no physical description of Meunier, and there was no photogragh of him before the magistrate. If Madame Bricout's evidence be struck out there is absolutely no evidence of identification. Madame Bricout was an accomplice, and her evidence therefore required material corroboration, but there was no real corroboration of it. If this offence had been committed in England it is clear that a judge would have advised the jury that they ought not to convict on the uncorroborated evidence of an accomplice, and the prisoner would have been acquitted; clearly, therefore, this is not a case for extradition. Sect. 10 of the Act points out that the magistrate shall not commit a prisoner under the Extradition Act unless the evidence produced is such as would justify his committal for trial if the crime of which he is accused had been committed in England. It is not sufficient that there is some evidence. This court will review the discretion of the magistrate:

> *Re Castioni*, 64 L. T. Rep. 344; (1891) 1 Q. B. 149; 60 L. J. 22, M. C.;
> *Re Guerin*, 60 L. T. Rep. 538; 58 L. J. 42, M. C.

As to the explosion at the Lobau Barracks it was a political offence within sect. 3, sub-sect. 1, of the Act. No words were added by the Legislature as to what constitute a political offence, nor is there any restriction placed on the words in the Act. The plain simple meaning of the words should be taken, namely, that they refer to an offence committed against the State with a political motive, and with a political object. The explosion at the Lobau Barracks is clearly such a political offence.

Cave, J.—I am of opinion that the writ in this case should be refused. The principal ground upon which Mr. Burnie rested his case was that there was no evidence before the magistrate of the identity of the Meunier whom he had committed to Holloway with the Meunier who is spoken of by the witnesses in the depositions sent from France. That was the point to which I think he attached the most importance. The second point was that the evidence against Meunier was that of an accomplice or an accessory after the fact, and that there was no corroboration of her evidence in any material particular. The third point was that there being two charges against the prisoner, there was only one commitment to Holloway. The fourth point was that the offence was a political offence within the meaning of those words in the Extradition Act, and not an ordinary crime. I think it is more convenient to take the second point first, and to inquire whether there was material corroboration of the evidence which no doubt rested mainly upon Madame Bricout. She gives a description of her acquaintance with Meunier, and says that some time in March he came to lodge with her and her husband, and from that date she gives a pretty particular and full account of him, and what they did together down to the time when the offence at the Café Véry was actually committed. It is important to see whether in point of fact she is corroborated with regard to this in material particular. Now she says that during the time they were living together there arose a dispute between them owing to Meunier having broken into the place when he found it locked, and that that circumstance happened is abundantly corroborated by the evidence of Roy, the locksmith and his wife,

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and by the evidence of the concierge at the place where they lived and his wife. No doubt it is said that all that might have been perfectly true, and yet that Meunier might have been perfectly innocent of the crime with which he stands charged. No doubt that is true, and if that matter stood alone there would hardly have been sufficient corroboration in a material particular to meet the general principle which Mr. Burnie invokes. But the case goes a great deal beyond that. There is a grey valise which plays an important part in this investigation. It is left by someone who cannot be precisely identified in the immediate neighbourhood of the Café Véry. Madame Bricout says that the explosive mixture was produced from that grey valise, and that Meunier had such valise is deposed to by the concierge and his wife. But further than that, there is the statement of Madame Bricout that on the Friday before the offence was committed she went to the house of one Francis in order to get clothes for disguising the identity of the prisoner Meunier, and, of course, that is far more nearly approaching the offence itself than the matter which I have spoken of before. Now, in that she is corroborated by Madame Roy, who says she saw Madame Bricout go to the house of the concierge and come away from it again with a bundle, and by Madame Scellery, who says that she saw Meunier wear the clothes which are shown to have been the clothes of Francis on Sunday and on Monday, the day when the explosion took place. Now those are very important matters, and do seem to me to corroborate in a material particular the evidence which Madame Bricout has given. It is, of course, possible to take each one of these and say, "Well, this is but a small matter," and "that is but a small matter," and "the other is only a small matter." They may all in themselves be small matters, but the whole of them taken together form very strong circumstantial evidence to show that there must at all events be a considerable amount of truth in what Madame Bricout is saying. I think that the Solicitor-General was warranted in saying that there was corroborative evidence which was sufficient for the magistrate to act upon. Before, however, passing from this point, I should like to say that in my judgment the fact of whether there is corroborative evidence or not is not conclusive of the duty of the magistrate, but that he has to exercise a discretion in these cases. The law is not that a man against whom there is only the evidence of an accessory or accomplice is entitled to be acquitted; the law falls short of that. The judge must lay the evidence before the jury, though at the same time it is the practice of judges to warn the jury against acting upon the uncorroborated evidence of an accomplice. No doubt, however, the jury are in law entitled to have that evidence laid before them, and if they choose to disregard the warning of the judge, and are so satisfied of the truth of the accomplice that they will act on his testimony, I know no law which says that they shall not, nor any power of setting such a verdict aside in a court of law. At the same time, the magistrate must of course act upon his own discretion, and if he had said, "The evidence here is that of an accomplice, there is no material corroboration, and I do not believe that any jury would act upon that testimony, and on that ground I discharge the accused," I could not say that he was wrong. On the other hand, as the learned magistrate has taken the opposite view, I am also unable to say that he is wrong. The matter must be one for the discretion of the magistrate, with which I think this court would hardly be justified in interfering. My brother Collins reminds me that I have omitted two other matters of corroboration which seem to me also to go some way. According to Madame Bricout it was arranged that the actual perpetrator of the offence should take the explosive into the café and should then be called out by someone outside, who was thus to give him an excuse for going outside and leaving the explosive within, and there is peculiar evidence given by two witnesses, one the waiter, and the other a person who was at the café, having some refreshment there, who both say that they saw a man outside just before the explosion making signs. Each of these two witnesses thought himself to be the person to whom the signs were made, and both went out and saw the man, and then found that they were mistaken. That is a peculiar corroboration no doubt of the story which Madame Bricout tells. Further, there is the statement of Madame Scellery, that after the offence had been committed she was with Meunier on a steamer, when Meunier gave her such a vivid and detailed description of the way in which the explosion had taken place as to impress her with the conclusion that he must have been a party to it himself. There is, further, the fact that later on he told her that it would be necessary for him to leave the country for a time for reasons which he did not very fully explain, but which she appears to have taken to have referred to the explosion at the Café Véry. All these matters seem to me to be abundant corroboration which the magistrate rightly exercised his discretion in acting upon. The next point was as to the evidence of identity. Mr. Burnie said, even if it be taken for granted that there was perfectly good evidence against a man of the name of Meunier, as having been engaged in these offences, there was no evidence that the man who was before Sir John Bridge was the man Meunier, spoken of by the witnesses. No one was called to identify him as the man to whom the witnesses in the deposition referred. That, undoubtedly, is perfectly true, but nevertheless it seems to me there was sufficient evidence of his identity to justify the magistrate in what he did. [His Lordship went through the evidence.] With regard to the question whether this is a political offence or not, it appears to me that there must be, in order to have a political offence, two distinct parties, each seeking to impose the Government of its choice upon the other, and when you have two distinct parties of that kind, then no doubt offences incidentally committed in the course of an attempt by one party to impose the Government of its choice on the other, are to be regarded as so connected with the political contest as to amount to political offences. Here, however, there are not two parties, one seeking to impose its Government on the other. The party to which the prisoner Meunier belongs has no form of Government which it seeks to impose at all; it is the enemy apparently of all Governments, and its operations are directed not primarily against the Government but only incidentally, and secondarily against the members of the political body, but they are directed

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primarily against the members of the general body, the citizens, and apparently only casually against the Government or governing body. The offences of which Anarchists are said to be, and in some cases have been proved to be, the authors, are in the main offences against the citizens generally, rather than against the Government *quâ* Government, and in my judgment such proceedings cannot rightly be classed as political offences, and so to escape from the meshes of the Extradition Act. I am very clearly of opinion that the writ ought not to go on the ground of this being a political offence, because it was not a political offence within the meaning of the Extradition Act, but an ordinary crime against a private citizen, and not against members of the Government. I am of opinion, therefore, that the application fails on all grounds, and must be dismissed.

Collins, J.—I am entirely of the same opinion, and on the same grounds. *Application refused.*

Solicitor for the prisoner, *T. O. Evans.*

Solicitor for the Secretary of State, *The Solicitor to the Treasury.*

June 12, 13, *and* 14.

(Before Cave and Collins, JJ.)

Re The Liberator Permanent Benefit Building Society. (*a*)

Building society—Solicitor—Officer of the society—Liability for misfeasance—The Companies (Winding-up) Act 1890 (53 *&* 54 *Vict. c.* 63), *s.* 10.

W., a solicitor, was appointed and acted as sole solicitor to the Liberator Society, which was incorporated under the Building Societies Act 1874, *at an annual salary out of which he was to pay officers, clerks, &c., and undertook to pay over to the society all fees and costs paid to him by clients of the society. An order was subsequently made for the compulsory winding-up of the society, and pursuant to rule* 78 *of the Companies (Winding-up) Act* 1890, *application was made by the official receiver to bring to the notice of the court certain acts of misfeasance committed by W., and for an order that he should contribute to the assets of the society sums received by him as officer thereof.*

Held, by Cave and Collins JJ., that, although primâ facie *a solicitor is not any more an officer of a society than is a banker, yet inasmuch as W. had agreed to do all the work that the society had for him to do in consideration of a fixed salary, and to forego as far as the members of the society were concerned all the ordinary rules with regard to payment, and as he had acted practically as the society's financial manager, he was an officer of the society within sect.* 10 *of the Companies (Winding-up) Act* 1890 (53 *&* 54 *Vict. c.* 63), *and that as such his estate was liable to contribute to the assets of the society all sums that he had received as "officer" of the society.*

This was an appeal from an order made by his Honour Mr. Commissioner Kerr, on the 24th April 1894, in the City of London Court, on an application by the official receiver and liquidator to make the estate of H. G. Wright, solicitor, liable, as officer of the Liberator Permanent Benefit Building Society, to refund certain sums of money which he had received, it was alleged as officer of the society, as commission on various transactions in which the society had been engaged.

Certain facts were set out in the official receiver's report, and accepted by both parties as substantially representing the facts of the case.

The report was made pursuant to rule 78 of the Companies Winding-up Rules 1890, and the facts so far as they are material are as follows:

1. This report is made to bring to the notice of the court certain acts of misfeasance committed by H. G. Wright, an officer of the society, and now a convict in Her Majesty's Prison, at Wormwood Scrubbs.

2. The society was formed in July 1868, and was incorporated under the Building Societies Act 1874, on the 11th Dec. 1874.

3. On the 4th Oct. 1892 an order was made for the compulsory winding-up of the society.

4. Wright and certain officers of the society have been examined in this winding-up under sect. 8 of the Companies Winding-up Act 1890.

5. The facts hereinafter stated are derived by me from the depositions of Wright on his examination, from documents produced and verified at such examination, from the books and papers of the society, and from the affidavits filed in this matter.

6. In the year 1873 Wright was appointed joint solicitor to the society with a Mr. Pattison. On the 6th March 1876 Wright was appointed sole solicitor to the society at a salary of 165*l.* a year, for which he was to provide offices, clerks, stationery, and all post and petty expenses. He was also to pay over to the society all fees and costs paid to him by the clients of the society.

7. Wright continued to be the sole solicitor to the society until Dec. 1887. On the 9th Jan. 1888 Messrs. Bonner, Wright, Thompson, Bonner, and Burnie, of which firm Wright was a partner, were appointed the society's solicitors, at the same salary as had been paid to Wright, and that firm continued to be the solicitors of the society down to the date of the liquidation; whilst his firm were the solicitors of the society Wright was principally concerned in matters relating to the society.

8. On the 20th Dec. 1887 Wright was appointed financial manager of the society from the 1st Jan. 1888, at a salary of 500*l.* per annum. In the year 1890 he sent in his resignation of this post, which was accepted by the board as from the 29th Sept. 1890, but before the resignation took effect he was re-appointed financial manager jointly with Mr. Dibley for twelve months from the 29th Sept. 1890, at the salary of 500*l.* a year between them. Dibley was to take the first six months, and Wright the second. He was again re-appointed financial manager for twelve months from 29th Sept. 1891 jointly with a Mr. Booth, at the same salary as before.

9. The society was closely connected with a number of companies, commonly known as the Balfour group. One of these companies, called the Lands Allotment Company, was incorporated on the 25th Nov. 1867, and in 1868 promoted the society for the purpose of making advances to purchasers from the company. But the company appears not to have done any business until 1872. On the 16th Jan. 1893 an order to wind-up the company was made on a creditor's petition presented on the 24th Oct. 1892. The society has claims against the company estimated to amount to upwards of 1,000,000*l.*

10. On the 26th Oct. 1874 Wright and Pattison were appointed solicitors of the Lands Allotment Company. On the 13th March 1876 Wright became the sole solicitor of the company, and he continued to hold that office until the 6th Sept. 1892, when his firm were appointed solicitors in his place.

(*a*) Reported by Henry Leigh, Esq., Barrister-at-Law.

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11. The other companies included in the Balfour group worked together, and most of the directors and officials of one company have at some time been directors or officials of one or more of the other companies.

The report then proceeded to deal at length with the various transactions in connection with the estate, which were divided into the following five heads: (*a*) The Romford Estate. (*b*) The Forged Bills. (*c*) The Strand Estate. (*d*) The Albert Hall Purchase. (*e*) The Queen's Gate Purchase.

Mr. Commissioner Kerr held that Wright, as solicitor, was not an officer of the said society within the meaning of sect. 10 of the Companies (Winding-up) Act 1890, and made no order as to so much of the application as related to the several sums claimed in connection with the Romford Estate and with a sum claimed in respect of the Forged Bills, but ordered that Wright was liable to contribute to the assets of the said society all sums received by him in respect of the Strand Estate, the Albert Hall, and the Queen's Gate Estate, after making such deductions as it should be found he was entitled to be allowed.

Wright appealed against so much of this order as declared that he was an officer of the society, and as such liable to contribute to its assets all sums received by him in connection with the three last mentioned estates on the ground, amongst others, that he never was an officer of the society within the meaning of the before-mentioned section.

The liquidator thereupon gave notice of a cross-appeal, claiming that so much of the order as declared that Wright, as solicitor, was not an officer of the society within sect. 10 should be varied; and that it should be declared that Wright was such an officer and was liable to contribute to the assets of the society the several sums in connection with the Romford Estate, and the sum in respect of the Forged Bills, on the following grounds, amongst others: (1) that Wright was an officer of the said society within sect. 10 of the Companies (Winding-up) Act 1890 (53 & 54 Vict. c. 63), which provides as follows:

(1.) Where in the course of the winding-up of a company under the Companies Acts it appears that any person who has taken part in the formation or promotion of the company, or any past or present director, manager, liquidator, or other officer of the company, has misapplied or retained, or become liable or accountable for any moneys or property of the company, or been guilty of any misfeasance or breach of trust in relation to the company, the court may, on the application of the official receiver, or of the liquidator of the company or of any creditor or contributory of the company, examine into the conduct of such promoter, director, manager, liquidator, or other officer of the company, and compel him to repay any moneys, or restore any property so misapplied or retained, or for which he has become liable or accountable, together with interest after such rate as the court thinks just, or to contribute such sums of money to the assets of the company by way of compensation in respect of such misapplication, retainer, misfeasance, or breach of trust as the court thinks just.

(2.) The provisions of this section shall apply in the winding-up of any company under the Companies Acts, whether the same is being wound-up by or subject to the supervision of the court, or is being wound-up voluntarily, and whether the winding-up commenced before or after the passing of this Act, and notwithstanding that the offence is one for which the offender may be criminally responsible.

Chester (*Grain* with him) appeared on behalf of Wright.—As to whether Wright, as solicitor, is an officer of the society, it is submitted that he is not an "officer." The dictum of Pearson, J. in *Re Great Western Forest of Dean Coal Consumers Company Limited; Carter's case* (54 L. T. Rep. 531; 31 Ch. Div. 496), is in point. There it is laid down that a solicitor is not an officer of the company any more than a banker, who has been held not to be an officer of the company in any sense whatever:

Re Imperial Land Company of Marseilles, 22 L. T. Rep. 598; L. Rep. 10 Eq. 298.

In *Carter's case* (*ubi sup.*) Pearson, J. expressed his doubts as to whether *Re Patent Bread Machinery Company; Ex parte Valpy and Chaplin* (26 L. T. Rep. 228; L. Rep. 7 Ch. 289) could be followed now.

Theobald (*Farwell*, Q.C. with him) appeared for the official receiver and liquidator.—*Carter's case* was quite a different case from the present one, and should be distinguished from it. The solicitor in a society like this is really a manager, and is essential to the society. He clearly comes within sect. 10.

Chester in reply.

Cave, J.—I think in disposing of this case it will be convenient to take the points in what is their natural order, that is, first in the order in which they are presented to us upon the appeal by Wright, and then in the order in which they are presented to us on the cross-appeal. The first objection made upon the appeal is, that Wright never was an officer of the society. The learned commissioner has held that at any rate he was so after he was made financial manager, and it seems to me that that is obviously correct, and that that disposes of the appeal of Wright upon that point. [The learned Judge then went on to deal at length with the other points raised by the appellant, but which are immaterial to this report.] Then comes the question of the cross-appeal. The first point raised on the cross-appeal is that Mr. Commissioner Kerr was wrong in holding that Wright was not an officer of the society until he became financial manager. It is contended that he became an officer of the society on the 6th March 1876, when he was appointed solicitor to the society at a salary of 1650*l.* a year, for which he was to provide offices, clerks, stationery, and all posting and petty expenses, and to pay over to the society all the fees and costs paid to him by the clients of the society. Now, we have been referred to two or three cases upon that point, of which the most material is the one before the late Pearson, J. (*Carter's case*, 54 L. T. Rep. 531; 31 Ch. Div. 496), in which that learned judge held that a solicitor was not an officer of the society then before him. I entirely agree with that decision. It seems to me that merely because he was appointed solicitor to the society, without more, the solicitor does not become an officer of the society any more than it has been held that a banker does if he is appointed banker to the society, or a broker if he is appointed broker to the society, or the auditor if he is appointed auditor to the society. All these persons render services to the society, but they cannot be said to be in the employment of the society so as to make them officials; and the decision of Pearson, J. depends upon that fact.

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That learned judge points out that a solicitor who receives no salary, who is perfectly independent, merely acts for the society when they choose to come to him to do certain legal business, whose relations with the society are regulated by the laws affecting solicitors so that he can put an end to those relations at any time; in no such case can he be said to be in the employ of the society. Here, however, things are changed. The solicitor agrees to forego his ordinary rights of refusing to take up this, that, or the other business which may be offered to him, and agrees to do all the work that the society may have for him to do in consideration of a fixed salary, and to take no fees from the members of the society, or, if he does, to pay them all over to the society, who are in fact to have them. That altogether alters his position; he is no longer an independent solicitor capable of exercising his own discretion as to accepting or refusing a particular branch of business that is brought to him to do. He undertakes to do all the work that the society have for the solicitor to do. He undertakes to be paid for it by a fixed salary, and to forego, as far as the members of the society are concerned, all the ordinary rules with regard to payment, and of course he becomes exempt from all the regulations which are made (with regard to taxation of costs for instance) for the purpose of regulating transactions between solicitor and client, and the charges that he might make for work done for the society. I think that the change is of such a character as to constitute Wright an officer of the society, and that it should be so regarded from the time when he accepted office upon those terms. [The learned Judge then dealt with other points raised, and in conclusion said:] In the result I am of opinion that Wright's appeal should be dismissed, but that the cross-appeal should be allowed, and that the case should go back with our determination that Wright became an officer of the society when he was appointed solicitor, under the terms which I have referred to, on the 6th March 1876.

Collins, J.—I am of the same opinion, and as the case is one of considerable importance, and has been argued so ably on both sides, I think I ought to add a few words: First of all, as to the question raised whether or not Wright was an officer of the society. This part of the case is perhaps best dealt with on the cross-appeal, which rests for its foundation mainly upon the proposition that a solicitor is an officer of the society. I think it is established that Wright was not merely solicitor to the society, but an officer thereof. I entirely agree with what has fallen from my learned brother, that *primâ facie* a solicitor is not any more an officer of a society than is a banker. He is not there to carry out the actual purposes for which the society exists; he is not one of their officers or agents in carrying those purposes out; he is an independent person to give them independent advice. But here some of the very circumstances exist, on the absence of which the opinion of Pearson, J. in the case before him was grounded. Here Wright was paid a fixed salary, and looking, as we are entitled to look, at the facts reported to us by the official receiver, it is obvious to me that in this case, upon the facts, Wright was acting in the capacity not only of a solicitor, but much more nearly in the capacity which he ultimately assumed in name as well as in fact, namely, that of financial manager to the Liberator Building Society. Taking the number of transactions that are detailed here, they are all of them such as a solicitor would *primâ facie* have no part at all in, and are much more akin to the duties of financial manager. I have therefore no hesitation in saying, as a fact in this case, that Wright is to be regarded as an officer of the society. As to Wright's appeal, therefore, I think it must be dismissed.

Wright's appeal dismissed accordingly, with leave to appeal. Cross-appeal of the liquidator allowed.

Solicitors for H. G. Wright, *Bonner, Thompson, Burnie,* and *Co.*

Solicitors for the official receiver and liquidator, *Thorne* and *Welsford.*

QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

Monday, July 23.

(Before Williams, J.)

Re Hallett; *Ex parte* National Insurance Company. (a)

Bankruptcy—Shares in company—Not fully paid—Disclaimer—Proof for damages by reason of.

The trustee in bankruptcy of a debtor who was the holder of shares in a company which were not fully paid, disclaimed the shares. The liquidator of the company put in a proof against the debtor's estate for the damage sustained by the operation of the disclaimer, and assessed that damage at the amount unpaid on the shares. The trustee rejected the proof.

Held, that the proof must be admitted for the amount claimed subject to a deduction for the value, if any, of any shares received back by the company, and any other advantage the company had gained by reason of the disclaimer.

This was an appeal by the liquidator of the National Insurance Company from the rejection by the trustee of the separate estate of Milford Hallett of a proof for 4000*l.* for damages caused to the company owing to the disclaimer by the trustee of 1000 shares in the company.

On the 2nd June 1893 a receiving order was made against the debtor, Milford Hallett. At the time of the receiving order the debtor was the registered holder of 1000 shares of 5*l.* each in the National Insurance Company, on which only 10*s.* per share had been paid up, and on the 6th Aug. the trustee of the debtor disclaimed the shares. Prior to such disclaimer a call of 1*l.* per share had been made by the company, payable after the date of the disclaimer.

On the 4th Sept. a petition for winding-up the company was presented.

On the 6th Sept. proof was put in by the liquidator for 4500*l.*, the whole amount due and unpaid on the shares. The trustee rejected the proof with the exception of 500*l.*, the amount due on the call of 1*l.* per share made prior to the disclaimer.

On the 31st Oct. the liquidator put in an amended proof, claiming 4000*l.* for damages caused by the operation of the disclaimer, being

(a) Reported by Walter B. Yates, Esq., Barrister-at-Law.

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the amount which might be called up on the shares.

The trustee rejected the amended proof, and the liquidator appealed.

Scrutton (*Fletcher Moulton*, Q.C. with him) for the appellant.—The proof must be admitted. The company have suffered by the operation of the disclaimer and are entitled to damages for the loss sustained. That damage they estimate at the amount due on the shares. The debtor was liable to pay 4500*l.*, and this we claim as damages:

Re West of England Bank; Ex parte Budden, 41 L. T. Rep. 979; 12 Ch. Div. 288;

Ex parte Llynvi Coal Company; Re Hide, 25 L. T. Rep. 609; L. Rep. 7 Ch. 28;

Re Mercantile Marine Company, 25 Ch. Div. 415.

Herbert Reed, Q.C. and *Whateley* for the trustee.—It may be perfectly correct to say that there is a right of proof for damages, but the amount of that proof must depend on the real loss sustained:

Re Muggeridge, L. Rep. 10 Eq. 443.

Williams, J.—In this case I am of opinion that this appeal must be allowed. But for the disclaimer the liquidator could have proved for the full amount of the liability of W. Hallett, and to the extent required for the purposes of the liquidation. I must assume the full amount would have been called up, and if so there would have been a right of proof for the full amount of the calls due and for which Mr. Hallett was liable. Now, that right was lost by the operation of the disclaimer. Then comes the claim for damages. Now, is there anything here which shows the damages ought to be reduced? If it was likely that the liquidator would get any advantage which he would not have got but for the disclaimer, that would have to be considered. If, for example, the shares which he got back again had a value, that value would have to be deducted. Here they have no value, and there does not seem to be any other advantage that the liquidator may get that can be valued or that can reduce the damages. The proof must be admitted.

Appeal allowed.

Solicitors for the appellant, *Parker, Garrett*, and *Parker*.

Solicitors for the trustee, *Rooper* and *Whately*.

House of Lords.

May 8, *June* 25, 26, *and Aug.* 2.

(Before the Lord Chancellor (Herschell), Lords Watson, Ashbourne, and Morris.)

London County Council *v.* Assessment Committee of St. George's, Hanover-square. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Poor rate—Valuation list—Valuation (*Metropolis*) *Act* 1869 (32 *&* 33 *Vict. c.* 67), *s.* 32—*Valuation of individual hereditaments.*

An appeal against "the total of the gross value," or "the total of the rateable value," of a parish under sect. 32 *of the Valuation* (*Metropolis*) *Act* 1869 (32 & 33 *Vict. c.* 67) *cannot be preferred on the ground that the valuation of individual hereditaments is incorrect.*

Judgment of the court below affirmed.

This was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Bowen and Kay, L.JJ.), reported in (1893) 2 Q. B. 476, who had affirmed an order of the Divisional Court (Charles and Williams, JJ.) directing that a prohibition should issue to the justices of the county of London prohibiting them from further proceeding in an appeal by the appellants against the valuation list of the parish of St. George's, Hanover-square, in which the appellants objected that the total of the gross values of the hereditaments in the parish of 2,200,486*l.* was too low to the extent of 260,076*l.*, and that the total of the rateable values of such hereditaments, 1,841,761*l.* was too low to the extent of 200,134*l.* The Queen's Bench Division made an order for prohibition on the ground that the appeal was out of time. The Court of Appeal affirmed the decision of the court below on the ground that the appeal was in reality an attempt to revise the valuations of individual hereditaments in the absence of the parties interested, and that the Valuation (Metropolis) Act 1869 did not allow the totals of the lists to be questioned on appeal on the allegation that some of the hereditaments in the list had been under-assessed, and that such an appeal was not one which the quarter sessions had jurisdiction to entertain. The London County Council appealed.

Sir *R. Webster*, Q.C., *Bosanquet*, Q.C., and *Avory*, for the appellants, argued that the contention of the respondents was, that there was no power to appeal against totals on the ground that some individual hereditaments had been rated too low. Rating powers are given to the county council by the Local Government Act of 1888 (51 & 52 Vict. c. 41); but the right of appeal is under the Valuation Act of 1869 (32 & 33 Vict. c. 67). The county council are "aggrieved" within sect. 32 of the Act if a parish is rated too low. The power to appeal against totals was originally given by the County Rating Act of 1852, but, though this Act was repealed as far as regards London by the Act of 1869, the power of appealing was preserved by sects. 19 and 32. It is given not only to the county council, but to other bodies also, and to individual ratepayers, and the valuation list is open to every ratepayer. There are two evils in a parish returning its total too low; it pays too little, and other parishes have to pay too much. The point as to the alteration of a total in consequence of the improper assessment of particular hereditaments was not discussed in the court below, but was fully discussed in *Reg.* v. *Justices of Middlesex* (17 Q. B. Div. 394). The statute is difficult to understand, because the "totals" of the gross values and of the rateable values are not the sums of the separate assessments, but have acquired a different and peculiar meaning. But the difficulty of working out the scheme of the Act is no argument against the right of appeal. See *Reg.* v. *Edlin* (65 L. T. Rep. 83), which was followed in *Reg.* v. *Woolwich* (65 L. T. Rep. 460; (1891) 2 Q. B. Div. 712). "Totals" as between parishes are something different from the sum of assessments. See sect. 32 of the Act with the definition of "gross" and "rateable" value in sect. 4, read into it. The appeal of an

(*a*) Reported by C. E. Malden, Esq., Barrister-at-Law.

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individual ratepayer is to have no effect upon the total because of the inconvenience of frequent alterations, but there cannot be an appeal against totals without going into the individual assessments. The result of the decision of the Court of Appeal is, that there is no way of dealing with an under-valuation for a period of five years.

Poland, Q.C. (Sir *E. Clarke*, Q.C. and *Danckwerts* with him), for the respondents, maintained that the appellants had picked out everything which they thought was rated too low, and had let alone the hereditaments which were rated too high. Some parts of a parish may go down in value during the five years period. As the law stands, the individual assessments cannot be questioned on an appeal against totals; if necessary, the matter must be dealt with by legislation. The whole process of making a rate by the assessment committee under the Act must be considered. Sect. 8 provides that the surveyor of taxes shall attend the assessment committee, and sect. 52 gives him a right of appeal against the valuation, which puts a great check on the overseers of the parish and the assessment committee. [He was stopped by the House.]

Sir *R. Webster*, Q.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Aug. 2.—Their Lordships gave judgment as follows:—

The Lord Chancellor (Herschell).—My Lords: This is an appeal from an order of the Court of Appeal affirming an order of the Queen's Bench Division, which directed that a prohibition should issue to the justices of the county of London prohibiting them from further proceeding in an appeal by the appellants against the valuation list of the parish of St. George's, Hanover-square. The appeal in question was one in which the appellants objected to the totals of the gross and rateable values of the parish as being too low. There was appended to the appellants' case, before the sessions, a schedule containing a list of 3000 hereditaments. Against these were set the gross and rateable values respectively shown by the valuation list and what the appellants alleged were the gross and rateable values of the same hereditaments respectively. The increase of the gross values amounted in the aggregate to 260,076*l.*, and the increase of the rateable values to 200,134*l.* Now, it is plain that the mere fact that certain hereditaments in a parish are undervalued does not prove that the total valuation is lower than it ought to be, for there may be other hereditaments in the parish which are as much overvalued. It was truly said that this would not afford ground for a prohibition. But I refer to it for the purpose of showing that, if the appellants' contention be well founded and they are entitled to maintain that the totals are too low because particular hereditaments were undervalued, it would necessarily involve an inquiry into and revision of the entire valuation of the parish. Moreover, if they are entitled to obtain an alteration of the totals by showing that by reason of the under-valuation of particular hereditaments the totals ought to be increased, the effect upon the interests of individual ratepayers will be very serious. The increased total will involve a larger contribution from the parish for those purposes for which the county council and other bodies are entitled to require contribution, which I will, for convenience, though it is not strictly accurate, call extra-parochial purposes. It is admitted that, though the totals were thus increased, the valuation of the individual hereditaments must remain unaltered. The result will be that those whose hereditaments are undervalued will contribute less than their fair share of the increased contribution due to the increase of the total, whilst those who are rated up to or above their value will have to pay more than their fair share of this contribution. And this state of things must continue without redress for a period of five years. When it is remembered that this consequence would flow from the decision of an appeal to which they were not and could not be parties one cannot but be sensible of the injustice involved. Nevertheless, if the assessment of the hereditaments within a parish had been left by the Legislature to the parish officers without control, it might be difficult to resist the conclusion that the Legislature had intended that those public bodies who were entitled to require a rateable contribution from all the parishes within their area should be at liberty to question the valuation of every hereditament in each of the parishes in order to ensure that the total of the several valuations was not less than it should be. I will, therefore, before considering the terms of sect. 32 of the Metropolis Valuation Act 1869, upon the construction of which the case depends, call attention to the provision made for securing that the valuation list should exhibit values arrived at in the manner prescribed by law. The valuation list made by the overseers is to be submitted to an assessment committee, who are to hear all objections made to it, and to revise the list in accordance with the Metropolis Valuation Act and the Acts incorporated therewith. When they have finally approved it they are to "cause the totals of the gross and rateable value in such list to be ascertained and inserted in the list," and three members of the committee are to sign at the foot thereof "such declaration of approval and certificate of compliance" with the Act as is contained in the schedule. The certificate prescribed by the schedule is in these terms: "We do hereby . . . certify that in determining the gross and rateable value of the above hereditaments the provisions of the Valuation (Metropolis) Act 1869 have been complied with." These are no slight precautions for securing a valuation according to law. But it may be said that the bias of the assessment committee would be in favour of too low an assessment generally, as it would diminish the total and therefore render the contribution of the parish to extra parochial purposes less. This, however, is not true of the surveyor of taxes, who has also an important function to fill in relation to the list. His interest would be to see that the valuations are not lower than they should be, as this would diminish the sums which the occupier would have to pay to Imperial as distinguished from local taxation. By sect. 8 of the Act, the overseers are to send a duplicate of the list to the surveyor of taxes, and he is to insert in it "the amount in his opinion of the gross value of the hereditaments comprised in such list where such amount differs from the amount inserted by the overseers," and to transmit the duplicate to the assessment committee. That committee have, therefore, his valuation before

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them. Moreover, by sect. 53, when a surveyor of taxes gives notice of objection or appeal, the amount specified in the notice as being in his judgment the gross value of any hereditament referred to is to be inserted in the valuation list by the assessment committee, special sessions, or assessment sessions, as the case may be, unless it is proved that such amount ought not to be so inserted. Add to this, that ample power of appeal is given to everyone interested against any decision of the assessment committee, and I think I have said enough to show that great precautions have been taken to secure a proper valuation of the hereditaments situate in the several parishes throughout the metropolis. That these precautions are perfect it would be rash to assert; that errors may nevertheless creep in is certain. This, however, would probably be the case under any system of valuation. I turn now to sect. 32, under which the appeal in question was presented to the sessions. It provides that (amongst others) "any body of persons authorised by law to levy rates or require contributions payable out of rates" may appeal to the assessment sessions if they feel aggrieved by reason "of the total of the gross value of any parish being too high or too low," or "of the total of the rateable value of any parish being too high or too low." There can be no doubt that the appellants are a body authorised to levy rates or require contributions within the meaning of the section, and I will assume, without deciding it, that if the total is too low they are "aggrieved." But the question is, does the enactment authorise their seeking to correct the total by attacking the valuation of any number of the hereditaments within the parish? It is important to observe that this right, if it exists, is not confined to public bodies such as the appellants; it is conferred equally upon "any ratepayer in the metropolis." Quite apart from the hardship I have already pointed out as likely to result from such a proceeding, it would be startling to find that when a valuation list had been completed and revised in the elaborate manner provided by the Legislature, and when the valuation of particular hereditaments might have been settled after objection by the assessment committee, or on appeal by the special sessions or even by the assessment sessions, any individual ratepayer could compel a reconsideration of such of the valuations as he pleased, and that behind the back of the parties to such appeals, who might nevertheless be gravely affected by the result. Of course, if the language used by the Legislature were such as to confer unequivocally this right, no sense of the inconvenience or even of the possible injustice of the legislation would justify any other construction. But, in my opinion, the terms of the enactment point in the contrary direction. The ground of appeal is that "the total of the gross value," or "the total of the rateable value," is too high or too low. The expression is somewhat peculiar, but its use is intelligible when other parts of the Act are examined. I have already pointed out that by sect. 14 when the assessment committee have finally approved the valuation list they are to "cause the totals of the gross and rateable value in such list to be ascertained and inserted in the list." The clerk to the managers of the Metropolitan Asylums District is (sect. 17) to "cause the totals of the gross and rateable values of all the valuation lists to be printed," and sent to the public bodies there specified. By sect. 20 the justices in special sessions are not to hear any appeal touching any part, or alter any part, of the valuation list except the part relating to the value of an hereditament, and an alteration by them of the value of an hereditament in the valuation list is only to affect the rights of the ratepayers amongst themselves, and is not of itself in any way "to alter the totals of the gross or rateable value of such list as settled by the assessment committee, but may form a reason for an appeal against such totals to the assessment sessions as hereinafter mentioned." Now, I find in these provisions the totals and the ascertainment of the totals dealt with apart from the valuations of individual hereditaments comprised in the list, and an alteration of the value of an hereditament is not treated as involving, as a mere clerical correction, an alteration of the total of the gross and rateable values. Provision is indeed made for such a correction if individual valuations be altered, but it is by way of appeal under sect. 32. It is not necessary to determine in what other cases an appeal might be preferred against the total. Possibly, if some wrong principle had been adopted throughout the parish for arriving either at the gross or rateable value which would affect the valuation generally, the case might be within the section, but I entirely agree with the Court of Appeal that it was not intended to allow any ratepayer, or even the appellants, to maintain such an appeal as that under discussion. For these reasons I think the judgment appealed from should be affirmed, and the appeal dismissed with costs.

Lords WATSON, ASHBOURNE, and MORRIS concurred.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitor for the appellants, *W. A. Blaxland.*

Solicitors for the respondents, *Caprons, Dalton, Hitchins,* and *Brabant.*

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, June 6.

(Before LINDLEY and DAVEY, L.JJ.)

BUDGETT v. BUDGETT. (a)

ORIGINAL MOTION.

Practice—Time for appealing—Final judgment—Judgment passed and entered—Rules of Court 1883, *Order LVIII., r.* 15—*Rules of Court. Nov.* 1893, *r.* 27 (1).

Rule 27 (1) *of the Rules of Court, Nov.* 1893, *which limits the time for appealing against a final judgment to three months, is not retrospective, and does not apply to a judgment passed and entered before the rule came into operation.*

ON the 23rd May 1893 final judgment in this action was pronounced by Kekewich, J. and on

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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the 24th Aug. 1893 it was duly passed and entered.

On the 2nd June 1894 one of the defendants gave notice of his intention to apply to the Court of Appeal for special leave to appeal from the judgment, apprehending that the time limited for appealing had then expired.

The application now came on to be heard,

The applicant appeared in person, and contended that, even if the effect of rule 27 (1) of the Rules of Nov. 1893 was to make the time for appealing in this action three months instead of one year, as provided by rule 15 of Order LVIII. of the Rules of 1883, an extension of the time was justified by the circumstances of the case.

Ingle Joyce, for the plaintiff, submitted that rule 27 (1) of the Rules of Nov. 1893 was retrospective, and applied to judgments which had been passed and entered before the 1st Jan. 1894, the date provided by rule 32 for the rules to come into operation. He further contended that there were no grounds which justified an extension of the time for appealing.

Lindley, L.J.—We are of opinion that rule 27 (1) of the Rules of Nov. 1893 does not apply to the judgment in this case, as it was passed and entered before the rule came into operation. The applicant has therefore a right to appeal, and his application for special leave is unnecessary and must be refused.

Davey, L.J. concurred.

Solicitors: *Ingle, Cooper*, and *Holmes*; *Foss* and *Ledsam*.

Tuesday, July 31.

(Before Lindley, Lopes, and Davey, L.JJ.)

Re Gardner; Long *v.* Gardner. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Practice—Time for appealing—Interlocutory or final order—Summons in administration action—Order for payment to annuitant under will—Rules of Court 1883, *Order LVIII., r.* 15—*Rules of Court, Nov.* 1893.

In the course of an action to administer the estate of a deceased testatrix, in which further consideration had been adjourned, the plaintiffs, the executors and trustees of the will, took out a summons asking that they might be at liberty to make certain payments, out of moneys in their hands, to one of the annuitants, on account of his interest under the will. North, J. acceded to the application.

Held, that the order of North, J. was interlocutory and not final; and that, therefore, an appeal from it, not being brought within fourteen days, was too late, and must be dismissed with costs.

Salaman *v.* Warner (1891) 1 *Q. B.* 734) *and* McNair and Co. *v.* Audenshaw Paint and Colour Company Limited (65 *L. T. Rep.* 292; (1891) 2 *Q. B.* 502) *considered.*

This action was brought for the administration of the estate of a deceased testatrix by the plaintiffs, the executors and trustees of her will.

On the 17th Jan. 1893 the order on further consideration was made, and by it the subsequent further consideration of the action was adjourned.

A summons was afterwards taken out by the plaintiffs asking that they might be at liberty to make certain payments, out of moneys in their hands, to Charles Franklin, one of the annuitants, on account of his interest under the will of the testatrix.

On the 9th May 1894 an order was made by North, J., declaring that, as between certain specific legatees and the residuary legatees under the will, the charge of certain annuities must be borne exclusively by the property bequeathed to the residuary legatees, and gave the plaintiffs liberty to make the payments to Charles Franklin accordingly.

On the 12th June 1894 that order was duly passed and entered.

On the 30th June 1894 notice of appeal from that order was given by one of the defendants to the action.

The appeal now came on to be heard.

Everitt, Q.C. (with him *B. B. Rogers*), for the appellant, stated the nature of the appeal.

P. B. Gregory (with him *Cozens-Hardy*, Q.C.) for the respondent Charles Franklin.—I take the preliminary objection that this appeal is out of time, having regard to the provisions of rule 15 of Order LVIII. of the Rules of Court 1883, as altered by the Rules of Nov. 1893. The order of the 9th May 1894 was an interlocutory and not a final order, and the notice of appeal ought therefore to have been given within fourteen days from the 12th June 1894, the date when the order was passed and entered. The summons was a summons in an action in which further consideration had been reserved. [Davey, L.J.—It is an interlocutory order, I think: *McAndrew* v. *Barker*, 37 L. T. Rep. 810; 7 Ch. Div. 701.]

Everitt, Q.C. and *B. B. Rogers, contrà*.—As the order absolutely determined the rights of the parties, according to the construction of the testatrix's will, it is a final order; and therefore it is not out of time. It is certainly not an interlocutory order. An order is interlocutory which directs how an action is to proceed:

Standard Discount Company v. *De la Grange*, 37 L. T. Rep. 372; 3 C. P. Div. 67, 71.

How can the order here be described as a direction how the action is to proceed? [Lindley, L.J.—It is interlocutory in one sense, and final in another sense.] It is emphatically a final order. Not only is it a final order itself, but it is a final order not followed by anything else, and it leads to nothing else. In *McAndrew* v. *Barker* (*ubi sup.*) the appeal was from findings on interpleader issues, and consequently that is a different case from this. [Lopes, L.J.—This kind of point came before the court in *Re Stockton Iron Furnace Company*, 40 L. T. Rep. 19; 10 Ch. Div. 335. That case related to winding-up proceedings, and it will not assist here. It adds no weight. [Davey, L.J. referred to *Salaman* v. *Warner* (1891) 1 Q. B. 734.] The court can hardly apply the test laid down in that case to a case like the present. There is no authority which says that the rule as to interlocutory appeals can be applied to such a case as this. This is absolutely a case of first impression. The observations of James, L.J. in *Pheysey* v. *Pheysey* (41 L. T. Rep. 607; 12 Ch. Div. 305, 306) show what orders made in administration actions are to be treated as interlocutory and what as final. [Lopes, L.J.—*McNair and Co.* v. *Audenshaw Paint and Colour Company Limited* (65 L. T. Rep. 292; (1891) 2 Q. B.

(*a*) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

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502) is a strong case on the point. LINDLEY, L.J. —It looks in substance uncommonly like an interlocutory order. Are there any special grounds on which the time for appealing can be enlarged?] We are unable to suggest any.

Methold for other respondents.

A. Dryden for the respondents, the plaintiffs.

No reply was called for.

LINDLEY, L.J.—I do not see how we can get over this preliminary objection. An action has been brought for the administration of the estate of a deceased testatrix. In the course of the action a summons was taken out by the executors and trustees of the will asking that they might be at liberty to pay certain moneys to one of the annuitants. The plaintiffs required the direction of the court as to what they should do. An order was made by North, J. giving leave to the plaintiffs to dispose of the moneys in a particular way. That was done after an order on further consideration had been made, but by it the subsequent further consideration of the action was adjourned. I do not see why the order is not an interlocutory one, nor why it is final. No doubt it will finally decide the point as to the construction of the clause in question. But when we look at the order, drawing the line between final and interlocutory orders, it appears to me that this is an interlocutory order. The latest cases on the point are *Salaman* v. *Warner* (*ubi sup.*) and *McNair and Co.* v. *Audenshaw Paint and Colour Company Limited* (*ubi sup.*). I do not like definitions in such a matter, and whether the case comes within the definitions laid down by the Master of the Rolls in *Standard Discount Company* v. *De la Grange* (*ubi sup.*) I do not pause to inquire. But when we come to look at this order, made on a mere summons for directions, we cannot say that it is a final order. Are there any special grounds for extending the time allowed for the appeal? None are suggested. And we cannot, without more laxity than I think is permissible, treat this appeal as being in time. It is a painful thing to restrict the right of appealing; but we have to bear in mind that, if we are lax, we shall disturb the practice. The appeal must therefore be dismissed with costs.

LOPES, L.J.—I have no doubt that this is an interlocutory order. An administration action having been brought, the plaintiffs desired to take the opinion of the court, by means of a summons, on a certain point. No doubt the decision on that summons determined that point. But it is not a final order. It is merely a step in the action, and therefore an interlocutory order. The two cases of *Salaman* v. *Warner* (*ubi sup.*) and *McNair and Co.* v. *Audenshaw Paint and Colour Company Limited* (*ubi sup.*) have been referred to. I am afraid of general definitions. But I have found a definition in a particular case very useful. I think that this comes within the definition of an interlocutory order. Can we extend the time for appealing? Not so unless special grounds are shown, and there are none here. I think that we cannot accede to the argument that the order is a final order.

DAVEY, L.J.—I also think that we must give effect to this preliminary objection, for, as Lindley, L.J. has said, there are no grounds for extending the time for appealing. I feel no doubt that this is an interlocutory order. I should have said so if I had not looked at the various decided cases. But when I look at *Salaman* v. *Warner* (*ubi sup.*) and *McNair nnd Co.* v. *Audenshaw Paint and Colour Company Limited* (*ubi sup.*) I feel no doubt that this ought to be treated as an interlocutory order. An order is final only which determines the matter in dispute at the trial of an action. Apart from authority I should have said that this was an interlocutory order, and having regard to authority I feel bound to say that it is. The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant, *Gedge, Kirby,* and *Millett.*

Solicitors for the respondents, *Western* and *Sons,* agents for *Long, Durnford,* and *Lovegrove,* Windsor; *C. O. Humphreys, Son,* and *Kershaw.*

Tuesday, July 31.

(Before LINDLEY, LOPES, and DAVEY, L.JJ.)

Re WOOD; TULLETT *v.* COLVILLE. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Will—Perpetuity—Remoteness—Direction to carry on business till gravel-pits worked out, and then sell—Trusts of proceeds for unascertained class—Gift to children of testator for life with remainder to their issue—Original or substitutional gift.

A testator gave his real estate and residuary personal estate to trustees, directing them to carry on his business of a gravel contractor until his gravel pits were worked out, and then to sell them, and the freehold land on which they were situate, and the horses, carts, and stock-in-trade, by auction, with power for his sons, or any of them, to bid at such sale; and to hold the proceeds "in trust for such children of mine then living, and such issue living of any child or children then deceased, as shall, being sons, attain the age of twenty-one years, or, being daughters, attain that age or marry, in equal shares" per stirpes. *And until such sale his sons should continue to be employed in the business as theretofore.*

Held, that the trust for sale, and the trust of the proceeds of sale, were both void for remoteness, as contravening the law against perpetuities.

The testator directed his trustees to hold the ultimate residue of his real and personal estate upon trusts for sale, conversion, and investment, and to divide the income thereof equally amongst all his children during their respective lives, and from the death of any such child, whether before or after the testator's death, to hold the corpus whereof the income was or would have been payable to such child "upon trust for all or any the child or children of such child who, being a son or sons, attain the age of twenty-one years, or, being a daughter or daughters, attain that age or marry under that age, and, if more than one, in equal shares."

Held, that the children of a daughter of the testator, dead at the date of his will, could not take under the residuary gift.

Decision of Kekewich, J. affirmed.

WILLIAM WOOD, by his will, after bequeathing to William Tullett and his (the testator's) son

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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George Wood his household furniture upon trust for his wife Catherine Wood during her widowhood, and after making a pecuniary bequest, continued as follows:

I devise and bequeath all my real estate and all the residue of my personal estate unto and to the use of the said William Tullett and George Wood, their heirs, executors, and administrators, upon trust to dispose thereof according to the directions hereinafter contained concerning the same; that is to say, I direct my trustees to carry on my said business of a gravel contractor until my gravel-pits are worked out, and then to sell the said gravel-pits and the freehold land on which the same are situate, and the horses, carts, and other stock-in-trade employed in the same, by public auction, either together or in lots, and subject to such conditions and generally in such manner as my trustees may think expedient, with full power for my sons, or any of them, to bid at such sale. And I direct my trustees to hold the proceeds of such sale in trust for such child or children of mine then living, and such issue living of any child or children then deceased as shall, being a son or sons, attain the age of twenty-one years, or, being a daughter or daughters, attain that age or marry, in equal shares, but so that the issue of my deceased children may take the share or the respective shares only that the parent or respective parents would have taken if living. And it is my wish and intention that, until such sale as aforesaid, my sons, or such of them as may be willing to do so, shall continue to be employed in the said business as heretofore at the usual wages.

After various specific devises and bequests the testator directed his trustees to hold the ultimate residue of his real and personal estate upon trusts for sale and conversion and investment as therein mentioned, and continued as follows:

And shall pay and divide the income of the said trust premises equally amongst all my children during their respective lives (nevertheless in the manner and upon the terms and subject to the discretionary powers hereinafter declared), and shall upon and from the death of any such child, whether before or after my death, hold the corpus whereof the income is or would have been payable to such child upon trust for all or any the child or children of such child who, being a son or sons, attain the age of twenty-one years, or, being a daughter or daughters, attain that age or marry under that age, and, if more than one, in equal shares.

In default of any such child or children of the testator's said child, the property was given in trust as mentioned in the will.

The testator appointed his trustees to be executors of his will.

The testator died on the 24th March 1872, and his executors proved his will on the 18th April 1872. He had twelve children, all of whom survived him except one, a daughter, Mrs. Colville, who had died prior to the date of the will, leaving issue who were still living.

The gravel-pits referred to in the will were about six acres in extent. At the date of the testator's death the whole had been worked out except about half an acre. After his death his trustees carried on his business of a gravel contractor, and continued the working of the pits.

Evidence was adduced to show that with the ordinary staff of workmen employed by the testator, and working the usual number of hours per day, the remaining half acre would have taken from three to four years from the testator's death to work out. But the trustees employed a smaller staff of men, and the half acre was not worked out until May 1878.

The whole of the gravel-pits having thus become exhausted, the trustees at once sold the horses, carts, and stock-in-trade, and as opportunity offered they sold portions of the pits and freehold land.

The question having arisen as to whether the children of the testator's daughter, Mrs. Colville, who, as above stated, died before the date of the will, were entitled to share in the proceeds of the sale of the gravel-pits, &c., with the eleven children who survived the testator, an originating summons was taken out by the trustees of the will to have that question determined.

The summons asked whether the direction for the sale of the gravel-pits, and the trusts of the proceeds of sale, were or were not altogether void for remoteness.

The summons was adjourned into court, and came on to be heard before Kekewich, J., who decided that the trust for sale and the trust declared of the proceeds of sale were both void for remoteness; and that Mrs. Colville's children could not take under the residuary gift.

From that decision the defendant, William Edward Colville, one of Mrs. Colville's children, now appealed.

Cozens-Hardy, Q.C. and *A. W. Rowden* for the appellant.—This gift does not offend the rule against perpetuities. The gravel-pits were nearly worked out at the date of the testator's death; they were, in fact, worked out about six years afterwards, and it was clearly impossible that the working could continue for twenty-one years after his death. The court may have before it evidence of the facts existing at the death of the testator. Then we submit that there are sufficient indications on the face of this will that the gift is to take effect within lives in being. On the construction of the will it is reasonably clear that the sale was to take place during the lifetime of some one of the testator's sons, for any of the sons was to have power to bid at the sale, and the sons were, if they were willing, to continue until the sale to be employed in the business as theretofore at the usual wages. The testator's idea evidently was, that the whole of the gravel-pits would be worked out within the required period. The will should be read as if it contained a proviso that the sale should take place during the life of one of the sons. An express provision to that effect would have rendered the gift absolutely valid. The case of *Re Dawson; Johnston* v. *Hill* (59 L. T. Rep. 725; 39 Ch. Div. 155, 159), which was relied upon in the court below, is distinguishable from the present, inasmuch as the rule there established as to the inadmissibility of evidence that a woman is past the age of childbearing is not a general one. The decision in *Lachlan* v. *Reynolds* (9 Hare, 796) shows that the trust for sale here is not liable to objection on the ground of remoteness. The court would not have refused to hear evidence that the testator had worked out the pits shortly before his death; and therefore evidence that the working could not last for so much as twenty-one years after his death is equally admissible. The evidence shows that the pits could have been worked out in three or four years from the testator's death, and therefore the direction to sell cannot be treated as extending beyond the legal limit. Then we say that the class which is to take the proceeds of sale is a

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class that is capable of taking; the maximum number must be ascertained within the legal period. "Issue" should be restricted to "children," so that there is a good gift to a class of ascertainable persons, for no one can take except this class living at the time the pits are worked out. [DAVEY, L.J. referred to the observations of Lord Selborne, L.C. in *Pearks* v. *Moseley*, 5 App. Cas. 714, 723.] One case was cited to Kekewich, J. to which we submit he did not attach sufficient importance, namely, *Wood* v. *Drew* (33 Beav. 610). [LINDLEY, L.J.—In that case the persons who were to take were ascertained.] But even assuming that the direction to sell may itself extend beyond the prescribed limit, yet, if the beneficial interest in the proceeds of sale does not involve a breach of the rule, the court will give effect to the gift:

Oddie v. *Brown*, 4 De G. & J. 179;
Re Daveron; Bowen v. *Churchill*, 69 L. T. Rep. 752; (1893) 3 Ch. 421;
Goodier v. *Edmunds*, (1893) 3 Ch. 455.

The decision in *Re Daveron* (*ubi sup.*) was, that the persons who were under a will to take the proceeds of the sale of a freehold house were entitled to the benefit intended for them by the testator, notwithstanding that the trust for sale was too remote, inasmuch as they could elect to take the property as real estate. No doubt there the beneficiaries were ascertainable within the legal period. A further question arises as to whether the appellant is entitled to share in the testator's residuary estate, for, if the trust for sale and the gift of the proceeds are invalid, the property will fall into the residue. We say that under the residuary gift the appellant is entitled to a share. There is enough to show that the children of the daughter who was dead at the date of the will were not to be excluded. The gift to the children of a deceased child is not a substitution for the deceased child, but is a new and independent gift to the children. It seems clear that a child of a child of a testator dead at the date of the will is entitled to take. The leading cases on the point are:

Christopherson v. *Naylor*, 1 Mer. 320;
Loring v. *Thomas*, 1 Dr. & Sm. 497;
Tytherleigh v. *Harben*, 6 Sim. 329.

The gift here is in a most unusual form, and an intention is clearly manifested that grandchildren of the testator are not to suffer by reason of the death of their parent before the date of the will. The gift is to "all my children," not "children living at my death." It is a gift *per stirpes*. We rely on the decisions of Malins, V.C. in

Re Lucas's Will, 17 Ch. Div. 788;
Re Potter's Trust, 20 L. T. Rep. 649; L. Rep. 8 Eq. 52.

[DAVEY, L.J. referred to *Re Hotchkiss' Trusts*, L. Rep. 8 Eq. 643. *Warrington.*—All the cases are collected in *Re Chinery; Chinery* v. *Hill* (59 L. T. Rep. 303; 39 Ch. Div. 614). LOPES, L.J.—*Re Musther; Groves* v. *Musther* (43 Ch. Div. 569) is the latest case, and is uncommonly like this, and Cotton, L.J. there reviewed all the authorities.]

Warrington for the respondent Richard Wood, *Benn* for the respondent Thomas Wood, and *C. E. E. Jenkins* for the respondents the plaintiffs, were not called upon to argue.

LINDLEY, L.J.—In this case the testator owned certain gravel-pits, and the questions raised by the appeal are two: First, whether the direction contained in the will to work the gravel-pits until they were worked out and then to sell them, and the direction as to the disposition of the proceeds of the sale of the gravel-pits, are void for remoteness as contravening the rule against perpetuities. Secondly, whether the appellant is entitled to a share of the residue of the testator's estate, into which the proceeds of the sale of the gravel-pits would fall if the gift of those proceeds was too remote. The will is as follows: [His Lordship read that part of the will containing the directions as to working the gravel-pits and selling them, and continued:] As regards the first question which arises, whether those directions to sell the gravel-pits and to divide the proceeds of sale are void under the doctrine of perpetuities, Mr. Rowden contended that it is reasonably clear on the construction of the will that the sale must take place within the lifetime of some one of the testator's sons. He relied upon two of the clauses of the will—the power given to the sons, or any of them, to bid at the sale, and the provision that until the sale the sons, or such of them as might be willing to do so, should continue to be employed in the business as theretofore at the usual wages. I think that that argument is not tenable. Then arises the more important question, whether the fact that the gravel-pits were nearly worked out at the date of the testator's death, and that they were in fact worked out about six years afterwards, can affect the matter so as to exclude the operation of the rule against perpetuities. I think that Kekewich, J. was right in holding that both the trust for the sale of the gravel-pits and the trust declared of the proceeds of sale were void for remoteness. The law on this point is conveniently stated in Mr. Theobald's book on wills (3rd edit., p. 401) thus: "In applying the rule against perpetuities the state of things existing at the testator's death, and not at the date of the will, is to be looked at. But possible and not actual events are to be considered; and, therefore, if at the testator's death a gift might possibly not have vested within the proper time, it will not be good because as a matter of fact it did so vest." He cites *Lord Dungannon* v. *Smith* (12 Cl. & F. 546) and *Re Roberts* (50 L. J. 265, Ch.). We have been also referred to *Re Dawson; Johnston* v. *Hill* (59 L. T. Rep. 725; 39 Ch. Div. 155, 159), where the cases were reviewed by Chitty, J. The law on that point is as old as the time of Lord Kenyon. It was settled in *Jee* v. *Audley* (1 Cox, 324). I take it, therefore, that that point is disposed of. If so, there is an end to that part of the case. The time for the sale of the gravel, pits would not necessarily arise within the period of a life or lives in being at the death of the testator and twenty-one years afterwards. When you come to ascertain the class who are to take the proceeds of the sale you cannot do it within the period. The direction is for the trustees to hold the proceeds of the sale in trust for the children "then living," and the issue living of any deceased child. "Then living" means when the time for the sale arrives. If the first direction is too remote, then the other direction is likewise too remote, and the trusts are both void as being within the rule against perpetuities. It follows, therefore, that the proceeds of sale fall into the residue. Then the second question arises, Does the appellant take a share of the residue? I will

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read the will so far as it relates to this part of the case. [His Lordship did so, and continued:] The appellant is a child of a daughter of the testator who was dead at the date of the will. It is not a case of a child of a child of the testator who died between the date of the will and the date of the death of the testator. Bearing that in mind let us go back. Is it possible to say that the words "during their respective lives" could have been intended to apply to a child who was dead at the date of the will? In my opinion it cannot apply to such a child. You cannot include the mother of the appellant within the residuary gift, and therefore, apart from all authority, I should say that the appellant cannot bring himself within the clause. But, looking at the authorities, and with great respect for the decisions of Malins, V.C. in *Re Lucas's Will* (17 Ch. Div. 788) and *Re Potter's Trust* (20 L. T. Rep. 649; L. Rep. 8 Eq. 52), I think they are clear that the child of a child of the testator who was dead at the date of his will cannot take under this gift. I am guided by *Christopherson* v. *Naylor* (1 Mer. 320), *Re Musther*; *Groves* v. *Musther* (43 Ch. Div. 569), and *Re Chinery* (59 L. T. Rep. 303; 39 Ch. Div. 614). Whatever way we look at it, it appears to me that the decision of Kekewich, J. is right, and that the appeal must be dismissed with costs.

Lopes, L.J.—I am of the same opinion. I think that the decision of Kekewich, J. is right. It appears to me that the trust for sale of the gravel-pits is too remote, for it would not necessarily take place within the period prescribed by law. Then as to the direction concerning the disposition of the proceeds of sale, I think that that also is too remote. It is impossible to ascertain all the class who were to take within the legal period. The testator says that the proceeds are to be held in trust for the child or children "then living," that is, living at the time when the gravel-pits are worked out. No one could say definitely at the death of the testator when they would be worked out. It was contended that the circumstance that the pits were nearly worked out at the time of the testator's death, and, as a fact, were actually worked out about six years afterwards, ought to be regarded. That, however, having regard to the authorities, cannot be taken into consideration. Then as to the point about the residue, I think the terms of the will are too strong for us to get over. I think, therefore, that the appeal should be dismissed with costs.

Davey, L.J.—I am of the same opinion, and I entirely agree with what has been said as to the trust for sale of the gravel-pits and the gift of the proceeds of sale being too remote. As I understand the law, you must first read the will, and if there is a gift to a class all the members of which will not necessarily be ascertained within the legal period, it is void as a perpetuity; the gift is too remote. The court is not at liberty to speculate about probabilities, nor to inquire as to the facts as they turned out on the testator's death. Mr. Rowden says that the court may have before it evidence of facts existing at the death of the testator. I agree that that is so. But it can only look at evidence of facts, it is not admissible to take evidence of probabilities. It may be that it was highly improbable at the time of the testator's death that the gravel-pits would not be worked out in the twenty-one years; but, as I understand the law, the court cannot take improbabilities into account. It may be that before the death of the testator the gravel-pits might be entirely worked out, so that the trust for carrying on the testator's business would never arise. I do not say whether that would have been so or not. But evidence of that kind would be evidence of actual fact and not of opinion. As to the second question, I am of opinion that it is concluded by authority. Lindley, L.J. has referred to *Re Chinery* (*ubi sup.*) and *Re Musther*; *Groves* v. *Musther* (*ubi sup.*). *Re Chinery*, which was before Stirling, J., was a case strikingly like this one. The words of the two wills of course are not identical, but on principle I am not able to distinguish that case from the present, and I think that Stirling, J. rightly decided *Re Chinery*. The well-known case of *Christopherson* v. *Naylor* (*ubi sup.*) was also a case of a substitutionary gift. It is true that, in the long line of cases on the subject, there are differences in the language used by the several testators, but the principle is the same in all of the cases; in effect it is exactly the same. Notwithstanding the opinion expressed by Malins, V.C. in *Re Lucas's Will* (*ubi sup.*) and *Re Potter's Trust* (*ubi sup.*), I am of opinion that *Christopherson* v. *Naylor* (*ubi sup.*) was rightly decided. And it has been so held by the Court of Appeal in *Re Musther*; *Groves* v. *Musther* (*ubi sup.*). But, if I put aside all authority, I should say the same upon the words of this particular will. The gift to children of a child is "upon the death of any such child." The expression "such child" must mean a child who, at the date of the will, was capable of taking, under the prior words, a tenancy for life. It appears to me that we should be forcing the language if we were to include a child who was then dead and therefore incapable of itself benefiting by the testator's bounty. I think, therefore, that this appeal ought to be dismissed, with costs.

Appeal dismissed.

Solicitors for the appellant, *Pownall* and *Co.*

Solicitors for the respondents, *Snow, Snow*, and *Fox*.

Wednesday, Aug. 1.

(Before Lindley, Lopes, and Davey, L.JJ.)

Guyot v. Thomson. (a)

APPEAL FROM THE CHANCERY DIVISION.

Patent—Exclusive licence—Power of revocation by licensor—Implied covenant not to revoke.

The defendant, who was the owner of certain patents, by deed granted to the plaintiffs, in Feb. 1891, *the exclusive right to use and exercise the patented inventions during the unexpired residues of the terms of the letters patent, or any renewal or extension thereof, and to manufacture, sell, and dispose of the articles manufactured under the letters patent as they should think fit for their absolute benefit. The licence was expressed to be granted in consideration of* 150*l. and certain royalties, and also of the plaintiffs agreeing* (inter alia) *to advertise and push the sale of the inventions, and endeavour to further their success. The deed contained a power for the plaintiffs to determine the licence by giving the defendant six calendar months'*

(a) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

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notice in writing, but no express power for the defendant to determine the licence. The defendant, being dissatisfied with the plaintiffs for not pushing the inventions sufficiently and for other reasons, began himself to manufacture and sell the articles, subject to the patents, for his own benefit; and in Oct. 1893 *sent the plaintiffs written notice purporting to revoke the licence on the ground of their breaches of covenant in not pushing and advertising the inventions, not paying the royalties punctually, and deviating from the specifications in manufacturing the articles.*

Held, that, having regard to the mutual obligations imposed on the defendant and the plaintiffs by the deed, the intention of the parties was that the licence should not be treated as revocable: and that a covenant must be implied therein not to revoke it until the end of the unexpired residues of the terms of the patents.

Decision of Romer, J. (ante, *p.* 124) *affirmed.*

APPEAL by the defendant from a decision of Romer, J. (*ante*, p. 124).

Rudall for the appellant. — The question involved in this appeal is, whether the patent licence granted by the appellant, although containing no express power of revocation, is either revocable in its nature, or at any rate conditional on the terms on which it was granted being observed. The claim for rectification is abandoned. I submit that it is revocable because it is a mere licence; it passes no interest, and is not a grant, except of leave and licence:

Heap v. *Hartley*, 61 L. T. Rep. 538; 42 Ch. Div. 461.

The fact that a money consideration has been paid for the licence does not affect its revocability:

Wood v. *Leadbitter*, 13 M. & W. 838.

[LINDLEY, L.J. — There is the decision of Bristowe, V.C., in *Ward* v. *Livesey* (5 R. P. C. 102), which seems against your contention.] But it is an authority in my favour on the point that the licence is conditional only on the terms on which it was granted being observed. Moreover, it is inconsistent with the decision of the Court of Appeal, on which I rely, in

Heap v. *Hartley* (*ubi sup.*).

[LINDLEY, L.J.—There is a definite term fixed for the continuance of the licence.] True; but that is immaterial, for in *Wood* v. *Leadbitter* (*ubi sup.*) the licence was for four days certain, and yet its revocability was not impugned. [LOPES, L.J.—There the licence was a parol licence.] Yes; but in the judgment in that case Alderson, B. pointed out that a licence under seal was as revocable as if granted by parol. [LINDLEY, L.J.—Is not a covenant not to revoke implied if a licence is granted for a definite term?] This is not the case of an easement. It resembles a right to shoot upon land, which might be an answer to an action for trespass, but would be revocable at any time. [*Haldane*, Q.C.—The licence here is a grant by the licensor as beneficial owner. *Clark* v. *Adie* (21 W. R. 456) shows that an injunction can be obtained to restrain a licensor from interfering with his licensee.] There was no question in that case of revocation. The licensor there had not revoked the licence. He was merely representing that the licensee was not manufacturing according to the patent. The licence here is, according to *Heap* v. *Hartley* (*ubi sup.*), a mere licence, and can be revoked, although granted by deed and for valuable consideration. It can, therefore, be revoked at will, and certainly for breach of the conditions on which it was granted. It was clearly granted on certain terms, and the continuance of the grant depends upon the observance of those terms.

Haldane, Q.C. (*W. N. Lawson* with him) for the respondents.—Nothing was said by Romer, J. in his judgment as to revocation of the licence at the will of the licensor. The case proceeded on the question whether or not there had been a breach of the conditions on which the licence was granted, and the learned judge found as a fact that there had been no breach. The case of *Wood* v. *Leadbitter* (*ubi sup.*) was decided on grounds relating to land only. There it was held that a licence to enter on land, even though by deed and for valuable consideration, was revocable. And it may also be true that an injunction would not lie in equity to protect such right. But all that is outside the present argument. In this case chattels are dealt with, and the document as a whole must be regarded. It is a grant for the residue of the term of the patent of the benefit of the patent rights, and there would be a right to enforce the contract in equity. The intention was to give the licensee the exclusive right to work the patent during its continuance. The licensee has therefore a right to work the patent during the whole period without interference, even by the licensor. An exclusive licence coupled with an interest cannot be revoked during the term for which it was granted. Besides the cases of *Heap* v. *Hartley* (*ubi sup.*) and *Wood* v. *Leadbitter* (*ubi sup.*) there is the other case of *Clark* v. *Adie* (*ubi sup.*), where the question of revocation was substantially involved. The Court of Appeal treated the contract to grant a licence as giving contractual rights to which a court of equity would have regard. If the appellant's contention is right, he as licensor could have determined the licence directly after the sum paid for it had been parted with. It is obvious, therefore, that it could not have been intended to be revocable. [He was stopped by the Court.]

Rudall in reply.—[LINDLEY, L.J.—If your construction of the licence is correct there are conditions in it that would be utterly destructive of the patent were we to agree with you. I think it quite inconsistent with the document that the licensor should have the right to revoke it at any time.] I say that this, being a mere licence, is revocable on the authority of *Heap* v. *Hartley* (*ubi sup.*). The decision in *Wood* v. *Leadbitter* was not restricted to licences to go on land, and *Heap* v. *Hartley* clearly refers to other licences than those relating to land. If that case is good law it shows that the licence here can be revoked. As regards the use of the word "beneficial" it is not appropriate in a mere licence, a licence to work a patent not being similar to an assignment of the patent.

LINDLEY, L.J.—The main question in this case is, whether an exclusive licence to work a patent which is granted by a document can be revoked by the patentee who granted the licence. There are some other points to which Mr. Rudall called our attention, to the effect that there had been some

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breaches of the stipulations which would justify revocation. But he has not satisfied us that the learned judge was wrong in the view which he took that there were no such breaches except the delay in payment of the royalties, and therefore I shall address myself entirely to the main question, whether this so-called licence is a revocable licence. Now the document is an indenture dated the 28th Feb. 1891 and made between Mr. Thomson, who is the defendant and the patentee of the one part, and the plaintiffs of the other part. There is a recital that the defendant is the patentee of certain inventions for fourteen years from the dates of them. Then there is a recital that the patentee has agreed with the licensees to grant to them an exclusive licence to manufacture, use, and vend the said inventions which are worked in the market by the name of Thomson's Patent Combined Circulator and Feed Water Heater for Steam Boilers. That is the recital, and then the deed witnesses that, in pursuance of the agreement and in consideration of 150*l.* paid to the patentee, the patentee hereby "as beneficial owner grants unto the licensees, their executors, administrators, and assigns, the full, sole, and exclusive licence to use and exercise the inventions, and each of them, during the unexpired residue of the terms of the letters patent respectively, or any renewal or extension thereof, and to manufacture, sell, and dispose of all circulators and feed water-heaters manufactured according to the said inventions or either of them when and as the licensees shall think fit for their absolute benefit." Then it is mutually covenanted and agreed that the licensees shall pay certain royalties. Then there is a proviso that in the event of the licensees granting sub-licences to any persons to use and exercise the inventions, those sub-licensees shall pay certain royalties of which I need not read the details. Then comes clause 2, to which I attach importance: "The licensees shall at all times during the continuance of this licence advertise and push the sale of the said inventions and use their best endeavours to further their success." Then there is a clause that the licensees shall at all times during the continuance of the licence keep correct accounts and let the patentee inspect them. Then clause 4 is that, "The patentee shall not commence proceedings at law or in equity for infringement of the patents or either of them without the consent in writing of the licensees first had and obtained." Then, lastly, "In case the licensees shall at any time hereafter be desirous of determining the licence hereby granted, and of such desire shall give six calendar months' notice in writing to the patentee at his last known place of abode in England, then and in such case the licence hereby granted shall at the expiration of such period of six calendar months' notice absolutely determine." Well now, what is the true effect of that document? To call that a mere revocable licence appears to me to call it that which it clearly is not. A person who has a licence is not bound to exercise it for any time, and the person who grants a licence does not come under any obligations to the licensee except not to treat him as a trespasser if it is a licence to go upon land, and not to take advantage of some condition or clause which he could take advantage of but for the licence. But this document imposes very serious obligations and duties, both on the so-called licensees and on the so-called licensor; and it would be an uncommonly strange construction of this document to hold that the grantor of this licence could at any moment relieve himself from the obligation under which he has come by giving notice to determine it. I think it is plain, when we come to look at this, that the true meaning of it is that the patentee grants to these gentlemen the exclusive right to use this patent for the unexpired term of the patent or any renewal thereof. That involves on his part an obligation not to use the patent himself, which is a most important matter. It devolves upon the licensees the duty, in the terms of clause 2, of advertising and pushing the sale of the inventions and using their best endeavours to further their success. Now, whoever heard of such obligations as those attached to what is called a mere licence? The real truth is, that this is a grant of a right to use the patent coupled with obligations both on the grantor and on the grantee. Now, I should hesitate before I called this a licence coupled with an interest. That is an ambiguous expression, and of course, before one uses it, one would like to understand the meaning of it. Coupled with an interest in what? I do not know that there is any particular interest as distinguished from the right to do that which the licensee acquires. He is not an assignee of the patent. We were asked to construe this, or it was suggested that we might construe this as amounting to an assignment of the patent, but the clause that the right to sue for an infringement is in the patentee excludes that view. It is not therefore quite an assignment of the patent. There is not very much difference in it, but that clause prevents us from holding that it is an assignment of the patent. But when you come to read it, it appears to me that there are several clauses which are so inconsistent with the right to revoke that we cannot hold that there is such a right to revoke; or, varying the language, it appears to me that on the face of this document there is an implied covenant not to revoke. And I get at that, not because the Conveyancing Act applies to it, for I do not think it does. I do not think it is a conveyance within the meaning of the Conveyancing Act; but it does not follow that the intention of the words "as beneficial owners" is unimportant. It tends to show what they mean; that they do not mean to treat this as a revocable licence. You never would obtain a formal document granting a licence in which the words were that "the licensor grants as beneficial owner." That is not the form of a licence, which is a totally different kind of document. I am happy to say that we are not driven by authority to do that which would be a clear injustice and utterly unwarranted. I think that the judgment appealed from is right, and that this appeal must be dismissed with costs.

Lopes, L.J.—I am of the same opinion. I think that this is not a revocable licence. The licence, to so call it, is created by deed and for valuable consideration. That would not in itself prevent its being revocable, but it is a licence for the residue of the term of the letters patent. There are in it mutual obligations imposed on the licensees and the licensor, obligations to my mind absolutely inconsistent with this being a licence revocable, as it is suggested, at pleasure. Looking at the document and considering it as best I can.

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I come to the conclusion that it was obviously the intention of the parties that it should not be revocable, but that there is to be implied a covenant that the licence is to continue during the residue of the term. Just for one moment consider what would follow if Mr. Rudall's contention were successful. The licensor might put the 150*l.* into his pocket and the next day revoke the licence and still keep the money in his pocket. Sub-licences may be granted by the licensees for considerations; if the licences were revoked all those sub-licences would fall as well, and the licensor at his pleasure might get rid of all the obligations imposed upon him by this document. All these matters to my mind tend to show that the true construction of that document is that it is not to be a revocable licence.

DAVEY, L.J.—I am of the same opinion. It is impossible to read through, as I have done, this document from the beginning to the end and not form the impression that the parties intended by the language they have used that this licence should not be one which was revocable at the will of the licensor. No doubt that would not go for much if the parties have used language which in law we are bound to construe so as to have that effect. But, when I read the details of this document rather more closely, I find obligations and cross obligations by the licensor and by the licensees, which, in my opinion, are utterly inconsistent with the idea that this licence was to subsist only at the will of the licensor. I find running through this document an assumption, upon which the provisions of it are framed, that the licence will subsist during the term for which it purports to be granted; or, to express myself more accurately, an implied covenant that the licence shall not be revoked by the licensor. It is true that the covenants to which I have referred are sometimes in the language "during the term of this licence" as in the first covenant, and in other covenants they are expressed to be "during the continuance of this licence." But, in my opinion, those words ought to be construed as having the same meaning, and that meaning I think is during the term for which this licence purports to be granted—that is to say, during the life of the patent. I also think that the power for the licensees to determine the licence on six months' notice is in Mr. Haldane's favour, because I cannot read that as a limitation of their power. I think that giving the express power to the licensees to determine the license on six calendar months' notice, and nothing being said as to the determination by the licensor, is a strong indication that the intention of the parties was that the licensees alone should have the power to determine the licence, and that the licensor should not have such power. I am of opinion that the appeal should be dismissed.

Appeal dismissed.

Solicitor for the appellant, *Francis A. Rudall.*

Solicitors for the respondents, *Stibbard, Gibson, and Co.*

July 9 and Aug. 8.

(Before the LORD CHANCELLOR (Herschell), LINDLEY and DAVEY, L.JJ.)

HOLLINRAKE *v.* TRUSWELL. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Copyright — Registration — Pattern of sleeve of dress—Interpretation of word "book"—"Map, chart, or plan"—Subject-matter—Literary merit —Copyright Act 1842 (5 *&* 6 *Vict. c.* 45), *ss.* 1, 2.

An action for infringement was brought by the plaintiff as assignee of the copyright in an apparatus entitled "The Cosmopolitan Sleeve Chart 1886,*" for cutting out on scientific principles the sleeves of ladies' dresses. It consisted of a cardboard pattern of the outer side of the sleeve of a lady's dress, and contained on its surface a system of lines and figures which enabled a dressmaker to cut from it a complete sleeve for any arm without the necessity of any measurements beyond the simple measurements of the actual arm. The principal defence was that the apparatus was not a "book" or a "map, chart, or plan," within the meaning of sect.* 2 *of the Copyright Act* 1842, *and could not be the subject of copyright.*

Held, that the apparatus was not a literary production; but that it was merely for purposes of measurement, and was not a "map, chart, or plan" within the statute.

Decision of Wright, J., sitting as an additional judge of the Chancery Division (68 *L. T. Rep.* 656), *reversed.*

MARY HOLLINRAKE, the plaintiff in this action, was a dressmaker and professor of scientific dress-cutting, and was the assignee under an assignment in writing, dated the 1st Feb. 1891, from Edmund George Kendall of the copyright in a chart, entitled "The Cosmopolitan Sleeve Chart 1886," for cutting out on scientific principles the sleeves of ladies' dresses, first published by E. G. Kendall on the 18th Nov. 1886.

The copyright was now subsisting, and was duly registered at Stationers' Hall on the 19th Nov. 1886 by E. G. Kendall. The assignment to the plaintiff was duly registered at Stationers' Hall on the 2nd Feb. 1891.

The defendant, Jane Eliza Truswell, also a dressmaker and professor of scientific dress-cutting, had, the plaintiff alleged, infringed the plaintiff's copyright in the Cosmopolitan Sleeve Chart, by the printing, publishing, and sale of a large number of sleeve charts called the "Ideal," such sleeve charts being copies of the plaintiff's Cosmopolitan Sleeve Chart.

The plaintiff accordingly brought this action against the defendant, claiming an account of all "Ideal" sleeve charts sold by the defendant and payment of all profits made by reason of such sale, an injunction to restrain the defendant from further infringing the plaintiff's copyright; an order for the delivery up to the plaintiff of all plates used by the defendant for printing the "Ideal" chart; and an order for the delivery up to the plaintiff of all copies of the "Ideal" chart in the possession of the defendant, or under her control.

By her statement of defence the defendant denied that any copyright existed in the plaintiff's chart,

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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on the ground that it was not a "book" or a "map, chart, or plan," within the meaning of sect. 2 of the Copyright Act 1842, as the same did not possess any literary or artistic merit, and contained no letterpress, and was not and could not be the subject of copyright under that statute or otherwise.

The defendant also denied that the plaintiff's chart was an original work, as the same was an imitation of, and the idea and design (if any) were taken from, certain specifications and drawings which the defendant specified.

The defendant admitted that she had caused to be printed, published, and sold some, though not a large number, of the "Ideal" sleeve charts; but she denied that she had thereby infringed the plaintiff's alleged copyright, or that the "Ideal" sleeve chart was in any way an imitation or copy of the Cosmopolitan Sleeve Chart. The defendant alleged that the "Ideal" sleeve chart was an improvement upon the plaintiff's chart, and was the result of independent research and labour by the defendant; that the method of working and the shape were entirely different, the defendant's chart being more perfect and accurate in its method of working than the plaintiff's. The defendant submitted and insisted that her chart was an entirely novel and valuable work, and was the result of her own labour and scientific calculation, and that she had made no unfair use of the previous state of knowledge relating to the making of sleeves for ladies' dresses and the scientific mode of dressmaking in reference thereto.

The action came on for trial before Wright, J., sitting as an additional judge of the Chancery Division, in March 1893, when his Lordship decided (68 L. T. Rep. 656) that the plaintiff's chart, though not a sheet of letterpress, was a "chart or plan" within the meaning of the Act, and therefore was capable of being registered thereunder. The learned judge also decided that the defendant had infringed the plaintiff's copyright, and he granted a perpetual injunction against the defendant in the terms of the statement of claim.

From the decision the defendant now appealed.

Bramwell Davis for the appellant.—I submit that Wright, J. was wrong in holding that the plaintiff's apparatus was capable of being registered under the Copyright Act 1842. There can be no copyright in such a thing under that statute. It has no literary merit, and it would be useless and unintelligible without further explanation. It is not a "book" in the ordinary meaning of the word; neither is it a sheet of letterpress, nor a "map, chart, or plan," within the Act. The Act, as appears from the preamble, and also from the general tenor of its language, was designed for the encouragement of literature, and it is essential in order to entitle a thing to protection under the Act that it should have some literary merit. If the plaintiff's apparatus can be protected at all, it is more properly the subject of a patent than of copyright. It is a mere mechanical contrivance for enabling persons to cut out the sleeve of a lady's dress, and it ought not to be registered under an Act intended for the protection of literary works. It has been held that there can be no copyright in the printed face of a barometer:

Davis v. *Comitti*, 52 L. T. Rep. 539.

Nor in a cricket scoring-sheet:

Page v. *Wisden*, 20 L. T. Rep. 435.

Nor in a cardboard puzzle called a "Christograph," so constructed as to throw a shadow resembling the picture "Ecce Homo:"

Cable v. *Marks*, 47 L. T. Rep. 432; 52 L. J. 107, Ch.

Nor in an illustrated photograph album:

Schove v. *Schmincké*, 55 L. T. Rep. 212; 33 Ch. Div. 546.

Nor in a card bearing a representation of a hand holding a pencil in the act of completing a cross within a square with a view to such cards being used at parliamentary and other elections for the guidance and instruction of illiterate voters in the marking of their ballot papers:

Kenrick and Co. v. *Lawrence and Co.*, 25 Q. B. Div. 99.

A picture or publication which consisted of a gloved hand painted on a card cut to the exact size, and showing the back and palm of the hand, and having on the back some verses, was held by Kekewich, J. to be capable of registration as a "sheet of letterpress:"

Hildersheimer and Faulkner v. *Dunn and Co.*, 64 L. T. Rep. 452.

That case, however, is distinguishable from the present, there being artistic and literary merit in the production, which is not so here. The whole line of authorities shows that there must be some literary merit in the thing registered. There must be something on the face of the thing itself which discloses literary merit. A map or chart is included in an Act dealing with literary copyright only because it conveys information in the same way as a book does; a map is intended to give geographical and historical details; a chart to give sailing instructions to mariners. Per James, L.J. in

Stannard v. *Lee*, 24 L. T. Rep. 549; L. Rep. 6 Ch. App. 346.

He referred also to Copinger on Copyright, 2nd edit. p. 100. [The Lord Chancellor referred to *Drury* v. *Ewing*, 1 Bond (Amer.) 540.]

Arthur J. Walter for the respondent.—The rules which govern the court in deciding whether or not a thing is a proper subject-matter of copyright were clearly laid down by the Court of Appeal in

Maple and Co. v. *Junior Army and Navy Stores*, 47 L. T. Rep. 589; 21 Ch. Div. 369.

Another case on the same lines is *Grace* v. *Newman* (L. Rep. 19 Eq. 623).

Bramwell Davis replied.

Cur. adv. vult.

Aug. 8.—The following written judgments were delivered:—

The Lord Chancellor.—This action was brought by the plaintiff as assignee under an assignment in writing of the 1st Feb. 1891, from one Edmund George Kendall, "of the copyright in a book, to wit, a map, chart, or plan, entitled "The Cosmopolitan Sleeve Chart 1886." The copyright and assignment were both duly registered at Stationers' Hall. The plaintiff alleged that the defendant had infringed her copyright in the Cosmopolitan Sleeve Chart by the printing, publishing, and sale of a large number of sleeve

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charts called the "Ideal," those sleeve charts being copies of the plaintiff's Cosmopolitan Sleeve Chart. Wright, J., before whom the action was tried, granted a perpetual injunction, restraining the defendant from manufacturing or causing to be manufactured, printing, selling, offering for sale, or in any manner using or dealing with a sleeve chart, called the "Ideal," or any other sleeve chart being a colourable or obvious imitation of the plaintiff's registered copyright sleeve chart. From this judgment the defendant has appealed, on the ground that the plaintiff is not protected by the Copyright Act 1842, the so-called sleeve chart not being a subject-matter in respect of which copyright protection can be obtained under that Act. The words and figures for which the plaintiff is alleged to have obtained such protection consist of the words "top curve line; under curve line; under arm curves; measure round the thick part of the arm; measure round the thick part of the elbow; measure round the knuckles of the hand;" together with certain curved lines in connection with the words "under arm curves" and certain scales of inches and half inches in connection with the words "measure round the thick part of the arm," and "measure round the thick part of the elbow." All these are printed on a piece of cardboard, so curved as to represent the parts of the arm above and below the elbow, which is called "The Cosmopolitan Sleeve Chart." I cannot do better than take Wright, J.'s account of the purpose intended to be served by the cardboard, with these words and scales upon it. After pointing out that, for the purpose of accurately measuring the inner part of a sleeve, so as to make it bear its due relation to the outer part, it was formerly necessary to make certain calculations, of a simple character indeed, but still leaving room for error, he said that the plaintiff's so-called chart embodied a method of dispensing with any computation and any measurement beyond the simple measurement of the actual arm. This was accomplished by holes made in the cardboard opposite each half inch of the scales, referring to the measurement round the thick part of the arm and of the elbow respectively, so that by means of these holes pencil marks might be made on a card or paper placed underneath the chart at the proper points in the scales of inches, and the required lines might thus be drawn. Wright, J. thought that the plaintiff's pattern did not come within the word "book" or "letterpress." The only words that appeared to fit it at all were, in his opinion, "map, chart, or plan." He thought that a map, chart, or plan need not be topographical, and that what the plaintiff had registered might be regarded either as a chart or plan of the female arm in relation to dressmaking, or as the plan of a pattern or model sleeve. Now, I have to observe, in the first place, that no one could claim a monopoly of the use of such a sentence as "measure round the thick part of the arm" or of a half-inch scale. And the words and figures found on the "chart" do not in combination convey any intelligible idea, nor could they be of the slightest use to any one, apart from the cardboard upon which they are printed. The object of the Copyright Act was to prevent any one publishing a copy of the particular form of expression in which an author conveyed ideas or information to the world. These may be retained by anyone, though the book, map, or chart which embodied them has passed out of his possession. If he were to commit to memory the contents of the book, or the information disclosed by the map or chart, he would be as much in possession of the author's ideas or information as if the book, map, or chart were physically in his hands. But this is not the case with the words or figures upon the sleeve chart. They are intended to be used, and can only be of use, in connection with that upon which they are inscribed. They are not merely directions for the use of the cardboard, which is in truth a measuring apparatus, but they are a part of that very apparatus itself, without which it cannot be used, and except in connection with which they are absolutely useless. I think it is clear, therefore, that what the plaintiff has sought to protect under the Act for the protection of literary productions is not a literary production, but an apparatus for the use of which certain words and figures must necessarily be inscribed upon it. It is quite true that, notwithstanding the words of the preamble, the protection of copyright may be obtained for works which cannot be said, in the ordinary sense of the term, to have literary merit. Compilations such as the Post Office Directory have, no doubt, properly been held to be the subject of copyright, but there is, as I have pointed out, a marked distinction between these and the claim of protection under the Copyright Act for words and figures inscribed on and necessarily forming part of an apparatus or tool. It is not necessary to determine whether such an apparatus as that now in question could be the subject of letters patent as an invention, though I am far from saying that it could not be so, if novel. One can conceive not a few kinds of apparatus clearly patentable, the use of which necessarily required as part thereof the inscription upon them of words or figures. If a patent were obtained, its duration would be limited to fourteen years; but, if the plaintiff's contention in the present case were well-founded, the patentee would only have to register these words and figures under the Copyright Act in order to obtain the much longer protection which is accorded to literary works. These considerations satisfy me that the decision pronounced in favour of the plaintiff cannot be supported. I think that the judgment should be reversed and the action dismissed, with costs.

LINDLEY, L.J.—This is an appeal by the defendant from a decision of Wright, J., granting an injunction restraining the defendant from infringing the plaintiff's copyright in a thing called "The Cosmopolitan Sleeve Chart." The appeal raises two questions, viz.: (1) whether the thing is one in which copyright can be had, and (2) if it is, then whether the defendant has infringed it? The first question is one which, so far as I know, is quite new in this country, although it has arisen in America, and been decided there in the plaintiff's favour: (see *Drury* v. *Ewing*, 1 Bond (Amer.) 540.) The thing in question consists of certain lines and figures printed on a piece of cardboard with the following words upon it: "Top curve line; under curve line; under arm curves; measure round the thick part of the arm; measure round the thick part of the elbow; measure round the knuckles of the hand." The evidence shows that what is on the cardboard is not intended simply to be understood by persons

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who wish to learn how to cut out sleeves, but that the cardboard itself is intended for use in cutting them out. This at once distinguishes this particular thing from every publication which is generally understood to come under the definition of the word "book" in 5 & 6 Vict. c. 45, sect. 2., viz., "volume, part, or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published." The learned judge considered that this thing was a map, chart, or plan; but, if so, it is a very peculiar one; for the use of it lies, not in the information conveyed by it, but in such information combined with the material on which the information is printed. The thing is in truth a measuring machine, and no more a chart or plan within the Literary Copyright Act than is a scaled ruler such as is found in any mathematical instrument case. Such a thing may, if novel and useful, be a good subject-matter for a patent; but I cannot bring myself to hold that it is a map, chart, or plan, within the meaning of the Copyright Act. In *Philpotts* v. *Hanbury* (2 Pat. Cas. 33) Grove, J. decided that a patent obtained by Philpotts in 1882 for a similar thing was bad for want of novelty and for insufficiency of the specification. But he did not decide that such a thing as this, if new, could not be the subject-matter of a patent. A new and useful machine or tool or apparatus for measuring would be patentable. But at the present day novelty would probably be difficult to establish. I am not aware of any English authority which throws any real light on the applicability of the Copyright Act to such a thing as this. The American case to which I have referred arose on a motion to commit for a breach of an injunction, and, although the learned judge thought the case might come within the American Copyright Act, yet all he had to decide was whether the defendant had committed a breach of the injunction, and this being proved it was not necessary for him to decide more. There is no report of the case when heard in the first instance on the merits, and the case has been doubted in America by the Supreme Court in *Baker* v. *Selden* (11 Otto, 99, at p. 107). The character of what is published is the test of copyright. If what is published is not separately published, is not a publication complete in itself, but it is only a direction on a tool or machine to be understood and used with it, such direction cannot, in my opinion, be severed from the tool or machine of which it is really part, and cannot be monopolised by its inventor under the Copyright Act. The register of the so-called copyright of the plaintiff in this case runs thus: "Title of Book, The Cosmopolitan Sleeve Chart, 1886." When the real character of the thing is ascertained it proves to be a measuring tool or machine, to which, in my judgment, the Copyright Act has no application. Under these circumstances it is unnecessary to consider the question of infringement. But here again the plaintiff appears to me to fail. The defendant may have got her own idea from the plaintiff's chart, but the defendant has not copied more than the plaintiff's method of measuring. Copyright, however, does not extend to ideas or schemes, or systems, or methods; it is confined to their expression, and if their expression is not copied the copyright is not infringed. The case of *Baker* v. *Selden* already referred to illustrates this very well. It was there held that the author of a system of book-keeping was not entitled to any monopoly in the system, but was only entitled to prevent other persons from copying his description of it. This is an attempt to use the Copyright Act for a purpose to which it is not properly applicable; and the appeal must be allowed, with costs here and below.

Davey, L.J.—In this case the plaintiff, as assignee of one Edmund George Kendall, claims copyright in what is described as "a book, to wit, a map, chart, or plan entitled the Cosmopolitan Sleeve Chart 1886." The question is whether the plaintiff can have copyright in the thing so described. The Act 5 & 6 Vict. c. 45, gives copyright, *i.e.*, the right of multiplying copies in books, and by sect. 2 it is enacted that "a book shall be construed to mean and include every volume, part, or division of a volume, pamphlet, sheet of letterpress, sheet of music, map, chart, or plan separately published." I agree with the learned judge that a map is not confined to what is popularly known as a map, viz., a geographical map; and a chart is not confined to what is popularly called a chart, viz., a map of a portion of the seas showing the rocks, soundings, and such like information for the use of navigators. But I cannot agree with him that the cardboard before us is either a "map, chart, or plan" within the Act. There may, no doubt, be an anatomical or physiological plan showing the structure and distribution of the muscles and bones of the human arm or any other part of the human frame, which would be protected by the Copyright Act. But this so-called chart does not seem to me to be of that character or to be the proper subject of copyright. The preamble of the Act recites that it is expedient "to afford greater encouragement to the production of literary works of lasting benefit to the world." And although I agree that the clear enactment of a statute cannot be controlled by the preamble, yet I think that the preamble may be usefully referred to for the purpose of ascertaining the class of works it was intended to protect. Now a literary work is intended to afford either information and instruction or pleasure in the form of literary enjoyment. The sleeve chart before us gives no information or instruction. It does not add to the stock of human knowledge, or give, and is not designed to give, any instruction by way of description or otherwise. And it certainly is not calculated to afford literary enjoyment or pleasure. It is a representation of the shape of a lady's arm, or more properly of a sleeve designed for a lady's arm, with certain scales for measurement upon it. It is intended not for the purpose of giving information or pleasure, but for practical use in the art of dressmaking. It is, in fact, a mechanical contrivance, appliance, or tool for the better enabling a dressmaker to take her measurements for the purpose of cutting out the sleeve of a lady's dress, and is intended to be used for that purpose. In my opinion it is no more entitled to copyright as a literary work than the scale attached to the barometer in *Davis* v. *Comitti* (52 L. T. Rep. 539). The plaintiff is really seeking a monopoly of her mode of measuring for sleeves of dresses under the guise of a claim to literary copyright. The fallacy of the learned counsel's argument seems to me to lie in a failure to distinguish between literary copyright and the right to patent an invention. No doubt you may

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have copyright in the description of an art, but having described it you give it to the public for their use, and there is a clear distinction between the book which describes and the art or mechanical device which is described. I agree with what is said in an American case of *Baker* v. *Selden* (11 Otto (Sup. Court U.S) 99, at p. 103): "Where the art cannot be used without employing the methods and diagrams used to illustrate the book or such as are similar to them, such methods or diagrams are to be considered as necessary incidents to the art, and given therewith to the public; not given for the purpose of publication in other works explanatory of the art, but for the purpose of practical application." In that case it was held that a man could not have copyright in the model pages of an account book contained in a work explaining a peculiar system of book-keeping. I know not whether this mode of cutting out sleeves could or could not have been patented. But of this I am sure, that the plaintiff, if she wished to protect it, should have had recourse to the patent law, and not to the law of copyright. I have said nothing on the question whether the defendant's chart is an infringement of the plaintiff's, and it is not necessary in the view which I take of the case to do so, but I do not disagree with what has been said by Lindley, L.J. I am of opinion that the appeal should be allowed and the action dismissed with costs.

Appeal allowed.

Solicitor for the appellant, *H. S. Holt*, agent for *H. P. Day*, Nottingham.

Solicitors for the respondent, *Firth* and *Co.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Wednesday, July 25.

(Before KEKEWICH, J.)

FORTESCUE *v.* LOSTWITHIEL AND FOWEY RAILWAY COMPANY AND OTHERS. (*a*)

Railway company—New company—Covenant to make and construct, and afterwards to maintain accommodation works—Personal service—Specific performance—Lostwithiel and Fowey Railway Act 1892 (55 *&* 56 *Vict. c. clxxxii.*), *s.* 6.

In 1873 *a landowner conveyed certain lands to the L. Railway Company for the purpose of their Act, and the company thereby covenanted to execute specified accommodation works, and to perform certain services, namely, to convey to and deposit on wharves connected with the railway timber and other produce from a wood belonging to the landowner. The L. Company took possession of the lands and made their railway. In* 1892 *the undertaking was by Act of Parliament transferred to the C. Railway Company "subject to the contracts obligations, debts, and liabilities of" the L. Company. The accommodation works were allowed by the landowner to remain unmade without objection, but the present tenant for life brought an action against the two companies to compel specific performance of the covenants.*

Held, that sect. 6 *of the Act of* 1892 *meant that the C. Company were to take the property and undertaking of the L. Company, and to perform the contracts and obligations, and satisfy the debts and liabilities, dealing not with the L. Company but directly with the covenantees; that there was a continuing liability which could be specifically performed; and that the covenant for conveyance and deposit of the produce of the wood being part of a larger contract, might be ordered to be specifically performed.*

Declaration, that the covenants ought to be specifically performed by the C. Company, nothing being said about the L. Company's costs, the costs of the plaintiff to be paid by the C. Company.

THE defendants, the Lostwithiel and Fowey Railway Company, under the powers of an Act of Parliament passed in 1862, for the purposes of their railway, took certain lands in the parishes of Fowey and Saint Sampsons in Cornwall, including part of a wood, called Colvethick Wood, of which the plaintiff, John Bevill Fortescue, was tenant for life, under a settlement dated the 1st May 1865. By an indenture engrossed in June 1873, but dated the 31st Dec. 1873, and executed in March 1874, after reciting the settlement, the lands so taken were conveyed to the Lostwithiel, &c. Company, and a line of railway was constructed thereon, and certain works were constructed. The line of railway runs between the lands and Colvethick Wood on the one side, and the tidal river Fowey on the other, and cuts off the access from the lands and wood to the river. The defendants, the Lostwithiel, &c., Company entered into covenants as follows:

The Lostwithiel, &c., Company, in consideration of the conveyance thereby for themselves, their successors and assigns, covenanted and agreed with the vendors, their heirs and assigns, and with "all other persons rightfully claiming or to claim" under the settlement of the 1st May 1865, that they, the said company, should and would at their own costs and expenses before the 29th Sept. 1873, for the exclusive use of the covenantees and all other persons claiming or to claim as aforesaid, make and afterwards maintain on the west side of the railway constructed on the pieces of parcels of land thereby assured and by the side of the said railway, a convenient road of twelve feet in width at the least in the direction shown on a plan drawn thereon, fit and suitable in all respects for the convenient passage thereover of agricultural waggons and carriages, and properly and securely fence and keep fenced the same road throughout the whole length thereof, and with good and substantial gates at such points as there should be level crossings or passages across the said railway of such width as to allow free passage for agricultural waggons and other carriages, and that the said railway company, their successors and assigns should and would at such costs and expenses, and for such use as aforesaid before the 29th Sept. 1873, make and construct, and afterwards maintain at a point marked on the said plan on the east or river side of the said railway, and on a level with and adjoining it a good and substantial wharf or depôt for the reception, lodgment, and storing of timber, poles, faggot wood, and other produce of Colvethick Wood, and eighty feet in length at the least along the line of the said railway, and thirty-five feet in width, and should and would also before the 29th Sept. 1873 make and construct, and afterwards maintain at a site marked on the said plan, a good and substantial approach road extending and leading from the foreshore of the said river to the said wharf or depôt, and not less than ten feet in width, and of an inclination not exceeding one foot perpendicular to five feet horizontal, and

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also should and would at such costs and expenses, and for such use as aforesaid, before the 29th Sept. 1873 make and afterwards maintain at two points marked on the said plan proper level crossings over or across the said railway fit and suitable in all respects for the passage thereover respectively of agricultural waggons and carriages as therein mentioned, and that the said covenantees and all other persons claiming or to claim as aforesaid, their agents, servants, and workmen, should be entitled at all times, but so as not to impede or obstruct the working of the said railway, exclusively to use the said crossings for all purposes of traffic, carriage, and accommodation between the said wharves or depôts, the said river and foreshore, and the said road and wood on the west side of the railway. And further, that the said railway company, their successors and assigns should and would at all times, on receiving twenty-four hours' previous notice, take and safely convey all timber, poles, and faggot wood and other produce of the said Colvethick Wood from the said road on the west side of the railway, or from such other place at the foot of the said wood by the side of the said railway, where the same respectively might be lying or stored across the railway, and deposit the same where required on the said wharves or depôts at certain points mentioned, free of all expense to the said covenantees and all other persons claiming or to claim as aforesaid. And in case the railway company, their successors or assigns, should at any time neglect or refuse for a period of six days next after the expiration of the said twenty-four hours' notice to convey and deposit the said timber and other produce as aforesaid of the said wood in manner aforesaid, it should be lawful for the said covenantees and all other persons claiming or to claim as aforesaid to convey and deposit or cause to be conveyed and deposited in manner aforesaid such timber and other produce, and to charge and pay all lawful charges for conveying the same, and the said railway company, their successors and assigns, would repay to the said covenantees, or all other persons claiming or to claim as aforesaid every sum of money expended for that purpose by them or him with interest at 5 per cent., and the covenantees should have power to quarry stone from the land and to construct wharves, and the company should make a siding or sidings at the expense of the covenantees for the accommodation of such wharves, and that all works executed by the said railway company under the indenture should be executed in a good and substantial manner, and the railway company, their successors and assigns, should and would at their own costs and expenses for ever maintain in good repair, order, and condition, the works already constructed, as also the several works thereby covenanted to be constructed by them.

By virtue of the Lostwithiel and Fowey Railway Act 1892 the property and undertaking of the company became vested in the defendants the Cornwall Minerals Railway Company, subject to the contracts, obligations, debts, and liabilities of the first-mentioned company.

The plaintiff alleged that the defendant companies had not fulfilled the covenants and obligations, but, on the contrary, though applied to by the plaintiff and his predecessors in title, had neglected and refused to fulfil the same, and in particular to make or maintain the said road referred to as of twelve feet width, or the gates or fences aforesaid, or the said approach road, or the said level crossings or sidings, or to maintain the accommodation works already constructed, or to do the other acts, and give the facilities stipulated for by the deed as aforesaid.

And the plaintiff claimed that the defendants might be decreed to forthwith fulfil and discharge the said covenants and obligations; and a declaration that the defendants were liable to make sidings to any wharves constructed by the plaintiff or his predecessors or successors in title, and to take, convey, and deposit the timber, poles, faggot wood, and other produce of the said wood, and that on default in this respect of the defendants, the plaintiff and his successors in title were and would be entitled to the rights and remedies specified in the deed; damages and costs.

The defendants, the Cornwall Minerals Railway Company, alleged that the covenants had been waived, or alternatively that the plaintiff was barred by the laches and acquiescence of himself and his predecessors from any claim for specific performance of the covenants, and if there was any liability it was in damages only, and if either of the defendants were liable under the Act and deed it was the Lostwithiel and Fowey Railway Company. And the defendants, the Cornwall Company, claimed the benefit of the Statute of Limitations. They also pleaded that the covenant for conveyance and deposit of the produce of the wood was a covenant for the performance of services, and submitted that it ought not to be ordered to be specifically performed.

The defendants the Lostwithiel and Fowey Railway Company submitted that they were under no liability to the plaintiff.

By the Lostwithiel and Fowey Railway Act 1892 (55 & 56 Vict. c. clxxxii.), s. 6, it was provided that, on and from the creation and issue to the Fowey Company of certain stock and the payment of a sum of money therein respectively mentioned the said undertaking, subject to the covenants, obligations, debts, and liabilities of the Fowey Company affecting the same should be vested in the Cornwall Minerals Railway Company.

Sect. 15 provided that with a view to the winding-up and dissolution of the Fowey Company the directors of that company should issue advertisements requiring all persons having any claim against the Fowey Company to send in particulars of their claims, and the directors of the Fowey Company should as soon as might be after the publication of such advertisements discharge all debts and liabilities properly owing by the Fowey Company, the particulars of which should have been sent in as aforesaid, or which were otherwise known to such directors.

Renshaw, Q.C. and *Medd* for the plaintiff.—The question is whether the court can order specific performance of the covenant set out in paragraph 5 of the statement of claim; we are certainly entitled to damages:

Ryan v. *Mutual Tontine Westminster Chambers Association*, 67 L. T. Rep. 820; (1893) 1 Ch. 11 and 128;

Wilson v. *Northampton and Banbury Junction Railway Company*, 30 L. T. Rep. 147; 9 Ch. App. 279.

In the case of *Earl of Jersey* v. *Great Western Railway Company* (*Times* Newspaper, April 24, 1893) Stirling, J. made an order enforcing a covenant of this nature. [KEKEWICH, J.—Can you have specific performance to maintain a road?] Yes.

Greene v. *West Cheshire Railway Company*, 25 L. T. Rep. 409; 13 Eq. 44;

Seton's Judgments and Orders (5th edit.) vol. 3, p. 1894;

Fry on Specific Performance (3rd edit.), pp. 46, 47.

Todd v. *Midland Great Western Railway of Ireland*, 9 L. R. (Ireland) 85.

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We submit that the defendant companies are bound to observe the covenants and to carry them out. [KEKEWICH, J.—If you get an order for specific performance you will probably have to enforce it by sequestration.]

Warmington, Q.C. and *Charles Macnaghten* for the Lostwithiel and Fowey Railway Company.—We submit that the plaintiff's remedy is against the Cornwall Minerals Railway Company, the transferees, and not against us. There may be a question between the companies, but that question should not be touched except so far as necessary for the purpose of this action.

Cripps, Q.C. and *Henry Wace*, for the Cornwall Minerals Railway Company, submitted that there was no continuing obligation which could be enforced.

KEKEWICH, J.—To prevent any misconception let me begin my judgment by saying that I do not intend to prejudice any question, if question there be, between the two railway companies respecting the obligations of one to the other. If the Lostwithiel Company has failed to perform those duties which, as between it and the Minerals Railway Company, it ought to have performed, then they must fight that out in some other proceedings, and if that results in costs, either in this action or any other action, those costs will have to be settled in accounts between the two companies. I do not wish to prejudice any question of that kind. The real question I have to consider is this, assuming this covenant to be still an existing obligation, by whom ought it to be performed in the first instance, that is to say, for the benefit of the plaintiff? There is certainly a great convenience in holding that when the undertaking of a railway is transferred from the original company to another company, subject to the contracts, obligations, debts, and liabilities, that is equivalent to imposing on the transferee company those contracts, obligations, debts, and liabilities so that they may be sued directly, and that case which has been cited to me of *Earl of Jersey* v. *The Great Western Railway Company* (*ubi sup.*) fully justifies me in saying that what is apparently good sense is also good law, and having the Briton Ferry Dock Transfer Act 1873, on which that case proceeded, before me, and concurring with the Lostwithiel and Fowey Act 1892, it seems to me that there is at least as strong ground for that conclusion here as there was there. I will only mention one coincidence, that is to say one set of facts, which substantially coincides in the two cases. The transferring company is ultimately to be dissolved, it is not only to cease to exist as a going concern, but it is to cease to exist altogether—the corporation is to come to an end. It cannot be that the Legislature contemplated actions against the corporation which has ceased to exist, nor can it be assumed that the Legislature intended that solemn covenants should give no remedy whatever by action, and yet, unless the action can be brought against the transferee company that result would seem to follow. I hold, therefore, that the true meaning of the 6th section of this Act of 1892 is that the transferee company, that is to say the minerals company, take the undertaking, and with it the obligation to perform the contracts, obligations, debts, and liabilities of the Lostwithiel Company, not only by way of indemnity to that company, but directly to the persons with whom these contracts have been entered into, in whose favour those obligations have been contracted and to whom those debts and liabilities are due. If that is the right construction, then the only other question is, Is this a continuing liability? and can it be specifically performed? Now, as regards the nature of the liability, I have it in a conveyance of the 31st Dec. 1873. It is set out in full in the statement of claim. It is an agreement of a familiar character providing that the railway company in consideration of the conveyance to them of the land shall make and construct and afterwards maintain certain accommodation works. They are not now in existence. Some of the accommodation works had been constructed at the time, some of them which had been so constructed have not been maintained, others have not been constructed, and therefore, of course, also have not been maintained. Why does not the obligation to construct and maintain still exist? The only answer is, that for some considerable time it has not been enforced. The complete answer to that is, that there has been no company really against which it could be enforced. These were accommodation works to be constructed and maintained in connection with a line of railway open for traffic; there never has been any line of railway open for traffic, and the occasion for which these accommodation works had to be constructed, and from which they had to be maintained has not yet arisen, the time has not arrived. That seems to me to be a sufficient answer quite apart from others. I am not sure that there are not others equally conclusive. Then the only remaining point is, can this be done in an action of this kind? I asked for some authority for it, because I know from my personal experience as counsel, and also some experience as a judge, that there is some little difficulty in applying the doctrine of specific performance to these matters, and there certainly are things here which the Court of Chancery would have hesitated to say ought to be specifically performed, and even now, as I pointed out to Mr. Renshaw, specific performance will probably have to be enforced by sequestration if the contract were not performed. But I do not see how a court could take upon itself to see that these works were constructed, still less to insist upon their maintenance. But I have been referred to what I may now regard as a work of authority, although so long as he sat on the bench he vehemently protested against it. I refer to the last edition of Sir Edward Fry's (a great judge I should call him) work on specific performance. Placitum 103, on p. 46, is well worth attention. "Whether the court will or will not interfere to enforce all such contracts (that is contracts of this kind, building and things of this kind) when definite, it appears to be settled that it will assume jurisdiction where we have the following three circumstances: First, that the work to be done is defined; secondly, that the plaintiff has a material interest in its execution which cannot adequately be compensated for by damages; and thirdly, that the defendants have by the contract obtained from the plaintiff possession of the land on which the work is to be done." Then he refers to cases of accommodation works. This seems to me to come strictly within that, although the company are to do these things on the land which they have obtained by conveyance from the predecessors in

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title of the plaintiff. It does not seem that there are any preceding cases that apply to such a case as this. There is one part of the covenant as to which I see very great difficulty, even on that footing. The covenant is, that the said railway company their successors and assigns shall and will at all times, on receiving twenty-four hours' previous notice, take and safely convey all timber poles and faggot wood and other produce of the said Colvethick Wood from the said road on the west of the railway, or from such other place at the foot of the said wood, by the side of the said railway, where the same respectively may be lying or stored across the railway "for deposit at the wharves of the plaintiff." There is great difficulty about this, and one of the defences takes the objection that that is a personal service. I am not aware of any case in which the court has gone so far as to decree specific performance of any contract of that kind, but I mean to venture so far in the present case on these grounds: In the first place it is only part of a larger contract which I have no doubt can be ordered to be specifically performed, and although it is a contract that certain works shall be done by one of the contracting parties now represented by the Minerals Railway Company, it is to be done for their convenience and on their land, and although Mr. Renshaw gave me an explanation it is obvious on the face of the contract when one reads it, that the object is to enable this to be done on their land which could not be done by the plaintiff or those claiming through him without either risk to him or a more serious business risk to the public traffic. It is a very special contract of service, and I think on those grounds may safely be ordered to be performed with the other provisions of the contract. I agree I do not see how that can possibly be enforced if the railway company are recalcitrant, otherwise than by a sequestration. I do not think it is possible for the court to undertake to appoint a receiver or officer to look after it and take it in his own control, but a sequestration would probably be an adequate remedy. That really disposes of the case, but there may be a good deal to be said on the 15th section of the Act of 1892. I have intentionally passed it by because Mr. Warmington appealed to me to decide nothing between the two companies except so far as was absolutely necessary for this purpose, but I shall not be rejecting that appeal in the slightest degree in adding that as it seems to me this obligation is not within sect. 15. In the first place, to take the last division first, it was certainly an obligation known to the Lostwithiel Company, being a covenant by themselves; and, secondly, the combination of the first, second, and third paragraphs of that section point directly to a debt in the ordinary sense of the word, at any rate to something which is capable of being reduced to money value, and does not point to anything like the present, which is an obligation to construct and maintain works. Beyond that I do not think that it is necessary to say anything. Therefore, there will be a declaration that the covenant ought to be specifically performed by the Cornwall Minerals Railway Company, and that will be adjudged accordingly in the ordinary way. Nothing will be said against the Lostwithiel Company at all. They will have no costs. They must fight that out hereafter with the Minerals Railway Company in whatever proceedings are necessary for the purpose, and the Minerals Railway Company will pay the costs of the plaintiff. I wish, as far as possible, to follow the case of *Greene* v. *West Cheshire Railway Company* (25 L. T. Rep. 409; 13 Eq. 44). I will therefore make a declaration that the covenants contained in the deed dated the 31st Dec. 1873 for the construction and maintenance of accommodation works and performance of other works, and which are set forth in the statement of claim are, having regard to the provisions of the Lostwithiel and Fowey Railway Act 1892, to be specifically performed and carried into execution by the defendants the Cornwall Minerals Company; and order and adjudge the same accordingly.

Renshaw, Q.C.—Will your Lordship go on to order the work to be done in detail, so as to construct the work and so on?

KEKEWICH, J.—No; the Minerals Company will pay the plaintiff's costs.

Solicitors: *R. W. Childs*, *Batten*, and *Harling*, for *William Pease*, Lostwithiel; *Hargrove* and *Co.*; *R. A. Read*.

June 22 and July 26.

(Before KEKEWICH, J.)

WELBY *v.* STILL. (*a*)

Practice—Mortgage—Leaseholds—Title—Solicitor—Costs—Scale fee—Taxation—General Order to the Solicitors' Remuneration Act 1881 (44 & 45 *Vict. c.* 44), *sched.* 1, *part* 1.

On the mortgage of leasehold property held under several leases by the original lessee, his solicitors furnished the mortgagee's solicitors with a short statement of dates and particulars of the leases, which were all in the same form, and a form of the covenants. The mortgagor's solicitors sent in a bill for the scale fee under the Solicitors' Remuneration Act, 1881, *on a mortgage transaction, but the taxing master held that the scale fee did not apply, and reduced the amount.*

On summons to review taxation:

Held, that no title had been deduced: all that was done was to send extracts from the leases; production was not deduction, and the mere production of a lease was not equivalent to deduction of title.

ON a mortgage of leasehold property held under several leases by Matthew Batten, the original lessee, Batten's solicitors furnished the mortgagee's solicitors with a short statement of dates and particulars of the leases, which were all in the same form, and a form of the covenants. Batten's solicitors sent in a bill under schedule 1, part 1, of the General Order made in pursuance of the Solicitors' Remuneration Act 1881, "for deducing title to . . . leasehold property, perusing mortgage, and completing." The taxing master reduced the amount on the ground that the scale fee did not apply, stating as his reason that no title had been deduced, and the solicitors were only entitled to fees for work actually done. The solicitors lodged objections to the taxation, and the taxing master disallowed this among other objections. The solicitors then took out a summons to review the taxation.

Renshaw, Q.C. and *Yate Lee* for the defendants, the solicitors.—The taxing master disallowed this

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item on the ground that the scale fee did not apply. We submit that the title of Batten was investigated by the defendants to the satisfaction of the mortgagee. The question is whether we are entitled to fees for work actually done or to the scale fee. [KEKEWICH, J.—You sent the dates and names in the leases, and a form of the covenants to the mortgagees' solicitors. Was that an abstract of title?] We sent in our bill under schedule 1, part 1 of the General Order to the Solicitors' Remuneration Act 1881, "Mortgagor's solicitor for deducing title," &c. In *Ex parte Mayor of London* (56 L. T. Rep. 13; 34 Ch. Div. 452) the scale fee was allowed for investigating title, though the investigation only consisted of reading one section of an Act of Parliament. We submit that the extracts from the leases and the form of covenants which we sent are equivalent to an abstract of title.

Upjohn, for the respondent, was not called on.

KEKEWICH, J.—In my judgment there has been no title deduced in this case. I have here the schedule which provides an *ad valorem* fee to be paid to the mortgagor's solicitor "for deducing title to freehold, copyhold, or leasehold property, perusing mortgage, and completing." The claim is for deducing title to leasehold property. Of course it is possible to go into the lessor's title, but that is not done here, nor is it usual to do so now. All that is deduced is the lessee's title to the leases stated either in the form of a copy or abstract of the lease, or particulars in a short form. There was no title deduced, no dealing with the leases, the mortgagor being the original lessee. I cannot think that it was intended by the Legislature so to misapply language that a solicitor could be said to deduce title when he deduces nothing, but simply hands over the lease under which his client holds the property. No doubt when you come to freehold property it is more difficult to apply this view, because you are bound to go back in the absence of stipulation for forty years, and directly you get to questions of heirship, and the title of the eldest son, you get some items going beyond the conveyance. Where you are dealing with leasehold property, I cannot understand that producing the lease is equivalent to deducing the title. Perhaps I have expressed the ground of my decision in the use of these two terms: one is production, the other deduction. The objection must be disallowed.

Solicitors for the defendants, *Trower, Freeling*, and *Parkin*.

Solicitor for the plaintiff, *Robert Chapman*.

Wednesday, July 25.

(Before KEKEWICH, J.)

Re TROUGHTON; RENT AND GENERAL COLLECTING AND ESTATE COMPANY *v.* TROUGHTON. (*a*)

Company—Shareholder—Debt—Legatee—Call on shares—Creditors—Fraudulent conveyance— 13 *Eliz. c.* 5.

Mrs. T., the widow and residuary legatee of R. T., the testator, in Nov. 1889 *took out letters of administration with the will annexed, and possessed herself of the personal property of the testator, but did not have* 500 *shares in the plaintiff company transferred into her name. On the* 10*th April* 1893 *the plaintiffs gave Mrs. T. notice of a call of* 1*l. per share. On the* 17*th April three deeds were executed, whereby Mrs. T. assigned the whole of the personal estate except the shares to L., upon consideration of covenants entered into by L. to indemnify Mrs. T. against all liabilities, and to provide her with board, lodging, and wearing apparel, and amenities suitable to her position, and on Mrs. T.'s death to provide her with a decent funeral.*

Held, that, as legal personal representative, Mrs. T. was bound to administer her husband's estate according to law, and that, as residuary legatee, she took only what was left after due administration, that is to say, after payment of the debts, including the calls that might be made on the shares; the deeds of assignment must be declared void as against the plaintiffs, and there must be the ordinary accounts in a creditor's action; the plaintiffs were entitled to be paid the call and interest, and the costs of the action, and the surplus of the estate would go according to the provisions of the deeds of assignment.

RICHARD ZOUCH SEBBON TROUGHTON was at the time of his death the holder of 500 shares of 5*l.* each in the plaintiff company, upon each of which shares 3*l.* 10*s.* was then uncalled. Troughton died in Oct. 1889, having by his will bequeathed all his property to his wife, the defendant Ann Adelaide Troughton, absolutely. The will contained no appointment of an executor, but in Nov. 1889 Mrs. Troughton was granted administration of her husband's estate with the will annexed. The testator left considerable property, consisting mainly of shares and debentures in various companies, household furniture, and leasehold houses. Mrs Troughton possessed herself of the whole of the personal estate and paid the whole of the testator's debts existing at his death, but the shares in the plaintiff company were not transferred into her name. On the 10th April 1893 the plaintiff company gave Mrs. Troughton notice of a call of 1*l.* per share on the 500 shares that had been held by the testator. The defendant Miss Alice Margaret Ann Lightly was an old friend of Mrs. Troughton, and Mrs. Troughton communicated to Miss Lightly the fact of the call having been made. On the 15th April the two ladies consulted a solicitor, and on the 17th April three deeds were executed by which Mrs. Troughton assigned the whole of her property, except the shares in the plaintiff company, to Miss Lightly, the consideration expressed being a covenant by Miss Lightly to indemnify Mrs. Troughton against all liabilities, and to provide her with board, lodging, wearing apparel, and "all the necessities and amenities of life" usual for a person occupying her social position, and also, after Mrs. Troughton's death, to "provide a decent funeral and decorously bury her body in the grave" belonging to her in the Kensington Cemetery at Hanwell. After the execution of these deeds Miss Lightly allowed Mrs. Troughton to remain in possession of one of the leasehold houses, No. 13, Douro-place, Kensington. Mrs. Troughton having failed to pay the call, the plaintiffs brought an action against her, as her deceased husband's legal personal representative,

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in the Queen's Bench Division, and recovered judgment for 500*l.* and costs. Mrs. Troughton having denuded herself of the means of paying the debt, the plaintiffs brought this action against her and Miss Lightly to have the deeds of assignment declared fraudulent and void under the statute 13 Eliz. c. 5, and the debt paid out of the testator's estate, and, if necessary, administration of the estate.

The defendants, in their answers to interrogatories, admitted that the object of the deeds of assignment was to defeat the plaintiffs' claim.

Marten, Q.C. and *O. L. Clare* for the plaintiffs.—The transaction is clearly dishonest, and ought to be set aside under the statute 13 Eliz. c. 5, as intended to defeat creditors. The consideration in the deeds was fictitious, and only intended to give colour to the transaction:

Twyne's case, 3 Rep. 80;
Bott v. *Smith*, 21 Beav. 511;
Re Maddever; Three Towns Banking Company v. *Maddever*, 52 L. T. Rep. 35; 27 Ch. Div. 523;
Re Ridler; Ridler v. *Ridler*, 48 L. T. Rep. 396; 22 Ch. Div. 74.

Cooper Willis, Q.C., *Warmington*, Q.C., and *Cosmo Rose-Innes* for the defendants.—The consideration was not fictitious; the transaction was honest, and the covenants were intended to be performed according to their terms:

Wood v. *Dixie*, 7 Q. B. 892;
Hale v. *Saloon Omnibus Company*, 4 Drew. 492;
Alton v. *Harrison*, 21 L. T. Rep. 282; 4 Ch. App. 622.

Then the plaintiffs' claim was not a debt due from the testator at the time of his death, and no claim having been made until 1893, that is, four years after the death, Mrs. Troughton, as administratrix, had, as she had a right to do, "assented to" the legacy to herself, so that the property had become her own, and subject to her absolute disposal free from the debts of the testator:

Jervis v. *Wolferstan*, 30 L. T. Rep. 452; 18 Eq. 18;
Whitaker v. *Kershaw*, 63 L. T. Rep. 203; 45 Ch. Div. 320;
Reese River Silver Mining Company v. *Atwell*, 20 L. T. Rep. 163; 7 Eq. 347;
Ex parte Games; Re Bamford, 12 Ch. Div. 324.

KEKEWICH, J.—The facts of the case, so far as they appear to me to be in the slightest degree material to the decision of the court, are few and simple. Mrs. Troughton was the legal personal representative and also residuary legatee of her deceased husband. As legal personal representative she was bound to administer the estate according to law. As residuary legatee she took what was left after due administration and no more; that is to say, the whole of the estate, less the debts, and in the word "debts" for the present purpose must be included liabilities which sooner or later might have to be discharged. Except in due course of administration she could not part with any part of the estate without making proper provision for those debts. At the time of the testator's death these shares were not fully paid up, but, as further calls had not been made upon them, that liability had not ripened into an actual debt. What would have happened if the shares had been transferred into Mrs. Troughton's name it is not necessary now to consider; in point of fact, she did not have them transferred into her name. Then the call was made. Knowing that the call was made, and that the 500*l.* had to be paid, she makes this arrangement with Miss Lightly, who also knew that the call had been made, and that the money had to be paid. As to the intention of the parties, there is no room for doubt. If any proof of that is necessary, it is contained in a letter of Mrs. Troughton's solicitor, who, when he took up his client's case, said she had no money to pay the call. I will not say that the defendants did not intend that the terms of the covenant should be performed; but the object of the arrangement was to get rid of the liability, and to enable Mrs. Troughton to say to her husband's creditor, "I have not got the wherewithal to pay." The argument on behalf of the defendants rests on this, that Mrs. Troughton is residuary legatee. No doubt that is so; but she is also legal personal representative, and I think it is impossible that a legal personal representative, notwithstanding that he is also residuary legatee, can in due course of administration hand over the whole estate to another person for his, the legatee's, own benefit, and then say to a creditor of the testator, "The estate is gone, and I have not wherewith to pay." True the estate is gone, but not according to law. In my opinion, the testator's estate in the hands of Mrs. Troughton still remains available for the payment of his debts. The proper judgment to pronounce is to declare that these deeds are void as against the plaintiffs, and to direct the ordinary accounts in a creditor's action. What is wanted will go in payment of the debts, and what is not wanted for that purpose will go according to the provisions of the deeds. The plaintiffs are entitled to be paid the full amount of their debt both principal and interest, together with the costs of this action.

Solicitors: *Miller*, *Wiggins*, and *Naylor*; *Rogers*, *Sons*, and *Russell*.

QUEEN'S BENCH DIVISION.

Saturday, Aug. 4.

(Before MATHEW and LAWRANCE, JJ.)

THE WYCOMBE UNION (apps.) v. PARSONS (resp.). (a)

Nuisance—Drainage—Sewer—Duty of local sanitary authority—Public Health Act 1875 (38 & 39 *Vict. c.* 55) *s.* 15.

Sect. 15 *of the Public Health Act* 1875 *provides that every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act.*

A complaint was preferred by an inspector of nuisances, against the respondent, under sect. 95 *of the Public Health Act* 1875 (38 & 39 *Vict. c.* 55), *for that he, as owner of certain premises, had suffered a nuisance to arise from certain water-closets being connected with a drain or sewer. In* 1863 *there was an open drain receiving surface water and sink drainage from houses near thereto, but not from water-closets. The sanitary authority subsequently covered up this drain, and laid down pipes therein for the purpose of receiving the aforesaid water and drainage, and made a rate upon the adjoining*

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

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properties to defray the expense. From time to time water-closets in the said houses were, unknown to the authority, connected with this drain, amongst them the respondent's. A nuisance was proved to exist, but not that it was caused by the respondent alone. No system of drainage was carried out in the district. It was admitted that the respondent was entitled to drain into the sewer, but it was contended that, if he thereby caused a nuisance, he could be ordered to disconnect his water-closets therefrom. The justices decided that the drain was a sewer vested in the sanitary authority, and that the respondent had not exceeded his rights, and that the authority were in default in allowing the sewer to become a nuisance.

Held, on appeal, that, under sect. 15 *of the Public Health Act* 1875 (38 & 39 *Vict. c.* 55), *the sanitary authority were bound to deal with the sewage themselves, and that they could not shirk the obligation and transfer it to those for whose protection they were called into existence as a local authority.*

CASE stated by justices. The facts sufficiently appear in the head-note and judgment.

Sect. 15 of the Public Health Act 1875 (38 & 39 Vict. c. 55) provides as follows:

Sect. 15. Every local authority shall keep in repair all sewers belonging to them, and shall cause to be made such sewers as may be necessary for effectually draining their district for the purposes of this Act.

Forbes, Q.C. (*Cunningham Glen* with him) for the appellants.—The sanitary authority were perfectly entitled by law to take these proceedings:

Brown v. *Bussell* and *Francombe* v. *Freeman*, 18 L. T. Rep. 19; L. Rep. 3 Q. B. 251;

Kirkheaton District Local Board v. *Ainley, Sons, and Co.*, 67 L. T. Rep. 209: (1892) 2 Q. B. 274.

They have rightly exercised their discretion, and it is submitted that the respondent should be ordered to abate the nuisance that has arisen.

Poland, Q.C. (*Edmondson* with him) for the respondent.—The local board alone are liable in respect of this nuisance, and are not entitled to take proceedings against the respondent to compel him to abate it. This is their sewer, and they are bound to keep it in order: Sects. 13, 15, and 17 of the Public Health Act 1875 (38 & 39 Vict. c. 55):

Molloy v. *Gray*, L. Rep. Ir. (1889-1890), 24 Q. B. & Ex. 259.

They cannot put the yoke upon the shoulders of a private person:

Ainley v. *The Kirkheaton Local Board*, 60 L. J. 734, Ch. Div.

Forbes, Q.C. in reply.

MATHEW, J.—I am clearly of opinion that this appeal must be dismissed. The material facts appear to be that the rural sanitary authority has created the sewer, which turns out to be insufficient for the purpose for which it was created; and it is said that instead of obeying the Act of Parliament or performing the duty imposed upon them by sect. 15 of the Public Health Act 1875, the brilliant idea seems to have occurred to somebody that they might be relieved of all the obligations under that section by calling on the unfortunate householders in their district to cease to use the system of drainage already provided, which system turns out to be insufficient. Accordingly, this particular person, who has for years, as is admitted, perfectly legitimately and lawfully been using the drain or sewer provided by the sanitary authority for the drainage from his house finds proceedings instituted against him requiring him to cut off communication with the drain. This is in name a proceeding for the prevention of a nuisance, but if the order which is asked for were made, the strong probability would be that a far greater nuisance would arise than the one that is now complained of. Now, is the Act of Parliament clear upon the subject? Was it meant that a local authority should have recourse to such a method of procedure in reference to a drain that existed? The proposition has only to be stated to condemn itself by its manifest absurdity. But Mr. Forbes is quite entitled to say it may be very absurd, it may be preposterous that, although the board has acknowledged that it has not performed its duty, and admits that a *mandamus* could issue against them to compel them to perform it, it should nevertheless be entitled to institute proceedings of this nature. He says that is the law. And he relies for his contention upon the case of *Brown* v. *Bussell* and *Francombe* v. *Freeman* (*ubi sup.*). It is sufficient for the purpose of this case to point out that there the nuisance was traced to the individual who was proceeded against; it was a different case to this. Lord Cockburn, C.J. begins his judgment by saying: "If the nuisance were caused by the joint contribution of different persons in such a way as that the contribution of each would not in itself cause a nuisance, though the aggregate amounted to a nuisance, I should hesitate to hold that it would be competent to the justices to make an order prohibiting each person who contributes. But I understand that in the first case the quantity of matter contributed by the appellant alone in itself creates a nuisance." The judgment proceeds upon that view of the case. In this case the justices have carefully abstained from any such finding. Indeed, they have found the contrary, that a contribution by this man himself would have been no nuisance whatever. That authority, therefore, does not apply. Then Mr. Forbes referred to a later authority. The case was one of a series of cases in a litigation which was carried on by the *Kirkheaton Local Board* v. *Ainley* (*ubi sup.*). He referred to the judgment of the Court of Appeal in that case and drew the distinction that there the application was in the circumstances, so far as the local board were concerned, very nearly the same as here. There the proceedings were taken under the Rivers Pollution Act, and Lord Bowen pointed out the view which was ultimately adopted by the court, that whatever might be the case under any other circumstances there the matter was purely discretionary, and therefore that it was wrong to make the order asked for, which was practically an injunction in that case. But that case is by no means a decision to the effect that a local board of health can shirk its obligation by the proceedings which have been taken in this case. The whole of the reasons point to a different conclusion. It was not necessary in that case to say it was obligatory, because, as the court pointed out, the particular order asked for was one which the County Court or the Court of Appeal, if it confirmed the decision of the County Court, could issue in its discretion. I decide this case upon

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the ground that sect. 15 of the Act clearly imposes an obligation upon the rural sanitary authority, and that they cannot by any such proceeding as this shirk that obligation, and transfer it to those for whose protection they are called into existence as a local authority. The appeal must be dismissed with costs.

Lawrance, J.—I am of the same opinion.

Appeal dismissed, and judgment for respondent.

Solicitors for the appellants, *Lovell, Son*, and *Co.*, agents for *Reynolds* and *Son*, High Wycombe.

Solicitors for the respondent, *Letts Brothers*, agents for *Parker* and *Wilkins*, Aylesbury and High Wycombe.

Tuesday, Aug. 7.

(Before Mathew and Kennedy, JJ.)

The Nottingham County Council *v.* The Manchester, Sheffield, and Lincolnshire Railway Company. (*a*)

Highway — Bridge and canal — Approaches— Repair of railway over bridge — Liability of canal company — Highways and Locomotives (Amendment) Act 1878 (41 *&* 42 *Vict. c.* 77), *s.* 13—*Local Government Act* 1888 (51 *&* 52 *Vict. c.* 41), *s.* 11.

By an Act of 11 *Geo.* 3, *for making a canal in the county of Derby, from Chesterfield to the river Trent, a canal company were authorised to make such canal, and it was provided that the company, their successors and assigns, should make and maintain, and keep in repair, certain bridges over such canal. At Clayworth, in the county of Nottingham, the canal crossed a public highway, which it was necessary to raise for a distance of* 180 *feet on either side of the canal for the purpose of making approaches to a bridge which the company had to construct over the canal at that point. The canal subsequently became vested in the defendant company, and the highway was made a main road within the Highways and Locomotives (Amendment) Act* 1878 (41 *&* 42 *Vict. c.* 77), *s.* 13, *and became vested in the plaintiffs. The question arose, who was legally liable to maintain and repair the raised approaches to the bridge.*

Held, that, as the bridge could not have been constructed without making the approaches, the latter were practically part of the bridge, and that the defendants' obligation as regards the approaches did not cease on the completion of the bridge, but that they were bound to keep them in repair.

Case stated by consent.

1. By an Act passed in the 11th year of His Majesty King George the Third, intituled "An Act for making a navigable cut or canal from Chesterfield, in the county of Derby, through or near Worksop and Retford to join the river Trent, at or near Stockwith, in the county of Nottingham," a company was incorporated by the name of "The Company of Proprietors of the Canal Navigation from Chesterfield to the river Trent."

2. By the said Act the company were authorised and empowered to make and complete the cut or canal above mentioned, and it was therein provided as follows:

The said company of proprietors, their successors and assigns, shall not make the said cut or canal or any trench or watercourse or any part thereof in or across any common highway, public bridleway, or footpath, until such time as they shall at their own proper charge have made and perfected such bridge or bridges over or convenient passages through or arch or arches under the said places where the said cut, canal, trench, or watercourse respectively shall be intended to be made for such roadway or path, and of such dimensions and in such manner as the said commissioners [meaning the commissioners appointed under the Act to settle differences] or any five or more of them shall adjudge proper, and all such bridges, arches, fords, and passages so to be made shall from time to time be supported, maintained, and kept in sufficient repair by the said company of proprietors, their successors and assigns.

3. The said cut or canal was duly made and completed. It passed through the village of Clayworth, in the county of Nottingham, and at the southern end of the village it crossed a public highway leading from Retford to Gringley-on-the-Hill. At the point where it crossed the said highway it was on a somewhat higher level than the highway, and, in order to carry the highway over it, it was necessary to raise the level of the highway for a distance of about 180 feet on the south side of the canal, and about 174 feet on the north side of the canal (as appearing in the plan attached hereto), so as to make approaches to the arch constructed over the canal. Without such raised arches the highway could not have been carried over the canal. A plan showing the said bridge and the approaches thereto is annexed, and is to be deemed part of this case.

4. The said canal is now vested in the defendants, who for the purpose of this case are admitted to have the same duties and obligations with respect to the said bridge and the approaches thereto as the original company of proprietors.

5. The highway from Retford to Gringley-on-the-Hill is now a main road within the meaning of the Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77, s. 13), and is now vested in the plaintiffs, upon whom the duty of maintaining and repairing it was imposed by the Local Government (England and Wales) Act 1888 (51 & 52 Vict. c. 41, s. 11).

6. Differences have arisen between the plaintiffs and the defendants with reference to the repair of the raised approaches to the said bridge which the plaintiffs allege are now out of repair.

7. It is contended by the plaintiffs that the original company of proprietors could not have made and perfected the said bridge by merely building an arch over the canal without making provision for the raising of the highway so as to carry it over the canal, and that they were bound to repair the said approaches as part of the bridges made and perfected by them, and that under the provision of the Act above set out, the defendants, as the successors or assigns of the company, are under the same liability. It is further contended by the plaintiffs that the defendants are by common law bound to repair the highway for a distance of 300 feet from each end of the said bridge.

8. The defendants admit that under the said Act they are liable to maintain the fabric of the said bridge, namely, the portion coloured pink on

(*a*) Reported by T. R. Bridgwater, Esq., Barrister-at-Law.

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the annexed plan, and so much of the highway as is comprised therein; but they contend that they are not liable to maintain or repair any other part of the said raised approaches.

9. The question for the opinion of the court is, whether, under the circumstances aforesaid, the defendants are legally liable to maintain and repair the said raised approaches.

Finlay, Q.C. (*Macmorran* with him) for the plaintiffs, contended that the defendants were legally liable to repair and maintain the said approaches. The approaches to the bridge were a necessary part of it. The original canal company constructed the bridge and its raised approaches, and they or their successors were bound to keep them in repair:

Reg. v. *The Mayor of Lincoln*, 8 A. & E. 65;
The Abbot of Coombe's case, 43 Assize 275 B. pl. 37 (referred to at p. 68 in above case).

Smyly, Q.C. (*C. A. Russell* and *Fearnley Owen* with him) for the defendants.—The word "bridge" means the bridge only, and does not include the approaches to it. The following cases were referred to:

London and North-Western Railway Company v. *The Surveyor for the Township of Skerton*, 10 L. T. Rep. 648; 5 B. & S. 559;
North Staffordshire Railway Company v. *Dale and others*, 8 Ell. & Bl. 836;
Lancashire and Yorkshire Railway Company v. *The Mayor, &c., of the Borough of Bury*, 61 L. T. Rep. 417; 14 App. Cas. 417.

MATHEW, J.—I am of opinion that the obligation lies upon the Manchester, Sheffield, and Lincolnshire Railway Company to repair the approaches. They took upon themselves the burden of the company on whom the liability was originally cast. Under the Act of the company, 11 Geo. 3, the company were bound not to make any cut or waterworks "in or across any common highway, public bridle way, or footpath, until such time as they shall, at their own proper charge, have made and perfected such bridge or bridges over, or convenient passages through, or arch or arches under, the said places where the said cut, canal, trench, or watercourse respectively shall be intended to be made for such roadway or path, and of such dimensions and in such manner as the said commissioners or any five or more of them shall judge proper, and all such bridges, arches, fords, and passages so to be made shall from time to time be supported, maintained, and kept in sufficient repair by the company of proprietors, their successors and assigns." Now the particular bridge which was made over the canal was on a higher level than the highway leading up to the spot in question, and so it became necessary to carry the bridge over the canal, and to do that, and for the convenient passage, it was necessary to provide approaches of a higher level than the former, of 180 feet on the south side of the canal and 174 feet on the north side. That was the bridge perfected and made under the provisions of the Act of Parliament. Now upon whom was the obligation cast of repairing those approaches? Mr. Smyly was obliged to admit that the bridge could not have been constructed within the meaning of the Act without the construction of the approaches. Of course that could not have been done. To have put a bridge over the canal and left a roadway many feet below so that nobody could get up to the bridge except by climbing the stonework or the brickwork, as the case may be, would have been utterly absurd. Then it was said that, although it was necessary to make the approaches in the first instance, yet the obligation of doing the repairs has ceased, that the bridge itself continued to be repairable by the canal company, but the approaches were cast back upon the public authority on whom the obligation, under the common law or under the statute, would rest. Mr. Smyly has not produced any authority in support of that proposition. The case referred to is an old case, of the time of Edward 3, and was a case of prescriptive obligation to repair the bridge, and it was held to include the approaches. But, as Mr. Smyly properly said, that case was no authority with regard to the construction of modern Acts of Parliament. There are intermediate cases from which it appears that the obligation to repair the approaches is not confined to a prescriptive obligation only, because in the case of *Rex* v. *The Inhabitants of West Riding of York* (7 East, 588) it was held that the approaches were included in the bridge. Then our attention was called to the case of *The London and North-Western Railway* v. *The Surveyor for the Township of Skerton* (*ubi sup.*), and there it was held, under the Railways Clauses Consolidation Act, that the approaches to a passage under the railway were not included in the word "approaches" applicable to a bridge over the railway, and, therefore, there was no provision in the Act that the railway company should, as in the former case, bear the obligation of repairing the approaches. The learned judges in that case, with deference to the judges in Ireland, came to the conclusion that they must act on that view of the statute, and the case was remitted on the ground that there was not the obligation cast clearly on the railway company in the case of a passage under the railway that there was in the case of a passage over the railway. That is no authority at the same time for Mr. Smyly, because that was an obligation, it was agreed, which, under the Railways Clauses Act, in clear terms was cast on the railway company. That is shown by a much later statute, the statute in question. But I have no doubt, as was pointed out in the course of the argument, that what was meant to be constructed here was a convenient passage over the canal. To construct that convenient passage it became necessary to have a bridge and approaches, and when the bridge and approaches were once constructed the obligation to keep them in repair was cast on the canal company, and that has passed on to the company in question. Therefore there must be judgment for the plaintiffs with costs.

KENNEDY, J.—I agree.

Judgment for the plaintiffs with costs.

Solicitors: for the plaintiffs, *Hind* and *Robinson*, agents for *Wells* and *Hind*, Nottingham; for the defendants, *Cunliffes* and *Davenport*, agents for *R. Lingard-Monk*, Manchester.

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Tuesday, Aug. 7.

(Before Mathew and Kennedy, JJ.)

The Vestry of the Parish of St. Martin-in-the-Fields v. Bird. (a)

Drainage—Sewer—Arcade of shops and houses having a common drain—Liability of vestry to maintain and repair—"Premises within the same curtilage"—Metropolis Local Management Act 1855 (18 & 19 *Vict. c.* 120, *ss.* 68, 69, *and* 250).

The plaintiffs were the vestry of the parish of St. Martin-in-the-Fields and the defendant was the owner of the Lowther Arcade, which consisted of a passage arched over by a common roof, with houses and shops on either side separately occupied and separately rated. At either end of the passage, over which there was no public right of way, were gates closed at night. The only access to the houses and shops was by means of the passage. The houses and shops drained into a common drain, which ran along under the passage into the sewer in the street at one end.

Held, that the drain was a "sewer," in respect of which the vestry was liable for the maintenance and repair within sect. 69 *of* 18 & 19 *Vict. c.* 120, *and that the arcade was not a "building" or "premises within the same curtilage" within the meaning of sect.* 250 *of the Act.*

Case stated raising the question whether the owner of the Lowther Arcade, in the Strand, or the vestry was liable under the Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120) to put in order the drains.

Beven for the plaintiffs.—The whole building constitutes "premises," and is within the "same curtilage" within the meaning of sect. 250. It is "one building," because it is arched over by a common roof and shut in by common gates, the property of one person, and used for one purpose as a bazaar. If it is not "one building" it is within the definition of "premises within the same curtilage." The word "premises" is a much wider word than the word "building," and has been defined by Turner, L.J. in the case of *Lethbridge* v. *Lethbridge* (at p. 730, in 6 L. T. Rep. 727; 8 Jur. N. S. 856), where he says: "The word 'premises' as used in this clause must, I think, be taken to mean premises in immediate connection with the mansion, and without the occupation of which the mansion could not be conveniently occupied and enjoyed. In the case of *Read* v. *Read* (W. N. 1866, p. 386) the Master of the Rolls says the word 'premises' is as nearly as possible synonymous with appurtenances. In Shepherd's Touchstone it is said that a grant of a messuage with the appurtenances passes the 'curtilage.'" The word "curtilage" has been defined in the case of *Marson* v. *The London, Chatham, and Dover Railway Company* (18 L. T. Rep. 317; L. Rep. 6 Eq. 101). In the present case the use to which the passage is put brings it within such a definition. The drainage here is the private property of the owner, it runs under the passage which he keeps within his own hands and shuts off from the public; those who pass along it only do so by the owner's licence.

Macmorran for the defendant.—When a drain receives the drainage of two or more houses it is *primâ facie* a sewer without regard to whether it is constructed by a local authority or by a private person: *Travis* v. *Uttley* (70 L. T. Rep. 242; (1894) 1 Q. B. p. 233), where the court held that a drain passing under and receiving the drainage of three houses was a sewer. In the present case this drain is a sewer within the meaning of the Act. In this Arcade there are twenty-five houses let to eighteen different occupiers, some of whom live on the premises. Each of these houses is distinct and separate, and has a curtilage of its own. The fact of the Arcade being the property of a common owner is only an accident, and does not affect the question. He also referred to *Ferrand* v. *The Hallas Land and Building Company* (69 L. T. Rep. 8; (1893) 2 Q. B. 135). These are distinct houses and shops, separately occupied and separately rated, and they are separately drained into a common drain. It is submitted they are not within the same curtilage within the meaning of the Act.

Beven in reply.

Mathew, J.—I think that the drainage mentioned here is vested under the Metropolis Management Act in the local authority, and that the owner cannot, therefore, be called upon to repair. This is a sewer unless it be a drain, and it is not a drain, within the meaning of the Act, unless it be "used for the drainage of one building only or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed, and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board." Now it is admitted here that there was no order of any vestry or district board, and the question is, whether this is a drain within the definition in sect. 250 of the Metropolis Local Management Act. I cannot bring myself to think that this is anything but a row of shops which happens to be occupied in a peculiar way, namely, with entrance gates at each end, for the purpose of securing privacy and safety. But that does not prevent the tenements within the gates at each end being separate tenements, as they unquestionably are, and they are separately assessed as such. Then does it cease to be a row of houses on each side because there is a covering to the passage through the Arcade? I cannot see why it should. The covering inside is convenient no doubt for those who have to repair to the shops in the Arcade. Take the case of Chester. There the shops are under an Arcade. But can anybody say that they are not separate shops? The shelter afforded by the roof cannot make any difference. Then are they "premises within the same curtilage"? That is the other description. Each of these tenements stands by itself, is accepted as a dwelling-house, is used as such, and has its own curtilage. It would be an extravagant and extraordinary use of the term "curtilage" to hold, because there are gates at each end and a covering, that there is one curtilage to the whole of this area. I am of opinion, therefore, that the owner is exempt from this liability, and that it falls on the vestry.

Kennedy, J.—I entirely agree.

Judgment for the defendant.

(a) Reported by T. R. Bridgwater, Esq., Barrister-at-Law.

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Solicitor for the plaintiffs, *Fladgates.*

Solicitors for the defendant, *Shepheards* and *Bird.*

Tuesday, Aug. 7.

(Before Mathew and Kennedy, JJ.)

Frodingham Steel and Iron Company v. Bowser. (a)

Surveyor of highways—Debts contracted on behalf of parish by predecessor—Liability—Highway Act 1835 (5 *&* 6 *Will.* 4, *c.* 50), *s.* 6—*Highway Rate Assessment and Expenditure Act* 1882 (45 *&* 46 *Vict. c.* 27), *s.* 5.

The plaintiffs brought an action for the price of certain slag sold and delivered to one W. H., then a surveyor of highways, for the purpose of repairing roads. W. H. remained surveyor until his death, at which time he had in his hands moneys of the parish more than sufficient to defray the debt, but his estate was found to be insolvent. The defendant was appointed surveyor in succession to W. H., and the plaintiffs then sought to recover the debt from him.

Held, that no action would lie.

Special case.

The action was for 95*l.* 8*s.*, the price of goods sold and delivered for the use of the parish of Sibsey, of which parish the defendant is the surveyor of highways.

The goods were ordered from the plaintiffs by one William Harrison, the then surveyor of highways of the parish, for the purpose of mending the roads.

Travers Humphreys, for the plaintiffs, referred to the Highway Act 1835 (5 & 6 Will. 4, c. 50), ss. 6 and 46, the latter of which authorises the surveyor of highways to contract on behalf of the parish.

Macmorran, contra, referred to 11 & 12 Vict. c. 91, as to liability of overseers for the debts of their predecessors. The liability of a parish official for the debts of his predecessor only exists where created by statute: see the Highway Rate Assessment and Expenditure Act 1882 (45 & 46 Vict. c. 27), s. 5. A highway rate for a retrospective debt would be bad, and anyone could appeal against it, therefore the ratepayers, through the parish cannot be compelled to pay this debt; and the surveyor of highways cannot be compelled to pay it personally out of his own pocket.

Mathew, J.—It seems to me that this action will not lie. It is an action brought against the successor of a surveyor of highways in respect of liabilities contracted by his predecessor. The scheme of the Highway Act (5 & 6 Will. 4, c. 50) is clear enough, and it is hopeless to apply the analogy in law of master and servant to this particular case. The surveyor is empowered by the Act to make contracts, and the materials which are purchased by him vest in him in order that he may perform his public duty of repairing the highways. In order to furnish him with funds for that purpose he is also empowered to make a rate, and persons dealing with him are entitled to ask for ready money for the materials supplied if they like. In this case they did not do that; they trusted the surveyor; and it may be that people who trust a surveyor of highways are sometimes in the position, as other tradesmen are, of having a debtor who does not pay. In this particular case, the former surveyor of highways comes under the category of a defaulting debtor. He did not pay the amount of the plaintiff's bill. Then he died insolvent, and there were no assets that he could hand over to his successor. Nevertheless, instead of bringing an action under these circumstances against his executors, an action is brought against his successor in the office of surveyor of highways, and it is sought to make him personally liable. The only ground on which his liability is put is, that he is empowered by sect. 43 of the Act to sue the executors of his predecessor for any money in the hands of the executors that ought to be handed over. Such an action in this case would be futile. How can it possibly be made out that the defendant here is liable? There is nothing whatever in the Highways Act that makes him liable. The cases in which he would be entitled to reimburse his predecessor's estate are mentioned in sect. 5 of the Highway Rate Assessment and Expenditure Act 1882 (45 & 46 Vict. c. 27), which provides that "if the rates levied by a surveyor of highways, together with any other sums received by him during his term of office, prove insufficient to meet the whole of the expenditure lawfully incurred by him, and such deficiency has not arisen from any neglect or default on his part, his successor in office may reimburse to him the amount of such deficiency." That is the only section upon the subject, and it is really the only grave point insisted on by the plaintiffs in this case. I am not aware of any liability existing in such a case as the present, and, therefore, I am of opinion that the action will not lie.

Kennedy, J.—I entirely agree. There is no statutory authority for such an action, and, in the absence of statutory authority, there clearly can be no right of action.

Judgment for the defendant with costs.

Solicitors for the plaintiffs, *Clarkson, Greenwells,* and *Co.*, agents for *John Barker*, Great Grimsby.

Solicitors for the defendant, *Hughes* and *Sons*, agents for *Walker, Sons,* and *Rainey*, Spilsby.

(a) Reported by T. R. Bridgwater, Esq., Barrister-at-Law.

Wednesday, Aug. 8.

(Before Mathew and Kennedy, JJ.)

Re Bedfordshire County Council and Bedford Urban Sanitary Authority. (a)

Highway — Urban authority—County Council—Repair and maintenance of main roads—Costs of—Dispute as to contribution—Mode of settling disputes—Highways and Locomotives (Amendment) Act 1878 (41 *&* 42 *Vict. c.* 77), *ss.* 13 *and* 15 *—Local Government Act* 1888 (51 *&* 52 *Vict. c.* 41), *s.* 11, *sub-sects.* 1, 2, 3, *and* 4; *s.* 35, *sub-sects.* 2, 3, *and* 4.

By sect. 11, *sub-sect.* 2 *of the Local Government Act* 1888 (51 *&* 52 *Vict. c.* 41), *it is provided that an urban authority may, within a certain period, claim to retain the powers and duties of maintaining and repairing any main road within their district, as if such road were an ordinary road vested in them, and that the county council shall make to such authority an annual payment*

(a) Reported by T. R. Bridgwater, Esq., Barrister-at-Law.

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towards the costs of the maintenance and repair of such road, and by sub-sect. 3 it is provided that the amount of such annual payment shall be such sum as may be agreed upon, or in the absence of agreement may be determined by arbitration of the Local Government Board. A dispute arose between the town council and county council as to what sum the latter should contribute, the town council claiming to be entitled to recover from the county council the entire amount expended. No agreement was come to between the parties. On a special case being stated for the opinion of the court:

Held, that the court had no jurisdiction and was not the proper tribunal to settle the amount to be paid, but that by sub-sect. 3 of sect. 11 the Local Government Board was the machinery created to determine such a question.

Case stated.

1. The mayor, aldermen, and burgesses of the borough of Bedford acting by the council are the urban sanitary authority of the borough for the purposes of and within the meaning of the Public Health Act 1875. The borough had, at the time of the passing of the Local Government Act 1888, a separate court of quarter sessions, and it had according to the census of 1881 a population of upwards of 10,000.

2. By the Highways and Locomotives (Amendment) Act 1878 (41 & 42 Vict. c. 77) it is enacted as follows:

Sect. 13. For the purpose of this Act and subject to its provisions, any road which has within the period between the 31st Dec. 1870, and the date of the passing of this Act, ceased to be a turnpike road, and any road which, being at the time of the passing of this Act a turnpike road, may afterwards cease to be such, shall be deemed to be a main road; and one-half of the expenses incurred from and after the 29th Sept. 1878 by the highway authority in the maintenance of such road shall, as to every part thereof which is within the limits of any highway area, be paid to the highway authority of such area by the county authority of the county in which such road is situate out of the county rate, on the certificate of the surveyor of the county authority, or of such other person or persons as the county authority may appoint, to the effect that such road has been maintained to his or their satisfaction.

Sect. 15. Where it appears to any highway authority that any highway within their district ought to become a main road by reason of its being a medium of communication between great towns, or a thoroughfare to a railway station or otherwise, such highway authority may apply to the county authority for an order declaring such road, as to such parts as aforesaid, to be a main road; and the county authority, if of opinion that there is a probable cause for the application, shall cause the road to be inspected, and, if satisfied that it ought to be a main road, shall make an order accordingly.

3. By the Local Government Act, 1888 (51 & 52 Vict. c. 41), sect. 11, it is enacted as follows:

(1.) Every road in a county which is for the time being a main road within the meaning of the Highways and Locomotive (Amendment) Act 1878, inclusive of every bridge carrying such road, if repairable by the highway authority, shall, after the appointed day, be wholly maintained and repaired by the council of the county in which the road is situate, and such council, for the purpose of the maintenance, repair, improvement, and enlargement of, and other dealing with such road, shall have the same powers and be subject to the same duties as a highway board, and may further exercise any powers vested in the council for the purpose of the maintenance and repair of bridges, and the enactments relating to highways and bridges shall apply accordingly: and the county council shall have the same powers as a highway board for preventing and removing obstructions and for asserting the right of the public to the use and enjoyment of the roadside wastes; and the execution of this section shall be a general county purpose and the costs thereof shall be charged to the general county account.

(2.) Provided that any urban authority may, within twelve months after the appointed day, or in case of a road in the district of such authority becoming a main road at any subsequent date, then within twelve months after that date, claim to retain the powers and duties of maintaining and repairing a main road within the district of such authority, and thereupon they shall be entitled to retain the same, and for the purpose of the maintenance, repair, improvement and enlargement of, and other dealing with such road, shall have the same powers, and be subject to the same duties as if such road were an ordinary road vested in them, and the council shall make to such authority an annual payment towards the cost of the maintenance and repair, and reasonable improvement connected with the maintenance and repair of such road.

(3.) The amount of such payment shall be such annual sum as may be from time to time agreed upon, or in the absence of agreement may be determined by arbitration of the Local Government Board.

(4.) The county council and any district council may from time to time contract for the undertaking by the district council of the maintenance, repair, improvement, and enlargement of, and other dealing with any main road, and if the county council so require the district council shall undertake the same, and such undertaking shall be in consideration of such annual payment by the county council for the costs of the undertaking as may from time to time be agreed upon, or, in case of difference, be determined by arbitration of the Local Government Board; and for the purposes of such undertaking the district council shall have the same powers and be subject to the same duties and liabilities as if the road were an ordinary road vested in them.

4. The Local Government Act 1888 further provides by sect. 35 as follows:

In the case of a quarter sessions borough not being one of the boroughs named in the third schedule to this Act but containing according to the census of 1881 a population of 10,000 or upwards the following provisions shall on and after the appointed day apply:

(2.) Where such borough is at the passing of this Act exempt in whole or in part from contributing towards costs incurred for any purpose for which the quarter sessions of the county in which the borough is situate are authorised to incur cost the parishes in the borough shall not, save as in this Act expressly mentioned, be assessed by the county council to county contributions in respect of costs incurred for any such purpose nor in the case of a partial exemption be so assessed for any larger sum than such as will give effect to that exemption, but this exemption shall not extend to any costs incurred for the purposes of any powers, duties, or liabilities of the justices of the borough which will by virtue of this Act be exercised or discharged by the county council nor to any costs of or incidental to the assizes of the county.

(3.) Notwithstanding the last enactment the borough shall for the purposes of the provisions of the Highways and Locomotives (Amendment) Act 1878 respecting main roads form part of the county and the costs of maintaining, repairing, improving, enlarging, or otherwise dealing with any main road in the borough shall be paid out of the county fund, and the payment of the costs incurred in the execution of the provisions of this Act with respect to main roads shall be a general county purpose, for which the parishes of the borough may be assessed to county contributions.

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(4.) Provided that (*b*) the council of the borough shall have power as an urban authority to claim in accordance with this Act to retain the powers and duties of maintaining and repairing any main road in the borough.

5. On the 4th Oct. 1889 (within twelve months after the day appointed under the Local Government Act 1888) the town council of the borough of Bedford resolved, in pursuance of the powers conferred by sect. 11 (2) and sect. 35 (4) of the last-mentioned Act, to retain the powers and duties of maintaining and repairing the main roads within the borough. Such main roads include some of the principal streets of the borough, and some considerable portion of the traffic to which they are subject is of a purely local character.

6. Until the expiration of the year ending the 6th Dec. 1891 the annual amount to be paid by the Bedfordshire County Council towards the costs of the maintenance and repair and reasonable improvement connected with the maintenance and repair of the main roads was fixed by agreement between the Bedfordshire County Council and the town council of the borough.

7. In the month of Dec. 1892 the town council made a claim upon the county council in respect of the costs alleged to have been incurred in respect of the maintenance and repair and reasonable improvement connected with the maintenance and repair of the main roads during the year ending the 6th Dec. 1892. The county council and the town council have failed to agree as to the amount to be paid by the county council in respect of such claim.

8. The town council contend that, under sect. 11 (2) and sect. 35 (3) of the Local Government Act 1888, they are entitled to receive from the county council the entire amount of the costs expended in the maintenance and repair and reasonable improvement connected with the maintenance and repair of the main roads, subject to the county council being able to dispute any item which is improper or unreasonable.

9. The county council contend that they are not necessarily liable to pay to the town council the whole amount expended by them, but only such an amount towards such costs as should be agreed upon between the county council and the town council, or as should in default of agreement be determined by the Local Government Board under section 11 (3) of the said last-mentioned Act, having regard to the circumstances of each particular road, *e.g.*, the origin, character, and extent of the traffic thereon, and the class of repair and maintenance rendered necessary by reason of such traffic.

The questions submitted for the decision of the court are: (1) Whether upon the true construction of the sections hereinbefore set out the contention of the town council or that of the county council is correct. (2) If that of the county council is correct, whether the amount of the payment to be made by the county council is in their discretion subject only to the arbitration of the Local Government Board in case of dispute, or upon what principle the amount should be determined.

Macmorran for the Urban Authority.

Joseph Walton, Q.C. and *C. M. Atkinson* for the Bedfordshire County Council.

Mathew, J.—This is a point we cannot deal with as we are not the proper tribunal to settle the amount to be paid. The question arises in respect of certain main roads, the control of which is vested in the Town Council of Bedford, which has made a claim against the county council in respect of the maintenance and repair of these roads. An attempt was made to settle the question by agreement, but no agreement was come to. [His Lordship stated the contentions.] Turning to the sections of the Local Government Act, we see that by sub-sect. 2 of sect. 11, it is provided that the urban authority may, within a certain period, claim to retain the powers and duties of maintaining and repairing a main road within their district, and for the purpose of so maintaining, repairing, improving, and enlarging and otherwise dealing with such road, shall have the same powers and duties as if such road were an ordinary road vested in them, "and the council shall make to such authority an annual payment towards the cost of the maintenance and repair, and reasonable improvement connected with the maintenance and repair of such road." The whole amount claimed will ordinarily not be contributed by the county council, the greater burden being borne by the urban authority, but that by no means includes a case where it would be right that the whole contribution should be made by the county council, but whatever the nature of the case may be, the next sub-section (sub-sect. 3) provides how the matter is to be dealt with—that is, by arbitration. It is therein provided that "the amount of such payment shall be such annual sum as may be from time to time agreed upon, or, in the absence of agreement, may be determined by arbitration of the Local Government Board." The Local Government Board is, therefore, the machinery created by Act of Parliament to determine this kind of question. We are told that there is some dissatisfaction in the way in which such arbitration proceeds. Whether that be so or not we can only say that the contention of the county council is right as against the local board. In the events that have arisen, the only mode is to proceed by arbitration.

Kennedy, J.—I entirely agree, and for the same reasons. The scheme of the Act is to let the Local Government Board decide what is the annual amount payable under the circumstances by the county council to the urban authority.

Judgment for the County Council.

Solicitors: for the County Council, *F. Venn* and *Co.*, agents for *Marks*, Clerk of the County Council, Bedford; for the Bedford Urban Sanitary Authority, *Ullithorne, Currey*, and *Currey*, agents for *T. S. Porter*, Bedford.

QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

May 16 *and Aug.* 11.

(Before Williams, J.)

Re Holland; *Ex parte* Parker *v.* Young. (*a*)

Bankruptcy—Proof—Interest on debts—Interest over five per cent.—Bankruptcy Act 1890 (53 & 54 *Vict. c.* 71), *s.* 23).

By the Bankruptcy Act 1890, *s.* 23 "*where a debt has been proved upon a debtor's estate under the principal Act and such debt includes interest, or*

(*a*) Reported by Walter B. Yates, Esq., Barrister-at-Law.

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any pecuniary consideration in lieu of interest, such interest or consideration shall for the purposes of dividend be calculated at a rate not exceeding five per cent. per annum, without prejudice to the right of a creditor to receive out of the estate any higher rate of interest to which he may be entitled, after all the debts proved in the estate have been paid in full."

Where a creditor had advanced 600l. to the bankrupt upon two promissory notes for 400l. and 600l. at three and six months respectively, whereof the first had been paid before the date of the receiving order,

Held, that the above section did not disentitle the creditor to appropriate the first payment to interest, and to prove for the sum due upon the second note as for principal unpaid.

APPEAL by Parker, a creditor of the bankrupt Holland, against the reduction of his proof by the trustee in the bankruptcy.

Upon the 17th Oct. 1892 Parker discounted a bill for the bankrupt of the amount of 1000l. giving 600l. in cash.

The bankrupt gave in return two promissory notes for 400l. and 600l. due at three and six months respectively. The first note (for 400l.) was met on the 10th Feb. 1893. A receiving order was made against the bankrupt upon the 6th March. The second note matured upon the 17th April, upon which event Parker tendered a proof for 600l.

The trustee refused to admit the proof for more than 200l. with interest at 5 per cent., from the date of the receiving order, claiming, under sect. 23 of the Bankruptcy Act 1890, to appropriate the whole of the 400l. paid off in February to payment of the principal sum of 600l. From this decision Parker appealed.

Montague Shearman, for the appellant.—The law is that where a debtor does not appropriate his payments either to interest or principal, the creditor is entitled to appropriate the prior payments to interest, the later to principal. This principle is to be found in the Roman Law (Cod. Lib. viii., tit. 53, l. 1, cited in Tudor's Cases on Mercantile Law, 3rd edit., at p. 31). The creditor here is entitled to appropriate all the 400l. paid to interest. He is, however, willing to appropriate 240l. of it to principal, and claims to prove for 360l. balance of principal unpaid. *Re Fox and Jacobs; Ex parte the Discount Banking Company* (69 L. T. Rep. 657; 10 Mor. 295) is analogous to the present case.

Whinney for the respondent.—Under sect. 23 of the Bankruptcy Act 1890 the court will not allow a creditor to receive more than his original advance and 5 per cent. interest thereon from the date when such advance was made. [WILLIAMS, J.—If that were so, in the case of a loan at 60 per cent. upon which interest had been duly paid for any length of time, the creditor would have to refund something to the trustee.] 400l. out of this 1000l. was in fact a bonus given for the advance, such as the creditor is dissentitled from recovering by the wording of sect. 23. The trustee is, however, willing to appropriate 300l. of the 400l. to principal, and to admit a proof for 300l. with interest at 5 per cent. from the date of the receiving order.

Montague Shearman in reply.—It is true that the 400l. was a bonus for the advance, but the trustee has lost sight of the fact that only one of the two notes has fallen due since the bankruptcy, and that prior to that there was a concluded transaction upon the first note which the trustee cannot re-open. [WILLIAMS, J.—But the parties did not appropriate that sum of 400l. either to interest or principal when they settled.] I submit that the debtor, not having appropriated it in any way, the law entitles the creditor to appropriate it entirely to interest.

Aug. 11.—WILLIAMS, J. (after stating the facts):—The question in this case turns upon sect. 23 of the Bankruptcy Act 1890. The amount to which Parker's proof must be admitted, depends upon how much of the 600l. owing to him is to be taken to be principal. I think that he was entitled to contend that the whole of the 400l. paid to him before the bankruptcy was interest, and that the whole of the 600l. now owing is principal; he did not however do so. In my opinion that contention would have been far more reasonable than the trustee's allegation that the 400l was all principal. It is in truth favourable to the trustee to treat the 1000l. as a lumped sum of principal and interest. If it is so treated, the 400l. paid off that lumped sum must be taken to have consisted of six-tenths principal, four-tenths interest; that is 240l. principal, 160l. interest. Parker may therefore, now prove for 360l. with interest at 5 per cent. from the 10th Feb. to the 6th March.

Appeal allowed.

Solicitor for the appellant, *J. J. Solomon.*

Solicitors for the respondent, *Lawrence, Waldron*, and *Webster.*

CROWN CASES RESERVED.

April 28, *May* 5 *and* 28.

(Before HAWKINS, MATHEW, CAVE, GRANTHAM, CHARLES, WILLIAMS, LAWRANCE, WRIGHT, COLLINS, BRUCE, and KENNEDY, JJ.)

REG. *v.* DENNIS. (*a*)

Unsound food—Fruit sold wholesale—Sale in bulk under condition that unsound portion be destroyed—Liability to seizure in hands of retail dealer—Questions for magistrates and jury— Bona fides *of sale—Public Health (London) Act* 1891 (54 *&* 55 *Vict. c.* 76), *s.* 47.

In order to convict a person under sub-sect. 3 *of sect.* 47 *of the Public Health (London) Act* 1891, *of having sold for the food of man an article unfit for the food of man, it is necessary to prove that the article at the time it was found in the purchaser's possession was liable to be seized for one or other of the reasons stated in sub-sect.* 1 *of the section. That is to say, because being diseased, unsound, unwholesome, or unfit for the food of man, it was exposed for sale or deposited in some place over which the purchaser had control for the purpose of sale or preparation for sale.*

Further, assuming such facts to be proved, it is a question for the magistrates or jury, having regard to all the circumstances of the sale, to say whether or not the article was intended for the food of man by the defendant when sold by him; and whether, if it was represented at the time of

(*a*) Reported by R. CUNNINGHAM GLEN, Esq., Barrister-at-Law.

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sale not to be so intended, such representation was made bonâ fide.

So held by the majority of the Court, Mathew, J. dissentiente.

CASE stated for the consideration of the Court for Crown Cases Reserved by the chairman of the London County Quarter Sessions as follows:—

John William Dennis was tried before me at the Quarter Sessions for the county of London, holden at the Sessions House, Newington, on the 13th Jan. 1894, upon an indictment (a copy of which is annexed to this case) charging him with having committed an offence under the Public Health (London) Act 1891 (54 & 55 Vict. c. 76), s. 47, sub-sect. (3).

1. The defendant is an English and foreign fruit and potato broker, and carries on business in Covent Garden.

2. On or about the 11th Oct. 1893 a consignment of eighty-three bags of "Grenoble" walnuts was received at the defendant's warehouse for sale on behalf of the foreign owner. One bag was taken indiscriminately from the bulk as a sample.

3. On the 21st Oct. 1893 ten bags of these walnuts were sold to a customer. This was the first sale made from this consignment. Later in the day, and after the sale to Charles Lyons hereinafter mentioned, eight of those ten bags were returned by the customer as bad, and exchanged for others of a different kind; the remaining two bags were kept by the customer as being good. On the 23rd Oct. 1893 the defendant was informed for the first time of the bad quality of the nuts, and ordered the bulk to be examined. As the result of that examination the eight returned bags and about fifteen more were by the defendant's orders destroyed, because there were not in those bags a sufficient number of good nuts to pay the cost of separating the good from the bad. What then remained of the bulk were sold to a person who promised to sort them and destroy the bad ones.

4. On Saturday, the said 21st Oct. 1893, Charles Lyons, a wholesale and retail fruiterer, bought twenty bags of the walnuts after examining the sample bag, but without examining the bulk, although he would have been allowed to do so if he had chosen.

5. Over the pigeon-hole of the pay desk in the shop, where the said Charles Lyons bought and paid for the walnuts, there was exhibited the printed notice a facsimile of which is annexed hereto (*a*).

6. The same Saturday evening, after he had taken them away, the said Charles Lyons, after shooting some of them on his stall in preparation for sale, found the major portion of the bulk of the said walnuts were bad, and endeavoured to return them to the defendant, but as it was after business hours the defendant's business premises were closed. The said Charles Lyons then tried to find a sanitary inspector, but failed to do so until the following Monday, the 23rd Oct. 1893, when he handed the said walnuts to the sanitary inspector for the vestry of Bermondsey.

7. On the said 23rd Oct. 1893 the said sanitary inspector took the whole of the said walnuts handed to him by the said Charles Lyons to the Southwark Metropolitan Police Court, where, after inspection, they were condemned by the magistrate as unfit for the food of man and destroyed.

8. No proceedings were taken against the said Charles Lyons with respect to the said walnuts.

9. The defendant and his witnesses proved that it was the practice of the fruit brokers in Covent Garden to sell foreign fruit in the original packages in which it comes from abroad without any examination of the contents, except by opening one or more samples according to the size of the consignment and by seeing whether the outsides of the packages showed any signs of damage and by testing the weight and by the smell. But the buyers might examine the bulk if they chose. That packages were frequently sold, although the brokers knew or had reason to believe that some part of the contents was bad and unfit for the food of man, but that as between the brokers and the buyers it was the buyers' duty to see that the bad fruit was separated from the good and destroyed, and that none of it was offered to the public. It was also stated by those witnesses that there was neither time, nor room, nor skilled labour enough obtainable at Covent Garden to enable the brokers to sort the good fruit from the bad before it was sold by them.

10. The fruit in the sample bag of walnuts was good, and at the time the consignment was received there was nothing in the external appearance of the packages in the bulk or in their weight or smell to indicate that the contents were bad. These were the cheapest quality of walnut the defendant had in stock.

11. The defendant admitted that he knew most of the bags in this consignment would in all probability contain some walnuts which were bad and unfit for the food of man, and that he sold them with that knowledge. He said he should not have sold them if he had known they were so bad as they turned out to be, but that he would sell walnuts when there was a sufficient quantity of good nuts in the packages to make it profitable to sort the good from the bad; if there was a less quantity of good nuts than that he would have the whole package destroyed. He also admitted that a larger proportion of walnuts had turned out bad than usual that season, and that the class of walnuts in question having had their husks removed by means of chemicals, were liable to go bad quickly, sometimes in two or three days. At the date of the sale to Lyons these walnuts had been in stock ten days.

12. On those facts it was contended by counsel for the defendant: (1) that no offence under sect. 47 (3) of the said Act had been shown, because that sub-section only applied where the person in whose possession the articles in question were found had himself committed an offence under sect. 47 (2); (2) that if the defendant had contracted with Lyons that Lyons should (in accordance with the notice "B") sort out and destroy the unsound fruit from the walnuts sold to him, the defendant would not be guilty of the offence charged, and that the said Notice "B" was evidence of such a contract; and (3) that the

(*a*) The notice, which was marked "B," was in the following terms, viz.: — Special Notice to Buyers. — Original packages of either fruit or vegetables, the contents of which may partly prove unsound, either from delay in transit or any other cause, are sold on the express condition that the "buyers" sort the said contents, and destroy the unsound portion before being offered to the public.—W. DENNIS AND SONS.

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jury should be asked whether the defendant, when he sold the packages of walnuts knowing there were some bad ones among them, intended the bad or only the good ones for the food of man.

13. I, however, overruled contentions 1 and 2, and declined to leave the question (3) to the jury.

14. I directed the jury to find the defendant guilty if they found that he sold the walnuts to Lyons and that the walnuts were at the time of sale unfit for the food of man, unless the defendant proved that at the time he sold them he did not know, and had no reason to believe, they were unfit for the food of man. I further told the jury that the defendant could not contract himself out of the liability to a penalty under the Act by agreeing with Lyons to sort out and destroy the bad nuts, and that they must altogether disregard the said notice marked "B."

The jury returned a verdict of "Guilty," and I postponed judgment and discharged the defendant on recognizance of bail to appear to receive judgment at the session next following the determination of this case.

Sect. 47 of the Public Health (London) Act 1891 (54 & 55 Vict. c. 76) enacts that:

1. Any medical officer of health or sanitary inspector may at all reasonable times enter any premises and inspect and examine (*a*) any animal intended for the food of man which is exposed for sale, or deposited in any place for the purpose of sale or of preparation for sale, and (*b*) any article, whether solid or liquid, intended for the food of man, and sold or exposed for sale, or deposited in any place for the purpose of sale or of preparation for sale, the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the person charged; and if any such animal or article appears to such medical officer or inspector to be diseased, or unsound, or unwholesome, or unfit for the food of man, he may seize and carry away the same, himself or by an assistant, in order to have the same dealt with by a justice.

2. If it appears to a justice that any animal or article which has been seized, or is liable to be seized under this section, is diseased, or unsound, or unwholesome, or unfit for the food of man, he shall condemn the same, and order it to be destroyed, or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs, or did belong at the time of sale or exposure for sale, or deposit for the purpose of sale or of preparation for sale, or in whose possession or on whose premises the same was found, shall be liable on summary conviction to a fine not exceeding 50*l.* for every animal, or article, or if the article consists of fruit, vegetables, corn, bread, or flour, for every parcel thereof so condemned, or, at the discretion of the court, without the infliction of a fine, to imprisonment for a term of not more than six months, with or without hard labour.

3. Where it is shown that any article liable to be seized under this section, and found in the possession of any person, was purchased by him from another person for the food of man, and when so purchased was in such a condition as to be liable to be seized and condemned under this section, the person who so sold the same shall be liable to the fine and imprisonment above mentioned, unless he proves that at the time he sold the said article he did not know, and had no reason to believe, that it was in such condition.

Sir *Henry James*, Q.C. (*Finlay*, Q.C. and *R. D. Muir* with him), on behalf of the defendant, submitted that the enactment in question did not prevent the sale of good and bad walnuts provided the good only were sold for the food of man; and the notice being evidence that the bad walnuts were not sold for the food of man should have been allowed to go to the jury. The contention on the part of the prosecution would effectually destroy the sale of all tinned goods, inasmuch as it is known that a certain proportion of such goods in most cases proves to be bad. It was essential that at the time the goods are seized they should be exposed for sale in an unsound condition; and these walnuts had not been found in the possession of the defendant when exposed or in preparation for sale. The placing of the notice before the purchaser must have been some evidence that he had knowledge that the walnuts were not sold as being good throughout, and a duty was by virtue of the contract imposed upon Lyons by the defendant of separating the unsound walnuts from the sound, and of not using the unsound for the food of man:

Symonds v. *Pain and others*, 30 L. J. 206, Ex.;
Sandys v. *Small*, 3 Q. B. Div. 449;
Vinter v. *Hind*, 10 Q. B. Div. 63.

Elliott, in support of the conviction, submitted that sect. 47 (3) of the Public Health London Act 1891 was passed in order to meet such a case as the present, the words used being wider than those in sects. 116 and 117 of the Public Health Act 1875, upon which the decision in *Vinter* v. *Hind* (*ubi sup.*) turned. The bags of walnuts were sold by the defendant with the knowledge that a certain proportion of the walnuts would, in all probability, prove to have been unfit for human food at the time they were sold; and the burden of proof lay upon him to prove that at the time he sold the walnuts he did not know and had no reason to believe that they were unfit. The notice spoke for itself, and the jury had nothing to do with its meaning. The liability to seizure under the section attached during the whole period between the receipt of the walnuts by the defendant and their being placed by Lyons upon his stall. The prosecution was not obliged to show fraudulent intent on the defendant's part, the Act being passed for the protection of the public and making it an offence if that which was unfit for the food of man was sold as fit. The question had been properly put to the jury, and they having found the defendant guilty of the offence charged in the indictment it was to be inferred that they found that the walnuts were purchased by Lyons from the defendant for the food of man, they being when so purchased in such a condition as to be liable to be seized and condemned under the section. *Cur. adv. vult.*

May 28.—The following judgments were read:

Kennedy, J.—I have come to the conclusion that this conviction cannot be sustained. In the first place, in order to establish any case against a seller, such as the accused in this case was, under the statute 54 & 55 Vict. c. 76, s. 47, sub-sect. 3, it is, in my judgment, clearly necessary, from the terms of the sub-section itself, to prove that the article found in the possession of the purchaser was an article "liable to be seized under this section." Sub-sect. 1 tells us what is meant by the term "liable to be seized." The article is "liable to be seized" only if it is an article (*a*) intended for the food of man; (*b*) sold or exposed for sale, or deposited in any place for the purpose

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of sale or preparation for sale; (c) appearing to the inspector to be diseased, or unsound, or unwholesome, or unfit for the food of man. The facts of this case show, in my view, that the second of these essential elements did not exist. It is not the fact that when the walnuts in the possession of Lyons were, at the instance of Lyons himself, taken by the inspector, they were either sold or exposed for sale, or deposited in any place for the purpose of sale or preparation for sale. Therefore they did not constitute an article "liable to be seized" within the meaning of the section. In the second place, the conviction of a seller under sub-sect. 3 cannot be justified, unless the buyer is shown to have purchased the article "for the food of man." In order to negative this, evidence was adduced by the defendant as to the exhibition of the special printed notice to buyers, and as to the practice of fruit brokers. It was evidence, no doubt, to be considered by the jury only in connection with all the other circumstances of the case. It was for the jury to consider whether the transaction, which appears otherwise to have been a sale by sample of articles commonly used for human food, was really made subject to the terms of the notice, and what weight should be given to the alleged trade practice, and then to use their conclusions on these points—with all other matters found to their satisfaction — in determining whether the walnuts were or were not purchased for the food of man. Speaking for myself, I should say that, if the evidence in question was believed, a jury might not improperly find that Lyons bought, and the accused sold, the sound walnuts, and the sound walnuts only, for the food of man, and the unsound for destruction —subject, of course, to Lyons's right to reject the whole lot, if upon inspection he found the bulk inferior to sample, or to prefer a claim for damages for breach of warranty. But, be this as it may, it could not, in my judgment, be right to direct the jury, as, from paragraph 14 of the case, the learned chairman appears to me, in effect—by limiting their consideration to questions as to the fact of the sale by the defendant, the condition of the walnuts when sold, and the defendant's knowledge and belief as to their condition—to have directed the jury, that they need not trouble themselves to find whether or not the walnuts were purchased from the accused for the food of man; and further to direct the jury, as he did, that they must disregard the evidence of the terms, as to sorting out and destroying the bad walnuts, upon which the transaction between the defendant and Lyons was, according to the defendant's contention, effected. It seems to me, looking at paragraph 14 of the case, impossible to infer, as the learned counsel, who appeared before us to support the conviction, asked us to infer, that the jury meant by their verdict to find that the walnuts were purchased from the accused for the food of man. The verdict of "guilty" in this case was, in my view, a verdict which, in consequence of the chairman's direction, was arrived at without a finding by the jury of that which was essential to the proof of the offence charged, and therefore the conviction on this second ground also ought, in my judgment, to be quashed.

Grantham, J.—What is the true way of testing such a case as this? Not to first argue what crimes or wrongs it is supposed were intended to be reached by the statute, and then to endeavour to make the facts of the case fit the supposed intention of the statute, but first to understand exactly what the facts are, and then see if the statute as drawn was intended to apply, and does in fact apply to those facts. Applying that principle, let us see what the facts are. A fruit broker receives an intimation from a foreign consignor, probably through his shipping agent, or it may be only from the carman delivering the goods, that a consignment consisting of a number of packages or bags containing walnuts has been forwarded from Grenoble to him, as a fruit broker, for sale. The walnuts, when despatched from Grenoble, were, no doubt, intended for human food, and were fit for human food, but the broker (the defendant) knows from his experience that, by the time any such consignment has reached England, some of the contents of some of the packages will in all probability be bad, or, as we will call it, unfit for human food, and that, in the interval between his selling them and his purchaser retailing them out, a still larger proportion will have become bad, either from the character of the fruit, the season of the year, or sudden changes of temperature. What, under these circumstances, does he do? It must not be forgotten that it is never intended that the broker is to be the retailer. He has only to find someone who will take these packages as they are, get the contents ready for market, and then retail them. The quantity is not, or may not be, sufficient to have an auction, with catalogue and conditions of sale attached, or it may be that there is not time, so he sells them as soon as he can, under a notice to everyone who buys that all articles sold in original packages (*i.e.*, that these walnuts) are sold on the express condition that the person taking these packages, or buying these packages, is not to sell for human food any of the walnuts that are bad; those he must undertake to destroy. (He might have said, "or use for some other purpose.") In other words, practically he says, "As we both know that probably some of the walnuts will be bad, and some good, you must separate the good from the bad, and destroy the bad, and, as you buy the packages of me with that liability attached, I expect you to give me only such a price for the good walnuts as will enable you to afford the expense of this sorting and destruction." The buyer therefore fixes the price he will give accordingly, and the price he gives, *plus* the cost he is put to in sorting, represents the value of, and the cost to him of, the good walnuts. As it is admitted that the broker in this case can only be convicted under sub-sect. 3 of this section, because the walnuts had passed into the hands of his purchaser, it is necessary to see what his purchaser does. After having bought the walnuts, he turns several of the bags out, and finding many more bad than he expected, he never attempts to sort or sell even the good, much less the bad, but bags them up again, and finding the broker's place of business closed, avails himself of the provisions of sub-sect. 8 to get the local authority to destroy them, and they are destroyed. Now, remembering that no article is liable to be seized that has not been exposed for sale for human food, how is it possible to say that either the broker or his purchaser exposed these walnuts for sale for human food? for the broker distinctly contracted with his purchaser that the bad walnuts should be

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destroyed, and the purchaser did accordingly carry out his contract and had them destroyed. Let us see now what the language of the 3rd sub-section is, and we shall then find that under no portion of that sub-section can the defendant be convicted. Sect. 47, sub-sect. 3: "Where it is shown that any article liable to be seized under this section and found in the possession of any person, was purchased by him from another person for the food of man," &c., &c. There are four distinct propositions therein referred to, to complete the crime: first, the liability to seizure; second, the finding in the possession; third, the purchase; fourth, the purchase for the food of man. First, these walnuts were never "liable to be seized," for, as we have seen, Mr. Lyons had never intended these bad ones for sale for human food, but even if he had so intended—secondly, they were never "found in the possession" of Mr. Lyons, because he had given them up to be destroyed; thirdly, they were never purchased by him from the defendant; as I have shown, it was only the good ones that were purchased; fourthly, if purchased, they were never purchased "for the food of man," for no one had determined, at the time of giving them up for destruction, how many, if any, might be fit for food. The contract between broker and purchaser was a contract to destroy the bad ones, and the purchaser, as I have before shown, in my judgment did carry out his contract. If he did not, how can the broker be convicted of a crime because his purchaser broke a civil contract? Many instances were referred to during the course of the argument, and many more might have been given, to show how impossible it is for foreign fruit brokers to sell fruit in original packages in any other way than is adopted as mentioned in this case. The instance I mentioned of the orange broker seemed to me the most familiar and most conclusive. Hardly a case is sold that has not some bad ones in it. For how many bad ones is a broker to be convicted or sent to prison? It has been said that he would not be for five or six bad oranges, but, if not for five or six, would he be for ten, or twenty, or fifty, or how many? I do not say under no circumstances could a broker be convicted, but he could only be convicted if he had an intention to commit the offence, viz., selling articles of food, unfit for, and sold for, human food, and, as that is a question of fact, that question must be left to the jury. Besides all this, how can it be said that a broker cannot contract himself out of a liability, by arranging with his purchaser to destroy the bad walnuts, as the learned chairman stated? His liability is determined by his conduct, and his conduct is determined by his contract of sale. If the purchaser, therefore, faithfully carries out his contract to destroy, how can any liability attach, and even if he commits a breach of his admitted contract to destroy, how can the broker be convicted? As the learned magistrate refused in this case to put the question of intent to the jury, the indictment must be quashed on that ground alone, even if not on all or any of the grounds I have mentioned. It has been argued that the object of the Act was to prevent the costermonger from being led into temptation to do wrong. You might as well say that anyone carrying a watch in his pocket attached to a gold chain should be convicted of stealing a watch because of the temptation it offers to a pickpocket to steal the watch. No person acting honestly and *bonâ fide* can by our law be criminally punished because some one else acts dishonestly; but in this case no one acted dishonestly, if the facts as stated were true, and their truth does not seem to have been disputed. For these reasons, in my judgment, this conviction must be quashed.

Cave, J.—This is a case stated by the chairman of the London County Sessions upon the trial of one John William Dennis, who was tried and convicted upon an indictment charging him with having committed an offence under the Public Health (London) Act 1891, s. 47, sub-sect. 3. [The learned Judge here read the first three sub-sections of sect. 47, which are set out *ante*, p. 438, stated the facts, and continued as follows:] The first contention on behalf of the defendant was founded on the facts above stated, and was that sub-sect. 3 only applied when the person in whose possession the articles in question were found had himself committed an offence under sub-sect. 2. The objection is not very artistically stated; but I think it amounts to this, that the article must be liable to seizure in the possession of the person with whom it is found; and that it is not sufficient that the walnuts were found in the possession of Lyons, unless they were then liable to be seized. Now, to make the walnuts liable to seizure in the possession of Lyons two conditions must have occurred. The walnuts must have been intended for the food of man, and sold, or exposed for sale, or deposited in some place for the purpose of sale or preparation for sale. It is true that the proof that these two conditions did not concur is thrown on the party charged. But the evidence given at the trial did, I think, establish that these two circumstances did not concur while the walnuts were in the possession of Lyons, and did not exist when the walnuts were found in his possession. As soon as he discovered the quality of the walnuts he was minded to reject them as not equal to sample; and it is clear that, when he handed them over to the sanitary inspector on the Monday, if they can be said to have been then found in his possession, they certainly were not then intended for the food of man. It was, however, contended on behalf of the prosecution that it is sufficient if the liability to seizure existed before the walnuts came into the possession of Lyons; and, as the learned chairman has not stated the grounds on which he overruled the objection of the defendant, this contention is clearly open to the prosecution. By sub-sect. 3 it must be shown that an article liable to be seized under that section, and found in the possession of any person, was purchased by him of another person for the food of man. Proof, however, that the article was unfit for the food of man will be sufficient *primâ facie* proof of its liability to seizure, the proof that it was not exposed for sale, or deposited for the purpose of sale or of preparation for sale, or was not intended for the food of man, resting with the person charged. But under sub-sect. 3 the prosecution must go on to show that, when the article was so purchased, it was in such a condition as to be liable to be seized and condemned under that section; and the proof of this rests on the prosecution, which seems to me to show that the liability to seizure referred to in the first line of sub-sect. 3 is not the same as the liability to seizure and condemnation referred to

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in the fourth line. It is said, however, that the word "sold" in clause (*b*) of sub-sect. 1 imports that the article may be liable to seizure in the hands of an innocent retail purchaser. Sub-sect. 3 appears to have been inserted to meet the case of *Vinter* v. *Hind* (10 Q. B. Div. 63); and the word "sold" was probably inserted for the same purpose. But in *Vinter* v. *Hind* the purchaser apparently intended to use the meat for the food of man at the time when it was seized; while the question here is whether the seller can be convicted where the purchaser did not intend to use the article sold for the food of man at the time when it was found in his possession. Upon the best consideration I can give to this somewhat obscurely worded section, I think the contention for the defendant ought to prevail, and that the walnuts in this case were not liable to seizure, which by sub-sect. 3 is made a condition precedent to the liability of the vendor to conviction under that section. These considerations dispose of the case, and I could have wished not to express any opinion on the other points; but, as my brethren, or some of them, have thought it necessary to take those points into consideration, I feel bound to give my opinion on the matter. I do not understand the majority of the court to say that there was not evidence on which the defendant might properly have been convicted, but merely to think that the summing-up of the chairman, as given by him, was not sufficient. I think, however, that we are limited to the objections taken by the defendant's counsel, and that the summing-up is only stated in the case so far as was material for the consideration of those objections, and, for the reasons given by my brother Mathew as to this part of the case, I think that these objections are groundless, and, had the case rested there, I should have been of opinion that the conviction was good. I hold, however, that the first objection is fatal, and that, for the reasons I have given on that part of the case, the conviction must be quashed. One lesson at least must be learnt from this case, and that is that those who state cases for the consideration of this Court should limit themselves to stating the objections taken by the counsel for the defendant, and then ruling upon them, and should not attempt to give a summary of their direction to the jury, which it will in general be easy to show was inexact or insufficient in some particular or other, owing to its being only a summary made with reference to the objections taken, and not a full statement.

MATHEW, J.—In this case proceedings were taken against the defendant under sect. 47 of the Public Health (London) Act 1891 on the ground that he had sold to a dealer named Lyons articles which, within the meaning of that section, were liable to be seized and condemned as unfit for human food. From the statements in the case it would seem to be clear that the articles in question, viz., walnuts, at the time when they were sold by the defendant, were intended to be used for food. The walnuts were sold by sample, and it was not suggested at the trial that the sample was one of unsound walnuts. It was not, and could not be, denied that the walnuts, when sold, were unfit for food. They were seized by a sanitary inspector, and condemned, and no attempt was made to show that the magistrate who made the order for their condemnation had either been misled or mistaken as to their condition. The sub-sect. 3 of sect. 47 is in the following terms: [The learned Judge here read 54 & 55 Vict. c. 76, s. 47, sub-sect. 3, which is set out *ante*, p. 438, and continued as follows:] It was argued for the defendant that the walnuts were not "liable to be seized" under the section, because when they were condemned the buyer had no intention to expose them for sale. But I see no reason to doubt that, at the time when the defendant sold to Lyons, the walnuts were liable to be seized under the section, on the ground that they were then intended for the food of man, and were sold to be used for food while they were unsound and unwholesome. The sub-section appears to me to have been framed to meet the objection raised in *Vinter* v. *Hind* (10 Q. B. Div. 63). In that case a butcher who sold unsound meat to a customer was held not to be liable to a penalty under the Public Health Act 1875 on the ground that when the meat was condemned it did not belong to the butcher, and therefore, that no penalty had been incurred, because of the terms of sect. 117 of the statute. Field, J., in his judgment, expressed a clear opinion, that if the inspector had seized the meat while in the possession of the respondent for the purpose of sale, the subsequent proceedings would have been in accordance with the provisions of a similar section in the Act of 1875. The defence on which the defendant mainly relied was this—that the unsound walnuts were not, when they were sold, intended for human food. In support of this contention reliance was placed upon the terms of the notice, under which it was properly admitted that the walnuts were sold. Assuming a contract between the defendant and the dealer to have been made in the words of the notice, the question for our determination would seem to be whether the defendant was thereby relieved of the obligation not to sell articles liable to be seized under sect. 47. We are asked to answer that question in the affirmative, and for that purpose in effect to add a proviso to the section, that a sale of what was unfit for food should be lawful if the seller stipulated that the buyer should, before a re-sale, separate what was sound from what was unsound. This would be to add to the statute what I have no reason to suppose the Legislature meant to enact, and what would obviously go far to take away the protection to the public which this statute, and the Public Health Act 1875, were intended to afford. It was strenuously contended that the question, whether the defendant had sold the unsound walnuts for the food of man, should be put to the jury. But this was no more than an adroit suggestion that the question of the meaning of the notice should be left to the jury. The terms of the notice are clear. It is not for the jury to say whether any other than their plain and obvious meaning should be attributed to them. And, assuming the notice to be embodied in the contract of sale, I am of opinion that the defendant was not relieved of the duty intended to be imposed upon him as seller by sub-sect. 3 of sect. 47. The enactment does not permit the seller to shift his responsibility to the buyer. I do not see why, if the notice in question should be held to exonerate the seller, a notice to the same effect, set up in the shop or on the barrow of the buyer, should not be equally available to him, as an answer to proceedings for

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seizure, condemnation, or punishment under the statute. I am of opinion that the conviction was right, and ought to be affirmed.

HAWKINS, J.—Before discussing the questions of law raised on behalf of the defendant, it will be convenient to state shortly the facts as set forth in the case. [His Lordship stated them.] On these facts the counsel for the defendant contended: First, that no offence under sub-sect. 3 of sect. 47 had been shown, because that sub-section only applied where the person in whose possession the articles in question were found had himself committed an offence under sub-sect. 2; secondly, that if the defendant had contracted with Lyons, that Lyons should, in accordance with the notice B., sort out and destroy the unsound fruit from the walnuts sold to him, the defendant would not be guilty of the offence charged, and that the notice was evidence of such a contract; thirdly, that the jury should be asked whether the defendant, when he sold the packages, knowing there were some bad ones among them, intended the bad, or only the good ones for the food of man. The chairman overruled the first and second contentions, and declined to leave the third question to the jury, and he directed the jury to find the defendant guilty, if they found that he sold the walnuts to Lyons, and, that the walnuts were at the time of sale unfit for the use of man, unless he proved that, at the time he sold them, he did not know, and had no reason to believe, that they were unfit for the food of man. He further told the jury that the defendant could not contract himself out of the liability to a penalty under the Act, by agreeing with Lyons to sort out and destroy the bad nuts, and that they must altogether disregard the notice B. The offence imputed to the defendant being purely the creation of the 47th section of the statute, it is necessary, in the discussion of this case, constantly to bear in mind the (at the first blush not very clear) language of the three first sub-sections of it; the first sub-section pointing out the circumstances justifying the seizure of articles intended for the food of man but unfit for that purpose; the second pointing out how the said articles are to be dealt with, and imposing penalties on those found in possession of them; the third subjecting to penalties the vendor of the unwholesome articles so seized, to the person in whose possession they are so found. [The learned Judge here read 54 & 55 Vict. c. 76, s. 47, sub-sect. 1 (omitting clause *a.*) and sub-sects. 2 and 3, which clauses are set out *ante*, p. 438, and continued as follows:] It may be conceded that walnuts are articles of food liable to seizure by a sanitary inspector under such circumstances, but under such circumstances only, as are specified in sub-sect. 1. That is to say, if, being intended for the food of man, they are found by such inspector on any premises, sold, or exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and if on inspection and examination they appear to such inspector to be unfit for the food of man. The mere possession of an article of food, ordinarily used as human food, which is in an unwholesome condition, is not unlawful; nor is the sale of it for any other purpose than for human food. It may be lawfully dealt with and sold for manure, or for a variety of other purposes not necessary to enumerate. It is the sale or exposure of it with the intention that it shall be used for human food which is an essential element to the rendering the possession of it illegal; and it is immaterial whether the sale be with the intention that the purchaser is himself to be the consumer, or whether it is sold with a view to its resale for human food by the purchaser. The burden of proof that such intention did not exist is, by sect. 47, cast upon the person charged with an offence, and in the absence of such proof the intention to sell for the food of man will be assumed if an article ordinarily so used be found exposed for sale or sold, &c. The non-existence of such a criminal intention is a fact to be established by evidence, and may be proved in a variety of ways: among others, for instance, a *bonâ fide* contract with the purchaser subject to a condition that an article unfit for human food should not be so used, or disposed of to be so used by others, would be evidence to negative such intention. I say a *bonâ fide* contract, because a mere illusory formal contract to that effect, coupled with an underlying intention that the restrictive stipulation need not be observed, would be worthless as a protection to the accused; but the evidence of the contract, together with the question of *bona fides*, ought to be considered by the justices if they have to determine the case, or submitted to the jury, if the defendant elects to be tried by jury, for their consideration; and such jury ought to be asked whether they find the criminal intent negatived by the evidence. In this case, I think, having regard to the practice of the trade, as mentioned in paragraph 9 of the case, and the notice B., there was evidence for the jury to consider (see *Symonds* v. *Pain*, 30 L. J. 256, Ex.; *Sandys* v. *Small* 3 Q. B. Div. 449); and if they upon such evidence had come to the conclusion that the defendant *bonâ fide* did not intend the articles to be, and that he sold upon an express condition that they should not be, used for the food of man until the bad walnuts had been separated from the good ones and destroyed, the defendant would have been entitled to an acquittal. Of course, I do not mean to say that the mere fact that the contract of sale was in accordance with notice B. would of itself be conclusive as a defence; for the issue before the jury upon the point now under discussion would be, not whether such a contract was in fact made, but whether the alleged criminal intent had been disproved by it with the other evidence, if any. I only say that the contract was evidence material to the issue, and, in my opinion, the chairman was wrong in refusing to leave the question I have suggested, and which was in substance that which the learned counsel desired should be left, to the jury. I have personally entertained a doubt during the consideration of this case, where articles of food of the same character—*e.g.*, oranges—some portions of which are good and some bad are mixed together, but the bad are severable from the good, and are not in such proportion to the good as to make the whole unfit for human food, how the sanitary inspector and the justices ought to deal with them. It is not necessary, however, to settle that point to-day. I turn my attention now to the offence created by sub-sect. 3. To constitute such an offence it must be shown—first, that articles liable to seizure were found in the possession of a person who has purchased of the person accused, for the food of man; secondly

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that when so purchased the articles were in such a condition as to be liable to be seized and condemned. Put shortly and in order of time, it amounts to this—that the articles must have been liable to seizure when sold by the accused to his purchaser; that they were bought by such purchaser for the food of man; that they were found in such purchaser's possession; and, when so found, were liable to seizure. Upon the facts stated in the case I fail to see any evidence of these requirements to justify the conviction. First, I think it cannot be truly said that the walnuts were ever according to the ordinary meaning of the term, "found" in the possession of Lyons at all. Secondly, they were voluntarily taken by Lyons to the sanitary inspector at the vestry hall; the inspector simply took them into his possession at Lyons's request. They were not, therefore, in any sense of that word, "seized" by the inspector. Thirdly, they were not when handed by Lyons to the inspector (even if that could be called a finding and seizure) liable to be seized under sub-sect. 1. They were certainly not then intended for the food of man, for they were handed to the inspector with a view simply to their destruction as unfit for food. They were never whilst in Lyons's possession either sold or exposed for sale, nor deposited in any place for the purpose of sale, or of preparation for sale; and if upon the facts disclosed in the case Lyons had been charged before the magistrate, he could not have been lawfully convicted under sub-sect. 2. That the walnuts were purchased by Lyons with a view to the ultimate sale of such as were good could not be denied, but his intention to sell for human food the bad with the good is inconsistent with his conduct in not offering any for sale, but voluntarily handing them all over for destruction, as though they were trade refuse (see sub-sect. 8 of sect. 47, and sect. 33 of the same Act). The absence of all proof that the walnuts were found or were liable to seizure whilst in Lyons's possession would alone be fatal to the conviction; but even in the defendant's possession, bad as they for the most part were, they were not seizable for condemnation, even in his warehouse or in his shop, nor could he have been convicted, if he could prove that the nuts in their unwholesome condition were not sold or offered for sale, nor intended for the food of man. Proof of the absence of such intention the defendant undoubtedly was entitled to offer to the jury. His counsel endeavoured to do so. The evidence so offered was, in my opinion, very material to that issue, and I think the chairman wrongly rejected it. I am also of opinion that the direction of the chairman to the jury was erroneous. He seems to have forgotten that, to satisfy the requirements of the third sub-section, essential to a conviction, the jury ought to have been asked to find upon the facts enough to establish, not merely the sale by the defendant to Lyons, and that the nuts were then unfit for human food, but that they were liable to seizure under sub-sect. 1, both in the hands of the defendant and of Lyons—that liability involving those most important questions of the intention of the defendant and the object or purpose for which the nuts were sold by the defendant to and purchased by Lyons. I do not agree altogether in the first contention of the defendant's counsel —viz., that the defendant could not be convicted under sub-sect. 3, unless Lyons could be convicted of an offence under sub-sect. 2; but I do agree that Lyons must have been placed in circumstances which would render him liable to a conviction, unless he could establish that the walnuts, had they been seizable when in his possession, were not purchased or intended by him for the food of man. The circumstances as against each must be such as to constitute a *primâ facie* case against each, but the guilt of each must depend upon whether the criminal intention existed—*i.e.*, to sell for human food. One might be able to disprove the existence of such intention, the other might not. In such an event one would be guilty, the other would not. So that the innocence of the purchaser, because he disproved by evidence the criminal intention, would not protect the vendor, who might not be able to offer such evidence. It is not, however, worth while further to notice the point raised, because no *primâ facie* evidence of any offence by Lyons was offered; and the defendant is entitled to an acquittal on other grounds. I should not have felt it necessary to discuss this matter at so much length, and with so much detail, had I not felt its great and grave importance, not only to the defendant, whose reputation as a respectable fruit broker I see no reason to question, but to the whole body of fruit brokers, who would find it difficult to pursue their calling if, having done all in their power to prevent unwholesome fruit being offered for sale for human food, they were in peril of criminal prosecution, involving serious fine or imprisonment, under such circumstances as those before us. I recognise to the fullest extent the policy and propriety of severely dealing with those who wilfully or recklessly expose for sale for human food articles they know to be in an unfit condition for consumption; but every man ought to have the fullest opportunity of establishing his innocence if he can. From a grave oversight on the part of the learned chairman, I think the defendant has been deprived of that opportunity. I think the conviction ought to be quashed, because, on the admitted facts, no offence under sub-sect. 3 could be established, and because, even assuming a *primâ facie* case, the chairman refused to put before the jury evidence tendered material for the defence, and misdirected the jury in telling them what would constitute guilt. The conviction must be quashed.

CHARLES and LAWRANCE, JJ. were of opinion that the conviction was bad, for the reasons stated in the judgment of Hawkins, J.; and Wright, J., who was absent when the judgment was delivered, was stated by Hawkins, J. to concur in his judgment.

WILLIAMS and COLLINS, JJ. were also not present when judgment was delivered, but were stated by Hawkins, J. to agree with the decision of the majority of the court that the conviction should be quashed.

BRUCE, J.—I have had an opportunity of reading the judgment of my brother Kennedy, and I agree with the reasons given by him, and am of opinion that this conviction should be quashed.

Conviction quashed.

Solicitor for prosecution, *J. Harrison*, clerk to the Bermondsey Vestry.

Solicitors for defendant, *Wilson* and *Wallis*.

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House of Lords.

June 15, 18, *and* 19.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, ASHBOURNE, and SHAND.)

FREER v. MURRAY AND OTHERS. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Licensing Acts—Licence—Lapse—Application by new tenant—Discretion of justices to refuse transfer—Licensing Act 1828 (9 *Geo.* 4, *c.* 61), *s.* 14—*Wine and Beerhouse Act* 1869 (32 *&* 33 *Vict. c.* 27), *ss.* 8 *and* 19—*Amendment Act* 1870 (33 *&* 34 *Vict. c.* 29).

The tenant of a beerhouse which had been continuously licensed from a date prior to the 1*st May* 1869, *was convicted of permitting drunkenness on the premises, and in consequence the justices, at the general annual licensing meeting in Aug.* 1891, *refused to renew the licence. The licence expired on the* 10*th Oct.* 1891. *On the* 5*th Oct. the tenant gave up possession to the appellant, who applied at the special sessions on the* 17*th Nov.* 1891, *under sect.* 14 *of the Licensing Act* 1828, *for a transfer of the licence. The justices refused the transfer upon grounds other than those mentioned in sect.* 8 *of the Wine and Beerhouse Act* 1869.

Held (affirming the judgment of the court below), that at the time that the application was made the licence was not "in force" within the meaning of sect. 19 *of the Act of* 1869, *as amended by the Act of* 1870, *and that, therefore, the justices' power of refusal was not limited to the four grounds mentioned in sect.* 8 *of that Act.*

Reg. *v.* Curzon (29 *L. T. Rep.* 32; *L. Rep.* 8 *Q. B.* 400) *approved and followed.*

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Lindley and Lopes, L.JJ.) reported in 68 L. T. Rep. 507 and (1893) 1 Q. B. 635, who had reversed a judgment of the Divisional Court (Pollock, B. and Williams, J.) upon a special case stated by the Court of Quarter Sessions of Lancashire.

The special case is set out in the reports in the court below, and the facts were shortly as follows:

The appellant was the transferee of the Pheasant inn, Charter-street, Manchester, which was continuously licensed for the sale of beer from a date prior to the 1st May 1869 until the 10th Oct. 1891, when the licence which had been in force from the 10th Oct. 1890 expired. The renewal of the licence had been refused to one John Faulkner, who had been previously licensed, on certain grounds, and no appeal was entered against that refusal. Subsequently Faulkner transferred the house to the appellant, who applied for a renewal of the licence, which w a refused by the justices on the ground that the house was frequented by thieves and prostitutes, and because there were too many licensed houses in the neighbourhood. The appellant appealed to the quarter sessions, who granted a renewal of the licence on the ground that the licence was still in force, and that therefore the justices could only refuse the licence on one of the four grounds mentioned in sect. 8 of the Wine and Beerhouse Act 1869, subject to the opinion of the Court of Queen's Bench on a special case. The Divisional Court upheld the decision of the quarter sessions, but their decision was reversed by the Court of Appeal. The appellant now sought to reverse the decision of the Court of Appeal.

Ambrose, Q.C. and *Pankhurst* (Sir *E. Clarke*, Q.C. with them) appeared for the appellant.

Sir *R. Webster*, Q.C., *J. Walton*, Q.C., and *E. Sutton*, who appeared for the respondent justices, were not called upon to address their Lordships.

At the conclusion of the arguments for the appellant, their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell).—My Lords: A licence had been held for the Pheasant inn, Charter-street, Manchester, prior to the occurrences to which I will call your Lordships' attention, from a period anterior to the 1st May 1869. In the year 1891, and prior to that time, one John Faulkner had held the licence, and had obtained a licence from time to time in previous years. At the general annual licensing sessions held on the 27th Aug. 1891 an objection was made to the renewal of the licence to the house by the superintendent of police for the district, and the consideration of the objection was adjourned until the 10th Sept. 1891, on which day John Faulkner applied for a renewal of his licence, and that renewal was refused. Faulkner did not appeal from the refusal to renew, but on the 5th Oct. "removed from and yielded up possession of the house to the appellant Isaac Freer, who forthwith took possession and has ever since remained and still remains in possession thereof." On the 9th Oct. 1891 Freer gave notice of his intention to apply to the special sessions for a transfer of the licence, and in pursuance of that notice on the 17th Nov. 1891 he applied to the justices pursuant to the 14th section of 9 Geo. 4, c. 61. The justices refused the application upon the ground that there was no licence in force, since it had expired on the 10th Oct. 1891; that they were therefore not limited to the four grounds of refusal specified in the Act of 1869, but were at liberty to exercise their discretion and consider the nature and requirements of the neighbourhood. The question which arises is whether the justices were at that time entitled to exercise their discretion at large as to whether they would grant the application or not, or whether they had power to refuse it only on one of the four grounds mentioned in the statute of 1869. The 19th section of the Wine and Beerhouse Act 1869 provides that, "where, on the 1st May 1869, a licence under any of the recited Acts is in force with respect to any house or shop for the sale by retail therein of beer, cider, or wine to be consumed on the premises, it shall not be lawful for the justices to refuse an application for a certificate . . . except upon one or more of the grounds on which an application for a certificate under this Act in respect of a licence for the sale of beer, cider, or wine not to be consumed on the premises may be refused." It is not necessary to trouble your Lordships with what those grounds are, because the sole question is whether that provision applied or not. The language of that clause is certainly not very clear, and by the 7th section of the Wine and Beerhouse Act Amendment Act 1870, there was this further enactment in relation to it: "The 19th section of the

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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principal Act shall extend to licences granted by way of renewal from time to time of licences in force on the 1st May 1869, whether such licences continue to be held by the same person or have been or may be transferred to any other person or persons." The construction which has been put upon the language used in those statutes is this, that in order to bring himself within the clause the applicant must show that there was a licence in respect of the premises in force on the 1st May 1869, and that there has been a renewal of such licence from time to time down to the time of the application. That was the construction put upon it by the Court of Queen's Bench in *Reg.* v. *Curzon* (29 L. T. Rep. 32; L. Rep. 8 Q. B. 400) by Blackburn, Quain, and Archibald, JJ. They expressed the opinion that, if the licence had lapsed at any time prior to the application, then the legislation, to which I have referred, did not apply. I confess I can entertain no doubt that, according to the proper construction of these sections, quite apart from authority, the meaning must be this, that the prohibition—or the limitation perhaps I should rather say—of the free jurisdiction of the justices only applies where there was a licence in force on the 1st May 1869 and where that licence has been renewed from time to time, so that it has been throughout, and is, in existence at the date of the application. If there is any time, prior to or at the date of the application, when there was not a licence in existence in respect of that house after the 1st May 1869, it appears to me that sect. 19 is inapplicable. Now, in the present case the licence which had been granted to the occupant of the house in 1890 expired on the 10th Oct. 1891. The licence is granted for the year expiring on that date and no longer. The application was made on the 17th Nov. following. Therefore, that on the 17th Nov. there was no licence in existence in respect of that house and had been no licence for more than a month, appears absolutely certain. The case of the appellant is founded upon the effect of 9 Geo. 4, c. 61, coupled with some words in sect. 7 of the Act of 1870 to which I have already called your Lordships' attention, and I will again refer to them presently. The 4th section of the Act of Geo. 4 prescribes that in addition to the general licensing sessions there are to be certain special sessions at which justices are empowered to license such persons intending to keep inns as they shall, in "their discretion, deem fit and proper persons under the provisions hereinafter enacted." Those provisions are the provisions in sect. 14. Sect. 14 is designed, in part at all events, to enable a transfer to be obtained to another person of a current licence where the licensee dies, or by sickness or other infirmity is incapable of keeping an inn, or becomes bankrupt. There are provisions also which enable application to be made at the special sessions, where the occupier has wilfully omitted, or neglected, to apply at the general annual licensing meeting for a licence to continue to sell excisable liquors, and in other cases with which I need not trouble your Lordships. In all the cases where the power is given under this or the previous section to the justices to grant a licence, they are to grant a licence to sell liquors to be "drunk and consumed in such house, or the premises thereto belonging," but with this proviso, "that every such licence shall continue in force only from the day on which it shall be granted until the 5th April or the 10th Oct. then next ensuing, as the case may be." In the present case, therefore, the justices to whom application was made on the 17th Nov. had no power to grant a licence which should be in any respect retrospective, or to carry the licence back to the day when the previous licence expired. Had they possessed such a power a different question might have arisen; but all they could have done was, on that 17th Nov., to grant a licence from that day, the result of which would have been that, the previous licence having expired on the 10th Oct., there would have been a period during which there was no licence to that house. How does the appellant seek to bring himself within the provision which requires, for the operation of sect. 19, that the licence shall not only have been in force on the 1st May 1869, but shall have continued to be in force by renewal down to the time of the application, which, as I have said, is the construction which has been put upon the enactment? It is suggested that, because an application may be made to a special sessions under the 14th section of the Act of Geo. 4 for a licence, and because such licence is called a "transfer," therefore the previous licence may be regarded, not as dead but as in a state of—I think the words of the learned counsel were—suspended animation; and that this condition of suspended animation, having regard to the provisions of the Act of Geo. 4, is sufficient to bring the case within the Act of 1869. I am unable to take that view. I think the licence was not in a state of suspended animation, but was dead, and incapable of coming to life again, and that all that could be granted was a licence, not a new licence technically so-called, but, if you like, a transfer within the language of the Licensing Acts, nevertheless not a licence which in any way revived the old licence, or bridged over the time after the old licence came to an end. There seems to me to be no difficulty in such a view. It may well be that the 14th section gives to a person who has possessed a licence a right to apply to a special sessions, even after that licence has expired, a right which would not exist in the case of a house to which no license had ever been attached, or one which did not come within the particular categories enacted in sect. 14. But that does not seem to me to have any bearing upon the question whether, at the time of this application, the applicant brought himself within the statute of 1869. Much reliance was placed upon the words in sect. 7 of the Act of 1870, "whether such licences continue to be held by the same person, or have been or may be transferred to any other person or persons." That seems to me merely to be introduced for this purpose, that if it be proved that the licence has been granted by way of renewal from time to time and been in force down to the date when the application is made, it shall not be an objection that it has not been strictly speaking a renewal under the renewal provisions, but that it has been not always in the same hands, but transferred from time to time to different persons. But the condition of the whole seems to me to be this, that you must show a licence in force on the 1st May 1869, and you must show that that licence, by way of renewal or transfer, has been continuously in force down to, and is in force at the date of the

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application. The words upon which so much stress has been laid, "or may be transferred," I am unable to construe in the way contended for by Mr. Ambrose. I think that the words "have been or may be transferred" merely refer to the dividing line of the time of the passing of the Act. Of course the legislation related to matters which had taken place prior to the passing of the Act. It was a section which was explanatory of and extended the Act of 1869. Therefore of course it was necessary to deal with what might have happened before the passing of the Act, or what might happen after the passing of the Act; accordingly the words are whether the licence "has been transferred"—that is prior to the passing of the Act—or "may be transferred"—that is, after the passing of the Act—to some other person; but the words do not seem to me to bear the meaning contended for by the appellant. For these reasons I move your Lordships that the judgment be affirmed and the appeal dismissed with costs.

Lord WATSON.—My Lords: It was assumed in the Court of Appeal, and it does not appear to be disputed, that in the circumstances narrated in the special case the present appellant had a good title to apply to the justices assembled at a special session on the 17th Nov. 1891 for a licence to continue to sell excisable liquors on the premises in question until the 10th Oct. 1892. The provisions of sect. 14 of 9 Geo. 4, c. 61, which confer that right upon him, when taken *per se*, also give the justices an absolute discretion to grant or refuse his application without cause assigned. By subsequent legislation, which is to be found in sect. 19 of the Wine and Beer-house Act 1869, as amended by sect. 7 of the Wine and Beerhouse Act Amendment Act 1870, the absolute discretion committed to the justices by the statute of 1828 was, in certain cases, made subject to limitation. In these cases, the justices have no power to refuse a licence, except upon one or other of four grounds which are specified in sect. 8 of the Act of 1869. The refusal, by the justices, of the appellant's application on the 17th Nov. 1891 was not based upon any of these grounds; and, the special case before us discloses that none of these special grounds did in fact exist. Accordingly the only question which it is necessary to determine is this, whether the present case falls within that class of cases in which the discretion of the justices is limited by the Acts of 1869 and 1870? If it does, the justices exceeded their statutory power in refusing the appellant's application. If it does not, their decision is unimpeachable. I have had little difficulty in coming to the conclusion that the statutory limitation which has been imposed upon the discretion of the justices by sect. 19 of the Act of 1869, in combination with sect. 7 of the Act of 1870, has no application in any case where the licence granted to the preceding occupant of the premises has ceased to be "in force" before the justices sitting in special sessions are asked to grant a licence in terms of sect. 14 of the Act of 1828. The point appears to me to have been expressly decided by Blackburn, J., with the assent of Quain and Archibald, JJ., in *Reg.* v. *Curzon* (29 L. T. Rep. 32; L. Rep. 8 Q. B. 400); and I have been unable to see any reason to differ from their ruling. In my opinion the appellant cannot succeed in this appeal unless he can satisfy your Lordships that the licence granted to John Faulkner, which, as stated in the special case, expired on the 10th Oct. 1891, continued, notwithstanding its expiry, to be in force until the 17th Nov. following. The appellant's argument has failed to satisfy me upon that point; and I therefore concur in the judgment which has been moved by the Lord Chancellor.

Lords ASHBOURNE and SHAND concurred.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Crowders* and *Visard*, for *Broadsmith* and *Stead*, and *Hockin*, *Raby*, and *Beckton*, Manchester, appellant's joint solicitors.

Solicitors for the respondents, *Collis* and *Mallam*, for *Cobbett*, *Wheeler*, and *Cobbett*, Manchester.

April 26, 27, *and June* 22.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, MORRIS, and SHAND.)

BLACK v. CLAY. (a)

ON APPEAL FROM THE FIRST DIVISION OF THE COURT OF SESSION IN SCOTLAND.

Agricultural Holdings (Scotland) Act 1883 (46 & 47 *Vict. c.* 62), *ss.* 2 *and* 7—*Lease—Compensation for improvements—Notice—Determination of tenancy.*

The Agricultural Holdings (Scotland) Act 1883, *by sect.* 2, *confers upon a tenant of an agricultural or pastoral holding a right to compensation for certain improvements "on quitting his holding at the determination of a tenancy;" and by sect.* 7, *in order to be entitled to such compensation, he must, "four months at least before the determination of the tenancy," give notice in writing to his landlord of his intention to make a claim.*

The respondent was tenant to the appellant of a farm under a lease for a term of years which expired as to the houses, grass and fallow land, at the spring quarter; as to the arable land at the separation of the crop of the same year from the ground; and as to the barns, barnyard, and two outhouses, at the spring quarter of the following year. After the spring quarter-day on which he gave up possession of the houses, grass and fallow land, and more than four months before the autumn quarter-day, he gave notice in writing of a claim to compensation for improvements under the Act.

Held (affirming the judgment of the court below), that, in a Scotch lease, the expression "separation of the crop" was equivalent to the autumn quarter-day, and that the notice was given in proper time.

Semble, *that the retention of the barns, barnyard, and outhouses for a further term of six months, did not constitute an agricultural or pastoral holding within the meaning of the Act.*

Wight *v.* Earl of Hopetoun (4 *Macq.* 729) *distinguished.*

THIS was an appeal from a judgment of the First Division of the Court of Session in Scotland, consisting of the Lord President (Robertson), Lords M'Laren and Kinnear, who had affirmed a judgment of the Lord Ordinary (Lord Low).

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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The case is reported in 21 Court Sess. Cas. 4th series, 41.

The respondent, who was tenant to the appellant of a farm in Berwickshire, under a lease for a term of years, on the determination of the tenancy in 1892, gave notice in writing under sect. 7 of the Agricultural Holdings (Scotland) Act 1883 (46 & 47 Vict. c. 62), of his intention to make a claim for compensation for improvements under the Act, and applied to the sheriff for the appointment of a referee under sect. 2 of the Agricultural Holdings (Scotland) Act 1889 (52 & 53 Vict. c. 20). The appellant applied to the court for an interdict (injunction) to restrain all further proceedings in the matter, on the ground that the notice had not been given in time, not having been given "four months at least before the determination of the tenancy," as required by the section. (*a*) The facts of the case appear from the head-note above, and are fully set out in the judgment of their Lordships.

The Lord Ordinary refused the interdict asked for by the appellant, and his judgment was affirmed as above mentioned.

The *Lord Advocate* (Balfour, Q.C.) and *Salvesen* (of the Scotch Bar) appeared for the appellant.

Asher, Q.C. and *J. J. Cook* (both of the Scotch Bar) and the Hon. *M. Napier*, for the respondent.

At the conclusion of the arguments their Lordships took time to consider their judgment.

June 22.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell). — My Lords: The question raised by this appeal is, whether the respondent is disentitled to compensation under the Agricultural Holdings (Scotland) Act 1883, by reason of his not having given notice "four months before the termination of the tenancy" to the landlord of his intention to make a claim for compensation under that Act, as required by the provisions of sect. 7. The lease under which the respondent held commenced in 1860, and was for a term of nineteen years, but it has since been extended by tacit relocation. By the lease the lessors set and in tack and assedation let to the lessees all and whole the farm and lands of Winfield, for the space of nineteen years "from and after the entry of the said John Clay, which, notwithstanding the date or dates hereof, is declared to be the houses (with the exceptions after mentioned), grass and fallow land, on the 26th May 1860; to the arable land in corn crop, at the separation of the crop of the same year from the ground; and to the barns and barnyard and two outhouses, at Whitsunday 1861, from these periods respectively to be possessed by the said John Clay and his foresaids, during the space above written." It will be observed that the term runs from the entry of the tenant, which, as to part of that farm, is to be on the 26th May 1860; and as to other part on the separation of the crop; and as to the residue of the subjects comprised in the letting on the 26th May 1861; and that these several subjects are to be possessed by the tenant during the space of nineteen years "from these periods respectively." At what period did the tenancy determine under these circumstances within the meaning of the section to which I have referred? It was contended for the appellant that it determined at Whitsunday 1892, when the tenant ceased to hold the grass and fallow lands, and that his subsequent possession of the arable lands was not a possession as tenant, but only a privilege accorded to one whose tenancy was already at an end. In support of that contention reliance was placed on the opinions expressed in this House in the case of *Wight* v. *Earl of Hopetoun* (4 Macq. 729). In that case, where the terms of the lease, so far as regards the grass and arable lands, were very similar to the present, the tenant was entitled to a new term on giving the landlord notice that he required it "at least twelve months before the expiring of the above term of nineteen years." No more was determined in that case than that the notice given was ineffectual, inasmuch as it was not given twelve months before the term had expired as to a part of the lands held. But there is no doubt that opinions were expressed, especially by Lord Westbury, which give some colour to the contention urged in the present case. He said: "According to the common law or custom of Scotland, if a lease be granted to a new tenant of a farm partly of arable and partly of meadow or pasture land, for a term of years to commence from Whitsunday, such tenant is entitled to enter on the grass or meadow land immediately on the commencement of the tack; but the outgoing tenant is entitled to continue in possession of such arable lands as are sown until the separation of the crop from the ground. Still the lease commences, and the term of years runs and is computed in law from Whitsunday, both as to grass and arable, although the common law or custom allows the outgoing tenant to reap and carry away off-going crop, and gives him a limited right of entry and occupation for that purpose." I admit that I have some little difficulty in reconciling the opinion thus expressed with the language used in the lease then under consideration. But in the present case it appears to me to be impossible to adopt the construction contended for. The barns and barnyards and two outhouses are to be possessed for nineteen years from the Whitsunday subsequent to the entry on the grass lands. It is not pretended that any such right as this exists "according to the common law or custom of Scotland," which was the foundation of Lord Westbury's opinion that in the case of arable lands no tenancy existed, but a mere permissive possession when the term, as to the grass lands, had come to an end. It appears to me impossible to avoid the conclusion that, as to the barns, barnyards, and outhouses, a tenancy is created a year later, and terminates a year later than the tenancy of the grass lands; and if there be a separate ish as to these, how can the lease be construed otherwise than as creating a tenancy in the arable lands which is to continue until the "separation of the crop" after the Whitsunday? The words of the demise are the same with regard to all three subjects, which are to be possessed for the space of nineteen years from the periods named "respectively." For these reasons I cannot but come to the conclusion that the contention that under the lease there was to be but one

(*a*) The provision in the English Agricultural Holdings Act 1883 (46 & 47 Vict. c. 61, s. 7), is the same, except that the period for giving notice is two months: (see *Re Paul*, 61 L. T. Rep. 835; 24 Q. B. Div. 247.)

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ish, and that as from the Whitsunday when the tenancy of the grass lands came to an end, cannot be supported. That seems to me to be sufficient to dispose of the appeal. The appellant in his pleadings rests his case upon the ground that the requisite notice was not given four months before that date. It is true that before the Lord Ordinary the appellant contended that the actual date when the crop was separated must be ascertained; but it may be doubted whether this was open to him upon the pleadings, and any such point was abandoned in the Inner House. It is not necessary to determine whether, when the ish as to the arable is to be "the separation of the crop," that is to be regarded as synonymous with the Martinmas term, so that the notice would be in time if given four months before Martinmas, or whether in the present case the notice would be in time if given before the ish as to the barns, barnyards, and outhouses, when the tenancy comes to an end. I understand that Lord Watson is of opinion that the former is the correct view. There is an obvious convenience in such a conclusion, and I do not desire to be understood as expressing any dissent from it. I do not feel pressed by the difficulty suggested in argument with regard to the period prior to which a notice must be given under sect. 28 of the Act, in order that the lease may not be renewed. It may well be that, having regard to the object in view, the prescribed notice under that section must be given prior to the first ish, where several are provided for by the lease. It does not follow that where there is more than one ish, the notice required by sect. 7 must be so given. I think, therefore, that the interlocutor appealed from should be affirmed, and the appeal dismissed with costs.

Lord WATSON.—My Lords: The appellant, who is the proprietor of a farm at Winfield, in the county of Berwick, in May 1891, obtained a decree ordaining the respondents to remove from the houses (with the exception hereinafter mentioned), grass and fallow land, at the term of Whitsunday 1892, from the arable land at the separation of the crop, and from the barns and barnyard, and two outhouses at Whitsunday 1893. The respondent was a tenant under a lease which commenced in 1860. The original term of the lease was for nineteen years, but it was extended for thirteen years beyond that period by tacit relocation. The decree of removing was in accordance with the stipulations of the lease in regard to entry and ish. The farm was thereby let "for the space of nineteen years from and after the entry of the said John Clay, which notwithstanding the date or dates hereof, is declared to be to the houses (with the exceptions after mentioned), grass and fallow lands, on the 26th May 1860; to the arable land in corn crop, at the separation of the crop of the same year from the ground; and to the barns and barnyards and two outhouses, at Whitsunday 1861, from these periods respectively to be possessed by the said John Clay and his foresaids during the space above written." It is, in my opinion, material to notice that the portions of the entire farm for which different periods of entry are assigned, are each of them set "in tack and assedation," and are to be possessed by the tenant for the full period of nineteen years from and after their respective dates of entry. Sect. 2 of the Agricultural Holdings (Scotland) Act 1883 (46 & 47 Vict. c. 62) confers upon a tenant of agricultural or pastoral lands, "on quitting his holding at the determination of a tenancy," the right to obtain from his landlord compensation for certain improvements. It is provided by sect. 7 that a tenant shall not be entitled to compensation under the Act unless "four months at least before the determination of the tenancy he gives notice to the landlord in writing of his intention to make a claim." The respondent quitted possession of the houses (with the exception of the barns, barnyard, and two outhouses), and also of the grass and fallow lands, at the term of Whitsunday 1892. He thereafter, on the 6th June 1892, gave the appellant notice of a claim for improvements under the provisions of the Act of 1883, which notice was followed by an application to the sheriff for the appointment of a referee in terms of sect. 2 of the Agricultural Holdings (Scotland) Act 1889 (52 & 53 Vict. c. 20). The appellant then instituted the present process of suspension and interdict before the Court of Session, in order to restrain all further procedure towards the assessment of compensation, upon the ground that the notice served upon him did not comply with the requirements of sect. 7 of the Act of 1883. The Lord Ordinary (Lord Low) refused the interdict, and his decision was unanimously affirmed by the learned judges of the First Division. In the Outer House the appellant maintained that the actual date at which the last of the respondent's crop of 1892 was separated from the ground constituted the determination of his tenancy within the meaning of the statute, and he contended that a proof ought to be allowed for the purpose of fixing that date. The Lord Ordinary held that such an inquiry was unnecessary, being of opinion that the term of Martinmas must be taken as the ish for the arable lands under crop in the year 1892. His Lordship said: "I think that an ish at the separation of the crop is practically a Martinmas ish. The rent of a farm is due for the crop and possession of each year separately, and the term of Martinmas is regarded as the end of one crop year and the beginning of another. It is assumed, on the one hand, that the crop will be secured by Martinmas, and, on the other hand, the tenant has up to Martinmas to secure the crop. No doubt, if the crop is secured before Martinmas, the incoming tenant will not be refused access to the land for the purpose of ploughing, but the outgoing tenant is entitled to exercise his discretion as to the most suitable time for gathering the harvest; and accordingly it is not uncommon that the ish or entry of arable land is made 'at the separation of the crop or Martinmas,' the two terms being used as synonymous." When the case went to the Inner House the appellant adopted a new kind of argument. He there maintained that the possession had by the respondent after Whitsunday 1892 for the purpose of reaping and gathering in his crop did not constitute tenancy, but merely amounted to a privilege accorded to a tenant by the common law, which was not altered in legal character by its introduction into the lease in the form of a stipulation. That was also the chief, if not the only, argument submitted for the appellant at your Lordships' bar; and it was mainly rested upon the decision of this House in *Wight* v. *Earl of Hopetoun* (4 Macq. 729). In that case the lease expired as to houses and

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grass at Whitsunday, and as to arable land under crop at its separation, the landlord being under an obligation to grant a new term upon a notice by the tenant demanding renewal "at least twelve months before the expiring of the above term of nineteen years." The only question was whether the specific term of nineteen years, which the contracting parties had in view, was to run from the Whitsunday of entry to the Whitsunday of ish as to the houses and grass, or from the later date of entry to the arable lands till the time of the tenant leaving them. It was held by this House (affirming the judgment of the Court of Session), that Whitsunday was the term which the parties contemplated for the expiring of the nineteen years, and that the tenant, having failed to give notice twelve months before that term, was not in a position to demand a renewal of his lease. I cannot regard the decision in *Wight* v. *Hopetoun* as establishing the principle contended for by the appellant, which appeared to me to be this: that no words of demise will be sufficient to create a tenancy of arable land under crop, after houses and grass lands are surrendered to the landlord, so long as the demise is made for the sole purpose of enabling an outgoing tenant to tend his crop and reap it at maturity. The proposition is, to my mind, altogether unintelligible, because the quality of the possession had by an outgoing tenant of land under crop, after he has flitted from houses and grass lands at Whitsunday, differ, so far as I am aware, in no single particular from the possession of lands under crop which he had enjoyed during the previous years of the lease, which was admitted to be possession under his tenancy. No such general question was really involved in the decision of *Wight* v. *Hopetoun*. That it was not the intention of the noble and learned Lords who gave judgment in that case to negative the possibility of a double ish, one for houses and grass, and another for land under crop, appears from the judgment of Lord Wensleydale, who said: "If it is a lease with a double termination, one for the houses and grass land, and the other for the arable, I am clearly of opinion that the majority of the judges have come to the right conclusion." The leading judgment in this case was delivered in the First Division by Lord M'Laren. The Lord President concurred in the views expressed by his Lordship, and in the additional observations which were made by Lord Kinnear. Lord M'Laren was of the same opinion with the Lord Ordinary in regard to the proper construction of the time indicated in the lease as the separation of the way-going crop from the ground. Upon that point his Lordship observed: "The reason why the expression 'separation of the crop' is used in the clauses relating to entry and removal is that the incoming tenant may have access to each field as soon as its crop has been gathered in, and shall not be liable to be kept out of possession by a troublesome outgoing tenant in the assertion of a theoretical right to retain possession until Martinmas. But this construction is quite consistent with Martinmas being the autumnal term whenever it is necessary that something to be done in fulfilment of the lease should be referred to a definite day, payment of rent being a clear case in point. I have, therefore, no difficulty in holding that, where notice has to be given four months before the autumnal term, the term of Martinmas is the time from which the period of four months is to be reckoned." I entertain little doubt that the contract embodied in the lease before us makes effectual provision for three terms of entry and three terms of ish, in regard to different portions of the subjects let; and that, until the arrival of each term of ish, a proper right of tenancy exists with respect to such part of the subjects let as the tenant is bound to quit possession of at that term. I am also of opinion with the learned judges of both courts below, and for substantially the same reasons, that, in cases like the present, the expression "separation of the crop" ought to be read as signifying the term of Martinmas. I venture to think that, whether tested by reference to their proper meaning, or to their legal effect, "separation of the crop" and "the Martinmas term" are equivalent expressions when they occur in a Scotch lease. When the arable ish is Martinmas, the outgoing tenant could not prevent his successor from ploughing before that term land from which his crop had been removed; nor, in the case of a late tenant, could his successor prevent him from reaping his crop after the term. And in my opinion, whichever of these expressions be used in the lease, it must be taken to mean the actual term of Martinmas in all cases where the contractual rights of landlord and tenant are made to depend upon their giving a previous notice. Upon any other interpretation many conditions to be performed after Whitsunday, at a time previous to, and dependent upon, the date of the tenant's removal from lands under crop, would become inextricable. Assuming the right construction of the lease to be that which I have indicated, the question still remains, which of the three periods of ish ought to be regarded, for the purposes of this appeal, as the determination of the respondent's tenancy within the meaning of sects. 2 and 7 of the Act? The definition which the Act gives of the expression "determination of tenancy" is not definitive for all purposes. It is defined in sect. 43 as meaning "the determination of a lease by reason of effluxion of time, or any other cause." That explanation affords no aid in ascertaining whether the *punctum temporis* from which the time for giving a notice is to be calculated *retro* is the first, the second, or the last term of removal. That is a question which, in my opinion, must be decided according to the nature and object of the notice; and I can detect no inconsistency in holding that in one section of the Act requiring notice the beginning of removal, and that in another the final removal, of the tenant may be contemplated. In this case I have come to the conclusion that the "determination of a tenancy," as that expression occurs in sects. 2 and 7 of the statute, refers to the time when the tenant finally gives up possession of the subjects which in the statute are described as his "holding." Sect. 2 is framed upon the assumption that his quittance of his holding and the determination of his tenancy are to be, in point of time, coincident; a holding which entitles the tenant to the benefit of its provisions must, according to sect. 35 of the Act, be "either wholly agricultural or wholly pastoral, or in part agricultural, and as to the residue pastoral." The respondent's holding, in so far as it consisted of lands in crop after Whitsunday 1892, was agricultural, and that is, in my opinion, sufficient for

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the disposal of this appeal. But I entertain serious doubts whether, after his removal in the autumn of 1892, the respondent remained in possession of any holding within the meaning of the Act. I do not think that the bare possession of a barn, barnyard, and two outhouses, unconnected with any land either pastoral or agricultural, is possession of a holding recognised by the Act. That view of its provisions does not appear to me to be in the least inconsistent with the main object of the Act, which obviously was to confer certain benefits upon an outgoing tenant. He can have no practical difficulty in intimating his claim to compensation for improvements four months before Martinmas. To postpone that intimation until four months before the following Whitsunday, when he cedes possession of subjects neither agricultural nor pastoral, and not required for any purpose connected with lands either agricultural or pastoral, would, in my opinion, be unnecessary, and would suspend for six months his right to recover moneys which he had previously expended for the benefit of his landlord or his successor in the tenancy. Not only so, but in so far as concerns the bulk of the statutory improvements specified in part 3 of the schedule, to which the consent of the landlord is not required, it would be difficult, if not impossible, for the landlord to check, or for an arbiter to assess satisfactorily, the amount of the tenant's claim, if the time for giving notice were extended to the 15th Jan. following the tenant's removal from lands under crop. For these reasons I am of opinion that the interlocutors appealed from ought to be affirmed with costs. Lord Shand, who heard the arguments, but is unable to be present to-day, has requested me to state that the opinions which I have expressed have his entire concurrence.

Lord MORRIS concurred.

Interlocutors appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Adam Burn* and *Son*, for *H.* and *H. Tod*, Edinburgh.

Solicitors for the respondent, *Andrew Wood* and *Co.*, for *Pringle, Dallas*, and *Co.*, Edinburgh.

Supreme Court of Judicature.

COURT OF APPEAL.

July 24, 26, *and Aug.* 10.

(Before The Lord CHANCELLOR (Herschell), LINDLEY and DAVEY, L.JJ.)

Re THE CLERGY ORPHAN CORPORATION. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Charity—Compulsory sale of lands to railway company—Voluntary subscriptions and donations—Endowment—Consent of Charity Commissioners—Lands Clauses Consolidation Act 1845 (8 *&* 9 *Vict. c.* 18), *s.* 69—*Charitable Trusts Act* 1853 (16 *&* 17 *Vict. c.* 137), *ss.* 10, 62, 66—*Charitable Trusts Act* 1855 (18 *&* 19 *Vict. c.* 124), *s.* 29.

The income of any endowment of a charity primâ facie *means income derived from any invested funds; but, in the case of a charity partly maintained by voluntary subscriptions, and partly by the income of any endowment, bequests and donations for the general purposes of a charity, which may be lawfully applied as income consistently with the terms of the gift, are exempt from the jurisdiction of the Charity Commissioners; and such gifts, and the income thereof, are not brought within the jurisdiction by being invested by the governing body of the charity.*

Land belonging to a charity had been taken by a railway company under the powers conferred by their special Act whereby the purchase money was fixed at 40,000*l. The Charity Commissioners having intervened, the sum of* 5000*l., part of the purchase money, had been paid into court. The land had originally been bought by the charity out of moneys produced by the sale of consols, which were derived from investments of voluntary contributions, and were available for the general purposes of the charity, and could be dealt with as income. The charity had power under their Act of incorporation to purchase land, but there was no provision empowering them to sell or let the land so purchased. A power of sale was, however, conferred by the special Act of the railway company above referred to. A petition was presented by the charity for payment of the* 5000*l. to them as being absolutely entitled thereto.*

Held, that the proceeds of the sale of the land were still applicable as income to the general purposes of the charity, and therefore exempt from the jurisdiction of the commissioners; and that direction for payment to the charity could be rightly made.

The Governors of the Charity for the Relief of the Poor Widows and Orphans of Clergymen *v.* Sutton (27 *Beav.* 651) *considered.*

Decision of Kekewich, J. (70 *L. T. Rep.* 649) *affirmed.*

A PLOT of land belonging to the Clergy Orphan Corporation, and situated near Lord's Cricket Ground, St. John's Wood-road, had been taken by the Manchester, Sheffield, and Lincolnshire Railway Company, under the powers conferred by a section of their special Act of 1893, whereby the purchase money was fixed at 40,000*l.* As a result of the intervention of the commissioners previously to the passing of the Act, the sum of 5000*l.*, part of the purchase money, had been paid into court under the provisions of the Lands Clauses Act 1845 to the credit of *ex parte* the railway company in the matter of the special Act in respect of land belonging to the charity "in fee simple without power of sale."

The land had originally been bought by the charity under the powers conferred on them by 49 Geo. 3, c. xviii., passed for the regulation of the charity, out of moneys produced by the sale of consols which were derived from investments of voluntary contributions and were available for the general purposes of the charity, and could be dealt with as income. The Act of Geo. 3 expressly empowered the charity to purchase land, but contained no provision empowering them to sell or let the land so purchased, and the only statutory power of sale which the charity had was that contained in or conferred by the section of the special Act of the railway company already referred to.

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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A petition was presented by the charity for payment of the 5000*l.* to them as being absolutely entitled thereto, but was opposed by the Charity Commissioners on the ground that the fund in court represented land which the charity had no power to sell or dispose of without the consent of the commissioners.

In April 1894 the petition came on to be heard before Kekewich, J., when his Lordship decided that the case was governed by *The Governors of the Charity for the Relief of the Poor Widows and Orphans of Clergymen* v. *Sutton* (27 Beav. 651); and that the land in question having been purchased and paid for out of the general funds of the corporation voluntarily contributed to its support was not an "endowment" within the Charitable Trusts Acts so as to make the consent of the commissioners necessary to the sale of it; and his Lordship directed the fund in court to be paid out to the corporation (70 L. T. Rep. 649).

From that decision the commissioners now appealed.

Sir *John Rigby* (Attorney-General) and *Vaughan Hawkins* for the appellants.—The fund in question represents land which the corporation had no power to sell or dispose of without the consent of the Charity Commissioners. The decision of Lord Romilly, M.R. on the meaning of the word "endowment" in the case of *The Governors of the Charity for the Relief of the Poor Widows and Orphans of Clergymen* v. *Sutton* (27 Beav. 651), by which Kekewich, J. considered himself bound, was we submit wrong, and, although it has been reluctantly followed by numerous judges of first instance, it ought now to be overruled by this court. See the observations of Stirling, J. in *Re St. John-street Wesleyan Methodist Chapel, Chester* (69 L. T. Rep. 105; (1893) 2 Ch. 618, 634.) They discussed the provisions of sects. 62 and 66 of the Charitable Trusts Act 1853.

Warmington, Q.C. and *Dibdin* for the respondents, the corporation.—The fund was originally a "donation or bequest" not specifically applied, and it did not lose that character on being invested in consols. Nor did it lose that character when the consols were sold and the proceeds applied in the purchase of land. The 62nd section of the Charitable Trusts Act 1853 contemplates the fund being applied "from time to time." Charities are not bound to keep their balances lying idle on pain of bringing them within the jurisdiction of the Charity Commissioners. We submit that, in substance, *Sutton's* case (*ubi sup.*) was rightly decided. But, even if not so, to overrule it now, after it has been in force for over thirty years and followed in many subsequent cases, would be to disturb titles and interfere with properties sold on the authority of it. The decision has been followed in, among other cases,

The Royal Society of London v. *Thompson*, 44 L. T. Rep. 274; 17 Ch. Div. 407, 415;

Finnis to Forbes; Ex parte the Trustees of the Tower Ward Schools, 48 L. T. Rep. 814; 24 Ch. Div. 591;

Re The Governors of the Charity for the Relief of the Poor Widows and Orphans of Clergymen and Skinner, 67 L. T. Rep. 751; (1893) 1 Ch. 178, 182;

Re St. John-street Wesleyan Chapel, Chester (*ubi sup.*).

They referred also to

Attorney-General v. *Warren*, 2 Swans. 302.

S. A. Sampson for the respondents, the Manchester, Sheffield, and Lincolnshire Railway Company.

Vaughan Hawkins replied.

Cur. adv. vult.

Aug. 10.—The following written judgment of the court (the Lord Chancellor, Lindley and Davey, L.JJ.) was delivered by

DAVEY, L.J.—The real and substantial question on this appeal is, whether the Clergy Orphan Corporation is subject to the jurisdiction of the Charity Commissioners and to the provisions of the Charitable Trusts Act so far as regards their land in St. John's Wood, which is or was the site of their school, but has been sold to a railway company under the provisions of an Act of Parliament. The corporation is undoubtedly a charity within the meaning of the Acts. The question is whether the land and the purchase money which now represents it are exempted from the jurisdiction by the provision of sect. 62 of the Charitable Trusts Act 1853. The first exemption is of charities "wholly maintained by voluntary contributions." It is not contended that the corporation is within this description. But we may observe that, if these words are read in their widest and most liberal meaning, every charity in the kingdom would be exempt, for we suppose that the ultimate source of all charitable endowments is to be found in the spontaneous bounty of founders and supporters. The words are, we think, intended to describe a charity which has no invested endowment yielding an income for its support, but is dependent on the gifts of the benevolent, whether recurrent or occasional, and whether *inter vivos* or by will. The second exemption which applies to this case is in the following words: "Where any charity is maintained partly by voluntary subscriptions, and partly by income arising from any endowment, the powers and provisions of the Act shall, with respect to such charity, extend and apply to the income from endowment only, to the exclusion of voluntary subscriptions, and the application thereof; and no donation or bequest unto or in trust for any such charity as last aforesaid, of which no special application or appropriation shall be directed or declared by the donor or testator, and which may legally be applied by the governing or managing body of such charity as income in aid of the voluntary subscription, shall be subject to the jurisdiction or control of the said board"—*i.e.*, the Charity Commissioners—"or the powers or provisions of this Act." Before we proceed to comment on this enactment we ask what is meant by an "endowment." The interpretation of this word is given in sect. 66, which enacts as follows: "The expression 'endowment' shall mean and include all lands and real estate whatsover of any tenure, and any charge thereon, or interest therein, and all stocks, funds, moneys, securities, investments, and personal estate whatsoever, which shall for the time being belong to, or be held in trust for any charity, or for all or any of the objects or purposes thereof." We can see no sufficient reason for limiting or restricting the meaning of these words, or for confining the words to property held upon some special purpose or trust, in

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connection with a charity as distinguished from the general purposes of the charity. On the contrary, the words, "in trust for any charity or for all or any of the objects or purposes thereof," seem to us to preclude any such limited construction. We conclude, therefore, that the words mean what they say, and that all property of every description belonging to or held in trust for a charity, and whether held upon trusts or conditions which render it lawful to apply the capital to the maintenance of the charity, or upon trusts which confine the charitable application to the income, is an endowment within the meaning of the Act. We return now to sect. 62. We observe that the words used are "voluntary subscriptions." We think that these words are used in a popular sense, and denote recurring gifts repeated annually or otherwise, with more or less regularity. Donations or bequests, which would be included as well as subscriptions in the general term contributions, are dealt with in the following sentence. The next words to be noticed are—"partly by income arising from any endowment." Bearing in mind the definition of endowment, we think that these words, if they were not qualified by the subsequent context, would mean, and so far as they are not so qualified do mean, income derived from any invested funds belonging to the charity, and any charity which depends for its maintenance partly on voluntary subscriptions and partly on income from investments would be within the description. The next sentence, however, must be read as a proviso on, or qualification of, the previous enactment, because it is made applicable only to "any such charity as last aforesaid," *i.e.*, to what has been called at the Bar a mixed charity. The effect of this proviso is, in our opinion, to exempt from the jurisdiction every donation or bequest for the general purposes of the charity, which is given on such terms that the capital may legally be applied for the maintenance of the charity, but to leave subject to the jurisdiction, an endowment for general purposes the income only of which is applicable to maintenance. We are further of opinion that, if the exempted donation or bequest or any subscriptions are in fact invested by the governors with the intention that they shall form a permanent fund or endowment, such investments or the income thereof are exempt from the jurisdiction, and such income is excepted from the income from endowment "in the previous sentence." That this is so is, we think, made clear from the last sentence of the section specially referring to donations, bequests, and voluntary subscriptions which have been invested. This sentence is again a proviso on the immediately preceding words. The effect of it is, that the governing body by appropriating for some specific purpose and investing a donation or bequest, or any subscriptions, which would otherwise be exempt, do not bring such appropriated endowment or the income thereof within the jurisdiction. We have thus far dealt with the construction of the clause apart from authority. In the case of *The Governors of the Charity for the Relief of the Poor Widows and Orphans of Clergymen* v. *Sutton* (27 Beav. 651), Lord Romilly put a construction on these sections. Although in the result Lord Romilly's conclusion may not differ much from that which we have endeavoured to express we cannot agree with him in the reason which he gave for his judgment. We do not think it was a legitimate mode of interpreting the Act first to consider the 62nd section and then to construe the interpetration clause by the 62nd section of the Act. Lord Romilly held that the word "endowment" in the 66th section applied only to endowments for a special purpose in connection with a charity and not to endowments for the general purposes of the charity. As we have already said, we cannot agree with this construction of the 66th section, and we may add that it seems to us inconsistent with other sections; see, for example, the 44th section. Lord Romilly's view has been followed in other cases, but apparently on his authority without the expression of any opinion as to its correctness by the judges who adopted and followed it. The test whether the property of a charity is an endowment within the meaning of the Act is not whether it is applicable to the general purposes of the charity or only to some specific purpose in connection with it, although this circumstance may be important in considering whether the endowment is exempt from the provisions of the Act in the case of a charity falling within the description in sect. 66. The corporation now before the court was incorporated in the year 1809 by an Act of Parliament by which it was recited that the society had been formed in the year 1749, and had been supported by the voluntary subscriptions and donations of charitable and well-disposed persons. The corporation was empowered to purchase and hold lands for the purposes of the charity, and by sect. 2 the governors were empowered to apply and dispose of the moneys and funds already given, and which should from time to time be contributed, and all other moneys and funds belonging to the corporation for the purposes mentioned in this Act, and for any other purpose relating to the corporation and for the benefit of it at their discretion. In the year 1858 the governors sold out 6400*l.* Consols, part of a larger sum then belonging to the corporation, and out of the proceeds purchased the reversion of the land in St. John's Wood, which they then held on lease and on which the school for the clergy orphans had been erected. It was not disputed by the counsel for the Commissioners that the Consols so sold out arose from the investment of subscriptions, donations, and bequests which the governors might have legally applied as income. We cannot hold that these subscriptions, donations, and bequests lost that character by being invested in consols. Did they lose it when the consols were sold and the proceeds applied in the purchase of land? It seems at first sight a strong thing to hold that lands purchased and held for the purpose of carrying on the charitable work of the corporation are not part of the permanent capital endowment of the corporation. But we are unable to say that the investment in land altered the character of the funds invested. The retention of the lands was not essential to the existence of the charity, for the corporation might have bought or rented schools elsewhere, or a site for other schools might have been given to them. In these circumstances, we cannot hold that the funds ceased to be legally applicable to income at the discretion of the governors. The governors for the time being could not, we think, alter the destination of the funds, or the trusts upon which they were held by investing them in land, or deprive their successors of the discretion vested in

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them. We are therefore of opinion that the proceeds of the sale of the lands are still applicable as income to the general purposes of the charity, and therefore exempt from the jurisdiction of the commissioners and the powers and provisions of the Charitable Trusts Acts. It is unnecessary to say what would be the case if a charity had no subscription list, and relied for its maintenance wholly on the income of endowments derived from voluntary donations for its general purposes in past years which had been invested and capitalised. We will only observe that it is for those who claim an exemption to make it out, and the provisions of the Act on which we have commented seem to apply only to a charity maintained partly by voluntary subscriptions and partly by income of endowments. The result of our judgment, therefore, is (1) that income of any endowment *primâ facie* means income derived from any invested funds; (2) but that in the case of a charity partly maintained by voluntary subscriptions and partly by the income of any endowment, bequests, and donations for the general purposes of a charity which may be lawfully applied as income consistently with the terms of the gift, are exempt; and (3) that such gifts and the income thereof are not brought within the jurisdiction by being invested by the governing body. There remains the question whether the learned judge was right in directing payment of the 5000*l.* to the corporation. Mr. Vaughan Hawkins contended that a charity cannot sell its land by law independently of the Charitable Trusts Acts. We think that statement is too broad. A charitable corporation can sell and pass the legal estate to a purchaser, but he takes it subject to the obligation of showing that the sale was beneficial to the charity and justified by the circumstances: (*Attorney-General* v. *Warren*, 2 Swanston, 302.) But we doubt whether this principle is applicable to a case where the land represents the investment of funds which the governors are empowered to apply and dispose of for every purpose of the charity at their discretion. The authorities referred to seem to contemplate a case where the land is part of the permanent endowment of a charity the income of which is applicable by the governors. We are therefore of opinion that, if the money in court were reinvested in land, the governors could sell it at their discretion and apply the proceeds as income, and the learned judge was therefore right in directing payment to the corporation. We are of opinion that the appeal should be dismissed, with costs.

Appeal dismissed.

Solicitor for the appellant, *J. M. Clabon.*

Solicitors for the respondents, *Bridges, Sawtell, Heywood, Ram,* and *Dibdin*; *Cunliffes* and *Davenport.*

July 9, 10, *and Aug.* 8.

(Before the LORD CHANCELLOR (Herschell), LINDLEY and DAVEY, L.JJ.)

Re TUCKER; TUCKER *v.* TUCKER. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Trustees—Investment—Loan to firm—Payment of interest by firm—Liability of partners—Statute of Limitations (21 *Jac.* 1, *c.* 16)—*Mercantile Law Amendment Act* 1856 (19 & 20 *Vict. c.* 97), *s.* 14.

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

By his will, dated in 1870, *a testator, who died in that year, empowered his trustees to invest certain moneys by placing the same "on deposit in the hands of the firm of B., T., and Co., should they be willing to receive it, at interest;" but if not, then upon the usual securities, with liberty "to call in, vary, and transpose investments." At the date of the testator's death a considerable sum belonging to him was on deposit with the said firm, which then consisted of W. and H. The trustees left it in the hands of the firm, and subsequently added other sums to it. H. died in* 1875. *Later on in the same year W. admitted two new partners into the firm. By a deed of dissolution of April* 1883 *W. retired from the partnership by arrangement, and the continuing partners agreed to pay the debts and liabilities of the firm, including the debt due to the testator's trustees. Down to March* 1891 *the continuing partners paid interest on the debt, in the name of the firm of B., T., and Co., to the person beneficially entitled. An action was brought by the beneficiaries under the will to have the money restored.*

Held, that W. was liable for the debt due, the case being taken out of the Statute of Limitations by the payment of interest by the firm after W.'s retirement therefrom.

Decision of Romer, J. (70 *L. T. Rep.* 127) *affirmed.*

Two appeals were brought against the judgment of Romer, J. (70 L. T. Rep. 127), one by the defendant W. Tucker, and the other by the defendants the executors and beneficiaries under the will of J. Kayess.

With respect to the latter appeal, the question whether any liability attached to the estate of J. Kayess for his breach of trust depended upon the inquiry whether his estate had really been damnified by it, for if W. Tucker discharged the debt no loss would accrue to the estate. The court could, therefore, express no opinion as to the points raised in that appeal until the result of that inquiry was known. The appeal was argued, but was ordered to stand over pending the inquiry.

Neville, Q.C. and *P. S. Stokes* in support of the first appeal.—The fact that the appellant knew that the loan was trust money did not constitute him a constructive trustee of it. Nor is he liable for this debt after retiring from the partnership firm in 1883. The continuing partners of the firm took over all debts and liabilities, and agreed to indemnify him. The payment of interest by the firm after his retirement did not keep the debt alive as against him. Interest having been paid by his co-debtor only, and not by himself, such payment does not operate to keep alive his liability: (Mercantile Law Amendment Act 1856, sect. 14.) There is no case exactly in point. The nearest decision is

Watson v. *Woodman*, L. Rep. 20 Eq. 721.

The payment of interest on the debt by the continuing partner, S. B. Tucker, to the beneficiaries must be taken to have been made by him in his character of a trustee, and not as agent for or on behalf of the firm of W. Tucker. Baker, Tuckers, and Co. were not agents for W. Tucker to make this payment. The debt, therefore, is barred by the Statute of Limitations, and the *cestuis que trust* must look to their trustees alone for the security of their trust funds. As to what

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amounts to an acknowledgment within the Statute of Limitations see

Morgan v. *Rowlands*, 26 L. T. Rep. 855; L. Rep. 7 Q. B. 493.

That case was decided since the passing of the Mercantile Law Amendment Act 1856, and was acted on in

Re Somerset; Somerset v. *Earl Poulett*, 69 L. T. Rep. 744; (1894) 1 Ch. 231, 264.

Haldane, Q.C. and *G. F. Hart* in support of the second appeal.

[Having regard to the fact that the decision in this appeal was postponed, the arguments need not be here stated.]

Chadwyck Healey, Q.C. and *W. B. Heath* for the respondents, the plaintiffs.—As regards the first appeal, W. Tucker knew that this was trust money, and we submit that at the death of H. Tucker he became a constructive trustee of it, having notice of the trust money in his hands:

Ernest v. *Croysdill* 2 De G. F. & J. 175, 198.

But in any case W. Tucker is liable as a partner in the firm, and the payment of interest on the debt prevents the Statute of Limitations from being a bar. The payment must be taken to have been made by him or on his behalf. The case of *Watson* v. *Woodman* (*ubi sup.*), which has been relied upon, is not really in point. Nor does the Mercantile Law Amendment Act 1856 apply to the present case.

[The arguments in opposition to the second appeal are omitted for the reason stated above.]

Neville, Q.C. replied as to the first appeal.

G. F. Hart replied as to the second appeal.

Cur. adv. vult.

Aug. 10.—The following written judgments were delivered:—

The Lord Chancellor (Herschell).—In this case there are two appeals from Romer, J. One appeal is by William Tucker, and the other is by the executors and beneficiaries of the will of J. Kayess. As regards the latter, Romer, J. found that Kayess had been guilty of wilful default, he being a trustee under the will of Stephen Tucker. The learned judge directed an inquiry as follows: [His Lordship read it, and continued:] That inquiry is now being prosecuted. If William Tucker is liable and discharges the debt the estate will suffer nothing. We therefore propose to deliver judgment now in William Tucker's appeal, and to leave the other appeal until the inquiry has been answered. As regards William Tucker's appeal, the question is whether William Tucker is liable to make good to the trustees the sum of money deposited with Baker, Tuckers, and Co., or whether any claim against him has been barred by the Statute of Limitations. In my opinion it is clear that, in 1883, when William Tucker retired from the firm, there was a debt due from him and his copartners to the trustees, and that he continued liable. I think there was no novation at or after that date which discharged him. After his retirement the business was carried on as before, and interest on the money which had been deposited at interest in Baker, Tuckers, and Co. was paid from time to time by the continuing partners in the name of the firm. By the deed of dissolution it was agreed that notice thereof should not be given or advertised until the 1st Feb. 1884; and after that date it was left to the option of any of the parties whether it should be advertised. By the deed the assets of the firm, including the goodwill, were to be taken over by the continuing partners, who were to pay and discharge all the debts and liabilities of the partnership, and jointly and severally indemnify the retiring partner, who was to receive by instalments (the last of which fell due in Dec. 1884) a sum of upwards of 50,000*l*. The deed provided that whilst any money was owing by the continuing partners to the retiring partner "under or by virtue thereof" a monthly balance-sheet should be delivered to the retiring partner, and he might at any time, by leaving notice at the counting-house of the partnership, call in the whole amount of the debt owing to him, and was thereupon entitled to collect all book-debts, and to enter on the premises and carry on the business on his own account. It was contended on behalf of the appellant that, inasmuch as the interest had only been paid by his co-debtors and not by himself, the provisions of the Mercantile Law Amendment Act 1856 (19 & 20 Vict. c. 97), s. 14, prevented such payment operating to keep alive his liability. But that statute merely provides that the debt shall not be kept alive as against a co-debtor by reason only of the payment of interest by a co-debtor, and was not, in my opinion, intended to have any application where the payment, though made by one debtor, was made by him for and on behalf of another co-debtor at his request. In the present case the money deposited with the firm was deposited on the terms that interest should be paid until the principal had been repaid. It was contemplated between the parties that the business should be continued by the continuing partners, and of course that the interest should be paid. The retiring partner had an interest in the continuance of the business, for he reserved to himself the right, if any debt were due to him "under or by virtue" of the deed of dissolution, to resume possession of the business. Under all these circumstances I think the fair inference is (and this was the conclusion at which the learned judge below arrived) that the interest was paid from time to time by the continuing partners for and on behalf and as the agent of the retiring partner as well as on their own account. I think, therefore, the judgment in this appeal should be affirmed.

Lindley, L.J.—As the appeal by the executors and beneficiaries under the will of J. Kayess stands over, I will confine my judgment to William Tucker's appeal. William Tucker is alive, and his liability as one of the original borrowers is clear, unless he has been released or discharged by the trustees of the will, or unless his liability is barred by the Statute of Limitations. Release under seal is not alleged. It is contended that he has been discharged by the trustees. But how and when? He remained in the firm until his retirement in 1883, and up to that time he was clearly liable either as the survivor of the two original borrowers or jointly with his new partners if he and they can be regarded as having become so liable to the trustees. I do not see on what ground it can be maintained that the trustees of the will, one of

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whom was his own partner, discharged him from his then liability. This was Romer, J.'s view, and I concur in it. There remains the question whether his liability is barred by the Statute of Limitations. In order to determine this question it is not necessary to decide whether William Tucker, although originally only a debtor, was so mixed up with various breaches of trust as to become liable as a constructive trustee. Romer, J. was of opinion that William Tucker was not liable on this ground. Assuming this view to be correct it does not affect William Tucker's liability as a debtor. His liability as a debtor remains, and this liability, in my judgment, is not barred by the Statute of Limitations. Interest on the money has been regularly paid under arrangements with him ever since his retirement down to Midsummer 1891; and apart from the Mercantile Law Amendment Act 1856 (19 & 20 Vict. c. 97) these payments would be amply sufficient to prevent the Statute of Limitations from running in his favour. He, however, relies on sect. 14 of 19 & 20 Vict. c. 97 as affording him protection. That section enacts that: "In reference to the provisions of the Act of 21 Jac. 1, c. 16, s. 3, and of the Act of 3 & 4 Will. 4, c. 42, s. 3, and of the Act of 16 & 17 Vict. c. 113, s. 20, when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, or executor or administrator, shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money by any other or others of such co-contractors or co-debtors, executors, or administrators." This section is not, in my opinion, applicable to this case. If the true view is that William Tucker was sole debtor, the Act does not apply, and the payments of interest can only be regarded as made by the continuing partners and on his behalf. On the other hand, if he and they are to be regarded as jointly liable to the trustees of the will, one of whom was on this supposition a co-debtor with him, I am of opinion that the provisions of the deed of 1883 were such as to show that the payments made by the continuing partners were made for the benefit and on behalf of William Tucker quite as much as of themselves, and that such arrangements prevented the statute relied upon by William Tucker from applying to this case. Such payments were made in order to conceal his retirement from the firm and to prevent the money from being called in by or at the instance of the *cestuis que trust*. The fact that William Tucker's retirement from the firm, was never gazetted, and that he still retained an interest in the business, and that the payments were made to the *cestuis que trust* as he had made them, viz., by cheques in the name of the firm, strengthen the inference that they were really made on his behalf. Nor was he called as a witness to deny that this was the truth. No doubt the payments were also made by his copartners on their own behalf, for they regarded themselves as liable for the debt, and had indemnified him against his liability to the trustees of the testator's will. The words "by reason only" in the section must not be overlooked; and, notwithstanding *Watson* v. *Woodman* (L. Rep. 20 Eq. 721, 730), I am of opinion that, if a partner retires but still retains an interest in the partnership business, and he agrees with his copartners that his retirement shall be kept secret, and that they shall pay interest on the partnership debts so as to prevent them from being called in, and such payments are made accordingly, the outgoing partner is not protected by the enactment on which William Tucker relies. The object of the enactment was not to facilitate frauds upon creditors, but to protect debtors from stale demands. For these reasons I am of opinion that William Tucker has been properly held liable for the debt in question, and that his appeal ought to be dismissed with costs. The other appeal will stand over until it has been ascertained whether William Tucker can pay or not.

DAVEY, L.J.—On this appeal the sole question is, whether the right of action against William Tucker is barred by the Statute of Limitations. It is not absolutely necessary for this purpose to say whether there was a novation when Stephen Baker Tucker and Arthur John Tucker were admitted into the firm, that is, whether Stephen Baker Tucker and Arthur John Tucker became jointly liable with William for the debt. If there were no such novation William remained the sole debtor at law, and in that case I agree with the conclusion which the learned judge in the court below has come to and for the reasons which he has given. I have some doubt, however, whether I should agree with the learned judge in thinking that there was no loan by the trustees to the new firms other than the firm constituted by Stephen Baker Tucker and Arthur John Tucker alone. I think that the recitals and operative part of the deed of 1891 are evidence against the old trustees, Stephen Baker Tucker and Cannon; that the sum was at that date in the hands of the then firm of Baker, Tuckers, and Co., and that they stood in the relation of debtors to the trustees. The deed of 1883 is evidence against Arthur John Tucker also and the other parties to it, that they accepted that situation, and that the firm were the real debtors; but, even if this is not so, the result, in my opinion, so far as regards this appeal is the same, because I agree entirely with the construction which has been put by the Lord Chancellor upon the section of the Mercantile Law Amendment Act which has been referred to. With regard to the case of *Watson* v. *Woodman* (L. Rep. 20 Eq. 721), Hall, V.C. came to the conclusion upon the facts of that case that the arrangements made on the dissolution of the partnership did not constitute the continuing partners agents for the retiring partner to pay the debt. In this case I think that under the express arrangements made between them and embodied in the deed of dissolution the continuing partners paid the subsequent interest at the request of the retiring partner, and must be deemed to have paid it for the purpose of discharging his liability under arrangements with him as well as their own; or, in other words, they paid the interest on his account and as his agents. Therefore there is an arrangement between the parties which explains the payment in addition, and beyond the mere fact of payment. The Mercantile Law Amendment Act consequently does not apply to the case. I am therefore of opinion that this appeal should be dismissed with costs.

Appeal dismissed.

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Solicitors for the appellants, *Kennedy, Hughes,* and *Kennedy; Tufnell, Southgate,* and *Sons.*

Solicitors for the respondents, *Tocque* and *Rodyk.*

Aug. 6, 7, *and* 9.

(Before LINDLEY, LOPES, and KAY, L.JJ.)

THE FOREIGN, AMERICAN, AND GENERAL INVESTMENT TRUST COMPANY LIMITED *v.* SLOPER.

COLLINGHAM *v.* SLOPER. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Company—Bondholders—Failure of object of company—Compromise—"Proceedings concerning a trust"—Power of court to enforce—Rules of Court, Nov. 1893, *Order XVI., r.* 9 (*a*).

Three actions were brought by the holders of first mortgage bonds issued to provide funds for the completion of a railway in course of construction, the proceeds of the bonds being in the hands of trustees. The first and third actions were brought by a substantial minority of the bondholders, which minority asked for a return of such proceeds of the bonds as remained in the hands of the trustees, on the ground that the completion of the railway had become practically impossible, and, consequently, the purpose for which the bonds had been issued had failed. The second action was brought by a small majority of the bondholders, who desired to have the remaining proceeds of the bonds expended in continuing the construction of the railway.

Pending certain inquiries directed by North, J., before whom the actions came on for trial, a petition was presented by the plaintiffs in the first action asking the sanction of the court to a proposed scheme for the compromise of the litigation.

North, J. refused to sanction the scheme. On appeal:

Held, that the court having power under rule 9a of Order XVI. to approve a compromise in the absence of some of the persons interested, and in this case the proposed compromise being beneficial, the scheme would be sanctioned, subject to a sum being set apart to meet the claims of the dissentient bondholders.

Decision of North, J. reversed.

THREE actions were brought by holders of first mortgage bonds issued to provide funds for the construction of the Saragossa and Mediterranean Railway, the proceeds of the bonds, amounting to about 225,000*l.*, being in the hands of trustees, Sloper and others, called the London Commissioners.

The first action was brought on the 19th Feb. 1892 by the Foreign, American, and General Investment Trust Company Limited, and other trust companies and persons, who formed a substantial minority of the holders of the bonds, asking that the trusts of an indenture of the 13th Feb. 1889, under which the proceeds were held by the London Commissioners, should be carried into execution under the direction of the court; the principal trust being for the construction of the railway.

The second action was commenced on the 25th July 1892, by Collingham and others, representing a small majority of the holders of the bonds, who were desirous that the construction of the railway should be carried out; also asking that the trusts of the indenture of the 13th Feb. 1889 should be carried into execution under the direction of the court.

On the 5th Aug. the plaintiffs in the first action delivered their statement of claim, in which they asked, in effect, for a declaration that the undertaking could no longer be carried out, and that the money remaining in the hands of the London Commissioners should be returned to the bondholders.

The third action was commenced on the 10th Aug. by the plaintiffs in the first action, in which they admitted a charge made in the first action against a company called the Arragon and Catalonia Company, formed in Sept. 1890 by a number of the bondholders for the purpose of obtaining funds for their own protection, but asked substantially the same relief as in the first action.

In Dec. 1892 and Jan. 1893 the three actions, with two motions and a summons relating thereto, came on for hearing together before North, J.

The facts of the case are more fully set out in the report of the proceedings before North, J. (69 L. T. Rep. 39; (1893) 2 Ch. 96).

It was decided by North, J. that there appeared on the evidence no reasonable prospect that the railway could be completed, and that, on the authority of *Wilson* v. *Church*; *National Bolivian Company* v. *Wilson* (41 L. T. Rep. 50; 43 Ib. 60; 13 Ch. Div. 1; 3 App. Cas. 176) the bondholders were entitled to a return of such proceeds as remained in the hands of the trustees, although those bondholders who desired that the moneys should be applied in continuing the construction of the railway were in a comparatively small majority; the return to be subject to the payment of all costs and expenses which had been incurred, and also to a sufficient portion of the proceeds being applied in the proper realisation of the assets of the company. And his Lordship directed certain inquiries to be made in chambers.

Before these inquiries had been fully answered by the chief clerk a petition was presented by the plaintiffs in the action of *Collingham* v. *Sloper* asking the sanction of the court to a proposed scheme for the compromise of the litigation.

North, J. refused to sanction the scheme.

The Saragossa Company appealed from the original judgment, and the plaintiffs in the action of *Collingham* v. *Sloper* appealed from the refusal to sanction the scheme.

The two appeals now came on to be heard together.

Swinfen Eady, Q.C. and *Martelli* for the Saragossa Company.

Crackanthorpe, Q.C., and *Eve* for the plaintiffs in *Collingham* v. *Sloper*.

Moulton, Q.C., *Byrne*, Q.C., and *E. C. Macnaghten* for the plaintiffs in the other actions.

Cozens-Hardy, Q.C. and *A. R. Kirby* for two of the commissioners.

C. T. Mitchell for the third commissioner.

Macaskie, Butcher, and *G. F. Hart* for different claimants upon the fund.

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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Lindley, L.J.—In this case, as regards the non-assenting, or absent bondholders, I have no hesitation in saying that I take upon myself the responsibility of judicially declaring that, in my opinion, it is in their interest that the compromise should be carried out. Now, until Order XVI., rule 9A, was passed, there was a difficulty in such cases. There was a statutory power which enabled the court to sanction a compromise to enable majorities to bind minorities, where before the court had no such power. This case does not come within any of the Acts that confer that power. But this Order XVI., rule 9A, is very important. It does not affect dissentients. Even if there is only one, he must be dealt with. I will deal with the dissentients presently. As regards the absentees, the power of the court has been enlarged. The rule says this: "Where in proceedings concerning a trust a compromise is proposed and some of the persons interested in the compromise are not parties to the proceedings, but there are other persons in the same interest before the court and assenting to the compromise, the court or a judge, if satisfied that the compromise will be for the benefit of the absent persons, and that to require service on such persons would cause unreasonable expense or delay, may approve the compromise and order that the same shall be binding on the absent persons, and they shall be bound accordingly, except where the order has been obtained by fraud or non-disclosure of material facts." Now that is a very valuable rule, and I certainly am prepared to act upon it in a proper case. There always was power in the court, in a suit properly constituted, to bind the rights of some members of a class whose interests were represented by others before the court. But the power to enforce a compromise, or to declare a compromise binding, is new. I think it is an extremely beneficial rule. Now, having heard the statements made in support of this scheme, and in opposition to it, I have not the slightest doubt that it is an extremely beneficial one to everybody. I am not going through the figures, but the case is shortly this: Here is a company formed for making a railway in Spain. The thing is a failure. It has come to a deadlock. Then men of business, and those who put money into it, naturally have to consider what is to be done. As to working out all the rights of the parties, that means simply endless litigation, and one object of this compromise is to put an end to that, and see if something cannot be saved out of the wreck. One has to face a difficulty, and that difficulty can only be faced by concessions being made. The theory is, that this fund over which we have jurisdiction has been subscribed for a particular purpose, and it is said that it is going to be applied for some purpose other than that for which it was subscribed. You must look at it as a whole, and when you come to understand what this arrangement is, I think it is a beneficial one. You start with this: that the railway cannot be completed; the thing cannot go on; no one pretends that it can go on, notwithstanding the extension of time which has been granted by the Spanish Government since North J.'s judgment. It is admitted, indeed, by everybody before the court that the thing cannot go on. That leaves us with the practical question of—What is best to be done? The scheme is, I think, an extremely honest one, and an extremely beneficial one. The evidence shows that, if the money is to be divided, the outside is about 3*l.* 18*s.* per bond. There are a heap of claims, some of which are said not to be good, against this fund. That may be, but still there are claims, and they will hamper everybody in any course which could be taken under the existing circumstances; and, if all the rights were strictly worked out, it would probably lead to litigation. The scheme is that those bondholders who assent shall take 2*l.* 10*s.*, and that the difference between that sum and 3*l.* 18*s.* shall be laid aside in order to get rid of those conflicting claims which, if they are allowed to be litigated, will require that sum; and then the whole fund will go. That is the practical situation. I have no hesitation in saying that I think this is a proper scheme to be assented to, and to be made binding under the order I have referred to. Then there are two or three dissentients. We have no power to bind dissentients; and the only way to deal with them is to set aside for them the maximum sum which they can get. I do not myself see why they should dissent, but there may, perhaps, be reasons out of court which we know nothing about, but, as far as I can judge in court, I do not see myself why they should dissent. However, 600*l.* must be set aside to answer the claims of those who do dissent, and then the court will approve the scheme on the part of those who are absent. In form, I think the right mode of dealing with the case will be to stay proceedings under North, J.'s judgment with liberty to apply. That will be the proper form as to that; and then the court will approve the compromise.

Lopes, L.J.—I am of the same opinion. This case, to my mind, is a valuable illustration of the desirability of the new rule to which reference has been made. This is a railway in Spain which was proposed to be constructed from Saragossa to the sea. The Spanish Government made a concession, and if the line could have been carried out it would have been a line of railway of great utility. But circumstances have transpired which make it impossible for the railway to be carried out. It is admitted in this case that the line cannot be carried out under any circumstances. We have to face the difficulty which has been placed before us, and to determine what is best to be done, having regard to the interest of all parties concerned. Now, a very large number of the obligation-holders assent to this compromise. There are a certain number of dissentients—I think three—representing the amount of about 150 bonds. Under this rule we can deal with those who do not assent, provided we make a compromise which is in their interest. And I have not the slightest hesitation in saying that I think the terms proposed are in the interest of the absentees. I feel quite certain, from what I have heard of the case, that, if I were one of the bondholders, I should readily assent to take the 2*l.* 10*s.* in cash. Under this rule, however, we have no power to bind dissentients, and it has been agreed that the sum of 600*l.*, which means a sum of 4*l.* per bond, shall be set aside for them; that being the maximum which, in any circumstances, they can possibly claim. I am clearly of opinion, therefore, that this compromise ought to be approved.

Kay, L.J. concurred.

Appeal allowed.

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Solicitors: *Huxham* and *Rawlinson*; *Slaughter* and *May*; *Norton, Rose, Norton*, and *Co.*; *Wilkins, Blyth*, and *Co.*; *Francis* and *Johnson*; *Bompas, Bischoff*, and *Co.*

Thursday, July 5.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

WARREN *v.* MURRAY AND OTHERS. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Statute of Limitations—Real property—Tenant at will—Entry on land under building agreement—Agreement to take a lease—Implied trust— 3 *&* 4 *Will.* 4, *c.* 27, *s.* 7.

In 1790, *the trustees of the Marquis Camden entered into a building agreement with certain persons as to a piece of land in Camden Town, and these persons entered into possession of the land under the agreement. By this agreement they agreed to develop the land as a building estate, and the trustees agreed that, as the houses were built, they would grant leases of them for the residue of the term of ninety-nine years from* 1790. *By these leases, a certain agreed amount of ground rent was to be secured to the trustees. Houses were accordingly built; but when the agreed amount of rental had been secured to the trustees, no leases of the houses afterwards erected were in fact made. The plaintiff, who was the successor of the persons who had entered into possession of the land in* 1790 *under the agreement, so far as concerned two houses as to which no lease had in fact been made, remained in possession till* 1890, *when the defendants, the successors of the trustees of* 1790, *resumed possession. Neither he, nor his predecessors, ever paid any rent, nor gave any acknowledgment of title to the trustees of* 1790 *or their successors. In an action to recover possession of the two houses, he contended that he and his predecessors, having been tenants at will within sect.* 7 *of* 3 *&* 4 *Will.* 4, *c.* 27, *were entitled to the fee simple under that statute.*

Held, that the title of the defendants to the two houses in question, had not been barred by the statute.

Per Kay, L.J.: The proviso in sect. 7 *applies to implied trusts, as well as to express trusts.*

Drummond *v.* Sant (25 *L. T. Rep.* 419; *L. Rep.* 6 *Q. B.* 763) *approved.*

THIS was an appeal from the judgment of Wills, J. at the trial of the action without a jury.

The action was brought to recover possession of two houses, Nos. 3 and 4, Archer-street, Camden Town, and for damages for trespass. The defendants were sued as the trustees of the will of the second Marquis Camden. By an agreement dated the 2nd June 1790, and made between the trustees of the Marquis Camden of the one part, and Kirkman and Hendy of the other part, after reciting that Kirkman and Hendy had proposed to take for building purposes a piece of land in Camden Town belonging to the trustees, it was witnessed that Kirkman and Hendy covenanted that they would within five years from Michaelmas 1790, lay out in the manner therein agreed, the sum of £50,000 in building houses on the said piece of land, and would pay for the said land the annual rent therein mentioned; and the trustees covenanted that as the said houses should be erected and covered in, they would grant to Kirkman and Hendy, or their assigns, leases of such houses for the residue of the term of ninety-nine years from Michaelmas 1790 at the rents to be therein reserved, amounting in all to the yearly rent of 25*l.* for every acre of the said piece of land, subject to certain deductions.

Kirkman and Hendy thereupon entered upon the land under this agreement, and erected and covered in several houses.

Leases of the houses were granted by the trustees until the rents reserved thereon amounted in all to the agreed rent of 25*l.* for every acre of the said piece of land. Kirkman and Hendy, or their assigns, then became entitled under the agreement to leases of the houses subsequently built on the remaining portion of the said piece of land, for a term of ninety-nine years from Michaelmas 1790, at a peppercorn rent. In fact, however, no such leases were ever asked for or granted, nor was any rent ever paid in respect of such houses.

The two houses in respect of which the action was brought were built on a part of the land of which no lease was ever granted.

Messrs. Kirkman and Hendy's interest in this part of the land was assigned in 1820 to the plaintiff's father, who entered into possession, and was succeeded, upon his death, by the plaintiff who remained in possession until 1891, when the defendants, the successors of the trustees of 1790 took possession.

The Statute of Limitations (3 & 4 Will. 4, c. 27) provides by sect. 2 for a limitation of a period of twenty years from the time when the right of entry first accrued, for the bringing of an action for the recovery of land, and by sect. 34 for the extinguishment of the right at the determination of such period.

By sect. 7 it is provided:

> That when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined; provided always that no mortgagor or *cestui que* trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee.

Sect. 15 provides that where no acknowledgment of title had been given, the person claiming the land might, notwithstanding the period of twenty years had elapsed, bring an action to recover the land at any time within five years next after the passing of the Act, *i.e.*, the 24th July 1838.

At the trial of the action before Wills, J. without a jury, the plaintiff contended that his predecessors having been simply tenants at will under the agreement the trustees' right to the houses in question had been extinguished under the statute. Wills, J. held, upon the authority of *Drummond* v. *Sant* (25 L. T. Rep. 419; L. Rep. 6 Q. B. 763), that the case was not within sect. 7, and he gave judgment for the defendants.

The plaintiff appealed.

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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J. G. Joseph for the plaintiff.—When the plaintiff's predecessors in title entered into possession of the land they became tenants at will to the trustees, and therefore, upon the expiration of one year from that date, time began to run under sect. 7 against the trustees. Then the effect of sects. 2, 15, and 34 was that in 1838 the title of the trustees was extinguished, and the plaintiff's predecessor became entitled to the fee simple:

The Marquis Camden v. *Batterbury*, 28 L. J. 187, C. P.;

Doe d. Coore v. *Clare*, 2 T. R. 739.

[Kay, J.—The question is whether sect. 7 applies to a tenant at will who has entered into possession under a building agreement such as this. He is at most a tenant at will only at law, he is not a mere tenant at will.] Wills, J. decided upon a case in the Queen's Bench, in which it was said that a tenant at will under an agreement such as this is in equity a *cestui que trust*:

Drummond v. *Sant*, 25 L. T. Rep. 419; L. Rep. 6 Q. B. 763.

But that was only a dictum, unnecessary for the decision of the case. The facts of the case were different from those of this case. There was an express trust, the relation was created under an Act of Parliament which governed the mode in which the land was vested. It is submitted that the proviso in sect. 7 applies only to express, not to implied trusts; and that this case is therefore governed by the first part of the section:

Sands to Thompson, 48 L. T. Rep. 210; 22 Ch. Div. 614;

Beckford v. *Wade*, 17 Ves. 87;

Doe d. Stanway v. *Rock*, Car. & M. 549; 4 M. & G. 30.

Sir *Richard Webster*, Q.C. and *J. F. P. Rawlinson* for the defendants were not called upon.

Lord Esher, M.R.—I think that this appeal fails. It seems to me that the judgment in *Drummond* v. *Sant* (*ubi sup.*) really is this, that in considering the effect and the application of the Statute of Limitations (3 & 4 Will. 4, c. 27) to an entry upon land, the court will consider what is the actual legal position of the two parties, including in that expression their equitable as well as their common law rights Therefore the question in the present case is, could the defendants ever have entered on the land in question when it was in the possession of the plaintiffs? Though they may have had a right of entry at common law, nevertheless, if in equity they had no such right, then they really had no right of entry, and the Statute of Limitations does not apply. That seems to me such a just and sensible view to take of the statute, that I do not wonder that in *Drummond* v. *Sant* (*ubi sup.*) the Court of Queen's Bench (Blackburn, Lush, and Hannen, JJ.) came to the conclusion they did. Therefore, agreeing with and approving of the way in which the law was there laid down, let me apply that case to this one. Now the rights of the parties as between themselves were determined, apart from the question as to the statute, by the indenture of 1790. The first question therefore is as to the true construction of that agreement. By it the grantors agreed with the grantees that the grantees should remain in possession of the land for a term of ninety-nine years provided that they performed their part of the agreement. If there had been a breach of their agreement by the grantees which entitled the grantors to re-entry, the case would have been different. So long as the grantees performed their part of the agreement, it seems to me, upon the true construction of the contract, that the grantors had no power to interfere with the possession of the grantees during the currency of the ninety-nine years. If the true rule is that which I have stated, and the court must now take into consideration equitable as well as legal rights, then it is immaterial to consider what would have been the decision of a court which could not take cognizance of equitable rights. Possibly under the former state of things a court of common law, unable to take notice of any equitable rights, might have given judgment that the grantors were entitled to take possession, but if such a judgment could be immediately rendered useless by an application to a Court of Equity, it would not be the real decision of the law. The real decision of the law would be the decision of the Court of Equity, that the grantors were not entitled to possession. The court has now to administer both law and equity. Therefore, although perhaps at common law the grantees were tenants at will, and the grantors may at common law have been entitled to turn them out of possession, yet according to the whole law the grantors would not be able to retake possession if the grantees performed their part of the agreement. The grantors had no right of entry, but they had a right, if they thought it worth while to do so, to call on the grantees to take leases. The grantees also would be entitled, if they wished, to require the grantors to grant them leases. That is a test which shows that, under the building agreement of 1790, the grantors would not have been able to eject the grantees at any time during the term of ninety-nine years. I am therefore of opinion that no part of the Statute of Limitations is applicable to the present case. If it were necessary to construe sect. 7, I should say that it applies simply to tenancies at will without any clog or difficulty in the way of the lessor which might prevent him from exercising his will, and entering on the land. If the lessor has not power to enter, then sect. 2 cannot be vouched against him. My opinion is that where, taking the law as a whole, a person has been unable to enter, the Statute of Limitations cannot be used against him. The judgment of Wills, J. was founded upon the judgment in *Drummond* v. *Sant* (*ubi sup.*), which I think was one of the greatest excellence, and this appeal must be dismissed.

Kay, L.J.—I entirely agree. In 1790 the trustees of the Marquis Camden entered into an agreement, under seal, with certain intending lessees, by which in effect they agreed to let a piece of land for building purposes, and to grant leases of the buildings which were to be erected, and, when by those buildings a certain amount of rent had been secured, then to grant leases of the remaining portions of the land at a peppercorn rent. All these leases were to be for the term of ninety-nine years from 1790. Thereupon the tenants entered, and buildings were erected of sufficient value to secure the agreed amount of rent by the leases which were granted in respect of them. Houses were afterwards erected on the remaining portion of the land, but the tenants

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who had entered under the building agreement remained in possession without having any legal leases granted to them. When the term of ninety-nine years from 1790 had expired, the grantors entered into possession, as though leases had been granted and had expired. After they had taken possession this action was brought to eject them from two houses built on the estate. The ground of the action was that, as no leases had been actually granted of these two houses, the tenants had acquired the fee simple by reason of the Statute of Limitations. It is argued by the plaintiff that, no leases having been granted, he and his predecessors in title were mere tenants at will of the grantors, no rent having been paid nor any acknowledgment of title having been given to them or to their successors, the present defendants; and that, therefore, under sect. 7 of the Statute of Limitations the grantor's title has been barred, and the plaintiff has been wrongfully ejected. The question comes to this, what is the position of persons who have entered into possession of land under an agreement such as this, have performed their part of the contract, and are holding a part of the land without requiring a lease of it to be granted to them and without having been required by the grantors to take a lease of it? It is said that their legal position is simply that of tenants at will. I will assume that it is so. But does it follow that under the Statute of Limitations a tenant who has entered into possession under such an agreement as this can acquire the fee simple? Reliance is placed upon the first part of sect. 7, and it is said that upon the expiration of one year from the commencement of the tenancy in 1790, the time began to run under the statute. It was admitted that if, within at any rate twenty years after 1790, an action had been brought against the tenant to eject him, he could at once have obtained an injunction from the Court of Chancery to stop it, asking at the same time for specific performance of the agreement. Can it possibly be the meaning of the Statute that time should begin to run so as to vest the fee simple in the tenant, although any attempt to eject him during that period could at once have been frustrated by a simple suit in equity? It is impossible that that could be so. Nor was the delay of the grantors in requiring the tenant to take a lease of such importance that, through their omission to do so for twenty years, their right to compel him to take it was gone. The agreement does not specify any time within which the lease was to be granted, nor does it state that he was to be required to take a lease. If the grantors had at any time within ninety-nine years from 1790 attempted to eject the tenant, after he had performed the whole of his part of the agreement, upon the ground that he was a tenant at will, I can see no reason to doubt that before the Judicature Act their action would have been stopped by a suit in equity, and since the Judicature Act the defendant would have successfully defended the action. In my opinion it is plain that the grantors could not, at any time within the ninety-nine years, have turned the tenant out of possession when he had fulfilled his part of the agreement, and that is so whether a legal lease had, or had not, been granted. That being so, there must naturally be a correlative right in the grantors not to be turned out by the tenant. Both parties are similarly situated. That seems to me to be by itself a complete answer to the plaintiff's case. But further than this, it has been decided in *Drummond* v. *Sant* (*ubi sup*), that this very case has been provided for by sect. 7 of the Statute of Limitations, which requires the court to have regard not merely to the legal rights of the parties but also to any equity which may be imposed upon them by a building agreement of this kind. By the proviso at the end of the section it is enacted "that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee." In the case of a mortgagor it is clear that there must be an express agreement between him and his mortgagee, and for many purposes there is no trust at all, but at best there is merely an implied trust. Therefore the case where an implied trust exists between a mortgagor and mortgagee is expressly excepted from this section. That is to say, that although a mortgagor may be tenant at will to his mortgagee, nevertheless sect. 7 does not apply at all to his case. Now then, by analogy, what is meant by "*cestui que trust*" in this clause? Does it merely mean a person who by express words, writing being necessary for a trust of real property, is put in the position of a *cestui que trust*, or does it not include the case of an implied *cestui que trust*? If it includes the case of an implied trust, the case before us is not within the words of the section because there is here that which, in the view of a court of equity, puts the persons concerned into a fiduciary relation. I find at page 148 in the last edition (the ninth) of Lewin on Trusts the following statement which I agree with. "If a person contract to sell another an estate, the vendor has impliedly declared himself a trustee in fee for the purchaser, and is accountable to him for the rents and profits." Now a lessor is *pro tanto* a vendor, and in this respect the same law applies between lessor and lessee as between vendor and vendee. Therefore when a lessor under an agreement such as there is here, lets the lessee, or intending lessee, into possession, there is between them an implied trust which puts the intending lessee into the position of *cestui que trust* of the lessor. If the proviso at the end of sect. 7 includes the case of an implied trust, that case is deliberately taken altogether out of the purview and effect of the section. That, I think, is what was intended, and what has been done. The section was not intended to apply to the case of a tenant at will who is in the position of a *cestui que trust* to his lessor, or between whom and his lessor exists such a fiduicary relation as existed here. I understand that to be the reasoning in the case of *Drummond* v. *Sant* (*ubi sup.*). and I agree entirely with that very careful and astute decision on this section. But then it was argued, and with great weight, that that decision is not altogether consistent with the language of Fry, L.J., in *Sands* v. *Thompson* (*ubi sup.*). In that case there had been a legal mortgage by which the legal estate had been vested in the mortgagee. The mortgagor had remained in possession and when the mortgage had been paid off there had been no re-conveyance. The mortgagee had continued in possession for more than twenty years after the mortgage had been paid off and then sold the estate, and the question was whether the fact of the legal estate having been outstanding all that time was a defect in the

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mortgagor's title. The question was raised by the purchaser upon a summons taken out under the Vendor and Purchaser Act 1874. But under those circumstances the mortgagee, who was not in possession, had no equity whatever against the mortgagor who was in possession, and if he had brought an action of ejectment, the mortgagor would have counter-claimed against him that he should be ordered to execute a conveyance of the legal estate, and if it was proved that the mortgage had been paid off, such a counter-claim must have succeeded. That case was totally different from the one which we have now to decide. Here the person in possession was rightfully in possession until the ninety-nine years came to an end, and the grantors acted rightfully in resuming possession. In *Sands* v. *Thompson* (*ubi sup.*) the person in possession had equity in his favour, but not the law; here, the persons in possession had both law and equity in their favour when this action was brought against them. I agree that the language of Fry, L.J. may be read as meaning that the proviso at the end of sect. 7 only applies to express trusts. If he meant to say that, though I doubt whether he did, I can only say that it is inconsistent with the decision in *Drummond* v. *Sant* (*ubi sup.*), in which the law was laid down in precisely the contrary way, viz., that the proviso applies to an implied trust as well as to an express trust. It is to be observed that sect. 25 of this same Act refers in so many words to "express trusts"; but in the proviso of sect. 7 there is no limitation to "express" trusts, and the words used, viz., *cestui que trust, prima facie* applies as much to an implied trust as to an express trust. The decision of Fry, L.J. in *Sands* v. *Thompson* (*ubi sup.*) ought not to be read as being at all in conflict with that of *Drummond* v. *Sant* (*ubi sup.*). However, if it is in conflict, I prefer the decision in *Drummond* v. *Sant*. I think that the present case is the very kind of case which the proviso in sect. 7 was intended to exempt from the operation of the section, and that the plaintiff cannot rely upon the statute as having converted his tenancy into a fee simple. I agree that the judgment of Wills, J. was right, and that this appeal should be dismissed.

SMITH, L.J.—The question to be determined in this case is whether under sect. 15 of the Statute of Limitations (3 & 4 Will. 4, c. 27), the defendants' right to the land was barred in 1838. The facts may be placed in the smallest compass, and I will shortly state them. On the 2nd June 1790, the trustees of the Marquis Camden agreed to let thirty acres of land at Camden Town to two builders who were to erect thereon houses of the value of 50,000*l.* and it was agreed that as the houses were built, leases should be granted by the trustees for the residue of a term of ninety-nine years from 1790, and that by these leases a certain amount of rent should be secured to them. The builders entered on the land under this agreement. Upon those facts it seems to me impossible to say that at any time during the ninety-nine years the trustees could have ejected the builders or their representatives, even if no leases were granted. If any such proceedings had been taken by the trustees, the builders or their representatives could have obtained from the Court of Chancery a decree for the specific performance by the trustees of their agreement to grant leases, and would have been able to stop the trustees' action of ejectment. If leases had ever been granted they would have expired shortly before 1890, and the trustees in that year took possession of the houses. The plaintiff now seeks to eject the trustees on the ground that he and his predecessors have been in possession without any lease, or acknowledgment to the trustees, and have therefore acquired the fee simple by virtue of the Statute of Limitations. It seems to me perfectly clear that the plaintiff cannot rely upon the statute. The effect of sect. 2 is that no person shall bring an action to recover land, but within twenty years next after the right of action has accrued, and it is self evident that before the statute can have effect, the person against whom it is sought to use it must have had a right to recover possession. We cannot say that the trustees are to lose their property because they have not entered on the land, when in fact they have not been entitled to enter. The trustees could not have entered at any time during the ninety-nine years because they had bargained to grant a lease, and as a court of equity would at once have ordered specific performance of that bargain, they could never have recovered possession of the land. But then sect. 7 is relied on, and it is said that time began to run as there provided, because the builders were tenants at will of the trustees. But it seems to me that, under this section, as under other sections of the Act, time does not begin to run until the right of entry has accrued. There must first be a right of entry. If on the facts of this case, the owners of the property had no enforceable right of entry, then the section does not apply. Here the trustees never had any right of entry within the meaning of this statute, and therefore the time never began to run, at least until the ninety-nine years had expired, or so long as the plaintiff or his predecessors could have required the trustees to grant a lease. I think the action fails, and the appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiff, *Wood, Bird,* and *Wood.*

Solicitors for the defendants, *Farrer* and *Co.*

June 20, 21, *and July* 9.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

THE DARLASTON LOCAL BOARD *v.* THE LONDON AND NORTH-WESTERN RAILWAY COMPANY. (*a*)

ON APPEAL FROM THE RAILWAY AND CANAL COMMISSION.

Railway and Canal Commission—Jurisdiction—Removal of a railway station—"Reasonable facilities for the receiving and forwarding and delivering of traffic"—Rebuilding of new station—Station not in actual use — Railway and Canal Traffic Act 1854 (17 *&* 18 *Vict. c.* 31), *ss.* 1 *and* 2.

A railway company ceased to use one of its branch lines for passenger traffic, and pulled down a station which had formerly been in use by passengers on the line. No obligation to maintain the station in use was imposed on the

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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company by any of its private Acts of Parliament. Upon an application being made to the Railway and Canal Commissioners about five years afterwards, they ordered the company, under sect. 2 of the Railway and Canal Traffic Act 1854, to afford reasonable facilities for the receiving and forwarding and delivering of passenger traffic on the line in question. The company appealed.

Held (reversing the decision of the Railway and Canal Commissioners), that the order was, in effect, an order to the company to build and open a new station, and that the jurisdiction of the commissioners to order a railway company to afford "all reasonable facilities," under sect. 2, had reference only to a railway or a station in actual use. The commissioners therefore had no jurisdiction to order a new station to be built.

This was an appeal from a decision of the Railway and Canal Commissioners (Wills, J., Sir Frederick Peel, and Viscount Cobham) granting an application by the Darlaston Local Board, under sect. 2 of the Railway and Canal Traffic Act 1854, for an order requiring the London and North-Western Railway Company to "afford reasonable facilities for the receiving and forwarding and delivering" of passenger traffic on their branch line between Wednesbury and James Bridge stations, and to re-open Darlaston station for that purpose.

By the Railway and Canal Traffic Act 1854 (17 & 18 Vict. c. 31) it is provided as follows:

Sect. 1. In the construction of this Act . . . the word "railway" shall include every station of or belonging to such railway used for the purpose of public traffic.

Sect. 2. Every railway company, canal company, and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively . . .

The facts of the case were as follows:—

The branch line in question was authorised to be made by the South Staffordshire Railway Act 1855 (18 & 19 Vict. c. clxxv.). It was opened in 1863, and upon it the defendant company built a station at Darlaston. The distance from the market-place at Darlaston to James Bridge station by road is less than one mile, and to Wednesbury station less than one mile and a half.

Subsequently a tramway was laid down near the railway from Wednesbury to Darlaston and from Darlaston to James Bridge, and it was found by the railway company that in consequence of this they could no longer work passenger traffic over the branch line in question at a profit.

In Oct. 1887 they ceased to run passenger trains over the branch line, and shut up Darlaston station.

In 1889 they pulled the station down.

In 1893 the Darlaston Local Board made the present application to the Railway Commissioners.

The commissioners thereupon made an order which, after reciting that the applicants had complained that the respondents had ceased to use the railway between Wednesbury and James Bridge for the conveyance of passengers, and had closed the station on such railway at Darlaston previously used for such traffic, and that such complaint had been proved to be true, required the respondents, their agents and servants, to afford reasonable facilities for the receiving and forwarding and delivering of passenger traffic upon and from the said railway.

The railway company appealed.

Sir *Richard Webster*, Q.C. (*Pope*, Q.C. and *C. A. Russell* with him) for the railway company.—The Railway Commissioners had no jurisdiction to make such an order as they have made. The order practically amounts to a direction to the company to build and maintain a new station at Darlaston. There are no words in the private Act under which this line was made, or in any of the company's private Acts, which cast any obligation on the company to continue the use of the line or to keep open any station upon it. The words used are only permissive, and therefore under these Acts the company is entitled to put the stations on the line where it likes:

Reg. v. *The York and North Midland Railway Company*, 1 E. & B. 858;

Reg. on the prosecution of the Ruabon Brick Company v. *The Great Western Railway Company*, 69 L. T. Rep. 572; 62 L. J. 572, Q. B.

Wills, J. held that, where there is at a station a substantial amount of passenger traffic such as to require a station, a railway company which closes that station without providing an equivalent, commits a breach of the obligation imposed by the Railway and Canal Traffic Act 1854, sect. 2, to afford "reasonable facilities." In fact he has laid down that, where there is once a station, there must always be a station. The commissioners have followed a previous decision of their own:

The Winsford Local Board v. *The Cheshire Lines Committee*, 62 L. T. Rep. 268; 24 Q. B. Div. 456.

It is submitted that that decision is wrong. Applying the interpretation in sect. 1 of the Railway and Canal Traffic Act 1854, sect. 2 refers only to stations which are in actual use. It is the fact of a station being actually in use for the purposes of public traffic at the time of an application to the Railway Commissioners, that gives the commissioners jurisdiction to order a company to give reasonable facilities. If there is no station in existence, then the commissioners have no jurisdiction to make an order, such as this, which amounts in effect to an order to build a station:

The South-Eastern Railway Company v. *The Railway Commissioners and the Corporation of Hastings*, 44 L. T. Rep. 203; 6 Q. B. Div. 586.

It is immaterial whether a station has once existed, or whether there has never been one at the place complained of, so long as there is no station actually in use there. The words "used for the purposes of public traffic" are in a general, not a private, Act, and are applicable to all railways. They should therefore be looked at, in construing them, from a business point of view. The judgment of the commissioners makes "reasonable facilities" to refer only to the wants of the public, and no consideration is paid as to what may be "reasonable" as regards the company in the matter of expense, &c. The court ought also to take into consideration the delay that there has been in making this application, several years having elapsed since the station was pulled down.

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Cripps, Q.C. (*Balfour Browne*, Q.C. and *E. T. Slater* with him) for the Darlaston Local Board.—We admit that under the company's private Acts, no obligation is cast upon them to maintain a station at Darlaston. The sole question is, whether the Act of 1854 does not lay such a duty on the company, and whether the company has provided "reasonable facilities" as required by sect. 2. It is no answer to such an application as this to say that over a particular branch of railway a company cannot carry on a particular class of traffic except at a loss; no question is involved as to the profits the company may make out of the line by passenger traffic. If the argument as to the company's losses is a good one, a railway company could refuse to carry any particular class of goods if the carriage of that class of goods should not be profitable; but that is clearly not the law. The *Hastings* case (*ubi sup.*) does not apply to such a case as this, where there has been a station in actual use for many years which the company has now ceased to use. If the continued user of a railway station is a "reasonable facility," then the company may be ordered to continue to use it under sect. 2. The commissioners have not ordered any specific works to be carried out, they have only required the company to afford reasonable facilities for passenger traffic. The decision in *Reg.* v. *The Great Western Railway Company* (*ubi sup.*) turned on private Acts of Parliament, and no reference was made to the Railway and Canal Traffic Act 1854 as to the duty of a railway company to maintain its lines and stations. Moreover in that case the railway was not being used for the purposes of traffic at all at the time the question arose; it had been abandoned. Here the branch line is still in use, though not for passenger traffic. Under sect. 2, there is an obligation to maintain a station so long as the maintenancce of it is a reasonable facility. Lindley, L.J. has said that under the Act of 1854 a railway company is now bound to carry passengers over its line if they have facilities for so doing:

Dickson v. *The Great Northern Railway Company*, 55 L. T. Rep. 868; 18 Q. B. Div. 176.

Sir *Richard Webster* replied.—The argument for the local board depends upon construing "reasonable facilities" in sect. 2 to include "stations." As the word "railway" in that section includes "stations," according to the interpretation of sect. 1, this would lead to an absurd construction of the section.

Cur. adv. vult.

July 9.—Lord Esher, M.R.—This is an appeal from a decision of the Railway Commissioners upon an application made by the Darlaston Local Board, under sect. 2 of the Railway and Canal Traffic Act 1854, for an order requiring the London and North-Western Railway Company to "afford reasonable facilities for the receiving and forwarding and delivering" of passenger traffic on their branch line between Wednesbury and James Bridge stations, and to re-open Darlaston station for that purpose. It was frankly admitted here that the application was really for an order to re-open Darlaston station for the purpose of passenger traffic. [His Lordship stated the facts and continued:] The whole question depends upon the true construction of the Railway and Canal Traffic Act 1854. Sect. 2 provides that every railway company, canal company, and railway and canal company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively; and by sect. 1, in the construction of that Act, "The word 'railway' shall include every station of or belonging to such railway used for the purposes of public traffic." It seems to me a necessary implication from that, that in sect. 2 the word "railway" does not include a station which is not used, that is to say which is not in use, for the purposes of public traffic. Is that a true construction of the statute? I am of opinion that that was determined by this court to be the construction of the statute, in the case of *The South-Eastern Railway Company* v. *The Railway Commissioners and the Corporation of Hastings* (*ubi sup.*). In his judgment in the present case Wills, J. says: "In that case the Court of Appeal certainly decided that this court has not jurisdiction to make an order for 'reasonable facilities' which can only be complied with by the opening of a new station. I confess that, but for the decision, I should have thought that much might have been urged against this view of the effect of the section." Wills, J. seems to me there to express a doubt whether the decision of this court in the *Hastings* case was correct. We have no authority to overrule a former decision of this court, but out of respect to him I will say this, that I have considered whether his doubt is well founded, and have come to the conclusion that it is not. I feel clear that the decision in that case was perfectly right, so that, even if I were able to overrule it, I should not do so. The effect of sect. 2 is, that a power to order reasonable facilities to be given means a power to insist upon a reasonable use. A facility is a use, and the word implies that the thing, with regard to which reasonable facilities may be ordered, is a thing in use, and is a thing, therefore, which is in existence. It follows therefore, from the use of this phrase in sect. 2, that a summary application cannot be made to the Railway Commissioners for an order under this section that a railway, or a station, shall be made; certainly, at least, the commissioners cannot upon such an application order reasonable facilities to be given with regard to a station which is not in use. Supposing a case in which a railway company, having obtained an Act of Parliament which imposed on them a duty of building a railway from London to York, neglected to perform that duty, can it be said that, upon a summary application under sect. 2, the commissioners have power to order that railway to be built? It seems to me from the very words of the section that they could not. If a railway company had entered into any such obligation and neglected the duty imposed on them by Act of Parliament, the only court which could enforce fulfilment of that duty would be the court which can issue a *mandamus* for that purpose—formerly, that is to say, the Court of Queen's Bench, and now the High Court. If a railway company, bound by an Act of Parliament to keep up a railway for the benefit of the public, neglected its duty and proposed to destroy the line, the remedy would be to obtain an injunction against it, and that should be

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obtained from the High Court. In such a case, in my opinion, there would not be any question about any order affording reasonable facilities. So that the question whether a railway company is bound to make a line of railway, or whether a railway company is bound not to cease working a line of railway as a railway, is a question for the consideration of the High Court as to the granting of a *mandamus* or an injunction, and is not a question to be decided by the Railway Commissioners upon a summary application under sect. 2. Still less can the Railway Commissioners interfere in the matter if the railway company in question is not under any Parliamentary duty to make the line or to keep the line open when it is made, but is merely authorised to make the line or to work it. They have jurisdiction to determine the question whether a railway company is giving reasonable facilities for the receiving and forwarding and delivering of traffic upon a railway only in the case where there is a railway in existence and being worked as a railway. Much more so as to a station. Now, it is obvious upon the true construction of this Act of Parliament that, though in one sense a station is part of a railway, yet for the purposes of sect. 2 it is to be considered as a separate thing and dealt with separately from the railway. It is upon that view that the *Hastings* case (*ubi sup.*) was decided. Lord Selborne, L.C. there says: "With respect to stations, there is no obligation to establish them at any particular places or place unless the company think fit to do so. The railway (as interpreted by the Act) only includes existing stations used for the purposes of public traffic. But when the company has in fact opened a station at a particular place, and actually uses it for the purpose of public traffic, and invites the public to resort to it for the purpose of being received or delivered as passengers to or from trains announced as starting from or stopping at that station," then, he says, the commissioners have jurisdiction to determine whether the company is giving reasonable facilities at that station. Lord Coleridge, C.J. said he agreed with the Lord Chancellor. In my judgment I used these words: "Applying these propositions to the present dispute, it follows that the defendants (the Railway Commissioners) had jurisdiction only to hear and determine and order in respect of facilities to be afforded upon or from the railway or the stations used by the company for the purposes of public traffic. This description of the railway and stations, namely, that they are used by the company, confines their jurisdiction—that is, the commissioners' jurisdiction—to a dealing with the existing railway and the existing stations, and prevents them from ordering the making of any new railway or any new station." The question in the *Hastings* case was raised in a suit for a prohibition to the Railway Commissioners on the ground that they were exceeding their jurisdiction. The case before us now is an appeal from a decision by the Railway Commissioners; but if it is shown that they have exceeded their jurisdiction, that objection is one that may be raised by way of appeal. In the present case Wills, J. says: "I think that we are justified in laying down the general proposition that, where a station exists and there is at that station a substantial amount of passenger traffic, for the railway company to close that station without providing an equivalent is a breach of the obligation to give reasonable facilities under the section, the word 'railway' in which is defined by words of extension as including 'every station of or belonging to such company used for the purposes of public traffic.'" Now the extent to which he goes may be shown by this. He says that the company "endeavoured in good faith for several years to provide an efficient passenger service, and it was only when they found that they were incurring a heavy loss that they closed the line for passenger traffic. We think that in doing so they acted illegally." The commissioners finally gave a decision in accordance with a case of *The Winsford Local Board* v. *The Cheshire Lines Committee* (*ubi sup.*), a previous decision by the Railway Commissioners. I think that, in so doing, they have acted contrary to the decision of this court in the *Hastings* case, and that they had no jurisdiction to make the order which they did make in the case of *The Winsford Local Board* v. *The Cheshire Lines Committee*, or in the present case. I adhere to what was said in the *Hastings* case, and I think that the Railway Commissioners cannot prevent a railway company from pulling down one of their stations any more than they can order a railway company to build a new station. If, therefore, this application had been made to the commissioners even within two months of the destruction of Darlaston station by the defendant company, the commissioners would have had no jurisdiction to order the company to reinstate it. That is in effect what they have ordered to be done in the present case. I think their decision is wrong because they had no jurisdiction to make such an order, and I am of opinion that it must be reversed and this appeal allowed.

Kay, L.J. after stating the facts, continued: In the judgment of the commissioners, delivered by Wills, J., it is decided: (1) That the Act of 1854 imposes upon railway companies an obligation to give reasonable facilities; (2) that this obligation was broken by the discontinuance of passenger traffic on this branch line; (3) that, as there was at the time of closing Darlaston station an amount of passenger traffic at it which, though not large, was still substantial, it was a breach of the obligation to close it without providing an equivalent; (4) that, as closing the branch for passenger traffic was an illegal act, it was proper to make the present order. I take the facts as they are found by the commissioners. In their printed judgment the circumstances of the case are very explicitly stated in the following words: "It is but too plain that the line must be worked at a loss, and we regret to impose this burden upon the respondents. They endeavoured in good faith for several years to provide an efficient passenger service, and it was only when they found that they were incurring a heavy loss that they closed the line for passenger traffic." The utmost that the Act of 1854 requires is, that railway and canal companies should afford reasonable facilities to the public. That must mean reasonable as regards the company as well as the public. This seems to be recognised in the judgment of the commissioners. They say that the service to be established must be reasonable from the point of view of the respondents, the railway company, as well as the applicants. The decision is, that it is reasonable to require a

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railway company to give facilities to the public which involve a heavy loss to themselves, after having "endeavoured in good faith for several years" thus to accommodate the public. With deference, this seems to me to disregard the plain language of the Act, and to assume a jurisdiction to compel a railway company to give unreasonable facilities, which is contrary to the terms of the statute, and therefore beyond the jurisdiction of the Railway Commissioners. This consideration alone compels me to the conclusion that the commissioners, upon the facts, as found by them, had no jurisdiction to make this order. But the question argued on this appeal was much larger and more important, and is one which affects railways and canal companies very seriously indeed. It was freely admitted by counsel that no obligation was imposed upon this railway company by any of its special Acts either to make, or having made to maintain, this branch railway from Wednesbury to the main line at James Bridge. The language of the statute (18 & 19 Vict. c. clxxv.), which empowered the company to make the branch in question, is in the usual form, that "subject to the provisions in this Act contained the company may make and maintain the railways hereinafter mentioned, with all necessary works and conveniences connected therewith." Whatever obligation the company were under in this respect was imposed upon them, it was admitted, by the Railway and Canal Traffic Act 1854 only. By the definition, sect. 1, "railway," as used in the Act, includes "every station of or belonging to such railway used for the purposes of public traffic." Sect. 2 is the section which is supposed to oblige the company to re-open the station in this case. I will read it shortly, introducing the words I have quoted from the definition: "Every railway company shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from their several railways, including every station of or belonging to such railway used for the purposes of public traffic." Now, no doubt these words are imperative. They were intended to impose upon railway companies an obligation which either did not exist or was imperfect before, and the Act provides a summary mode of enforcing that obligation, a jurisdiction which is now vested in the Railway Commissioners. If the company do not give the reasonable facilities made obligatory by this Act, the Railway Commissioners may require them to do so on a summary application for the purpose. But what are the reasonable facilities intended? If the company never made the branch railway at all, could the commissioners compel them to do so? It was decided in *Reg.* v. *York and North Midland Railway Company* (1 E. & B. 858), that a railway company, under such words as are used in the special Act in this case, is not under any obligation, contractual or otherwise, to make the line, although, if the words in the special Act are imperative, as in *Rex* v. *The Severn and Wye Railway Company* (2 B. & A. 646), it was held otherwise. And in *The Scottish North-Eastern Railway Company* v. *Stewart* (3 Macq. 382) the decision in *Reg.* v. *York and North Midland Railway Company* was cited, and approved by Lord Wensleydale in the House of Lords. This decision was before the Act of 1854. But it can hardly be argued that this statute made it compulsory to make the railway. Then, in *Reg.* v. *The Great Western Railway Company* in 1893 (69 L. T. Rep. 572; 62 L. J. 572, Q. B.), it wa decided that, where the special Act contained only the usual permissive words, a railway company could not be compelled by *mandamus* to reinstate a part of their line which had been let down and destroyed by working the minerals underneath it. The ground of that decision was, that the company was under no obligation to maintain the line, and therefore could not be compelled to reinstate it. Bowen, L.J. said: "It must be admitted, after the decision in the House of Lords, and in the Exchequer Chamber, that there was no obligation on the railway to make the line. The applicants can only get the obligation to reinstate, if at all, out of a supposed obligation to maintain the line after it is once made. They cannot ask for a *mandamus* directing the railway company to maintain the line, but they say that, if there is an obligation to maintain it, that involves an obligation to reinstate it if it is destroyed. No doubt, if there were an obligation to maintain, there would be an obligation to reinstate; but, in order to get the duty to reinstate, one must find the duty to maintain." It was suggested in the argument in the present case that the statute of 1854 was overlooked in that case, because no reference to it appears in the judgments. But the statute was referred to in the judgment of the Divisional Court from which the appeal was brought, and if no argument upon it was raised in the Court of Appeal it must have been because such argument would have been useless. I am clearly of opinion that, if a railway company is not bound by its special Act to make or maintain the railway, no such obligation is imposed upon it by the Act of 1854. But there is another decision of the Court of Appeal which bears still more closely upon the present case. I mean *The South-Eastern Railway Company* v. *The Corporation of Hastings* (*ubi sup.*). The short effect of that decision is that a railway company cannot be compelled to make a station where there was not one before, nor to direct that imperfections in an existing station shall be remedied by specific alterations prescribed by the commissioners. The Lord Chancellor, Lord Selborne said, in giving judgment: "A company may carry or not upon its own line as it thinks fit; and if it does so may undertake that business under various conditions and limitations. But, if and so far as it does undertake so to carry either passenger or goods traffic, it comes, in my opinion, under the obligation to afford, for the purposes of that traffic, the facilities required by the first branch of the 2nd section of the Act. With respect to stations there is no obligation to establish them at any particular places or place unless the company think fit to do so. The railway (as interpreted by the Act) only includes existing stations used for the purposes of public traffic. But when the company has in fact opened a station at a particular place and actually uses it for the purposes of public traffic and invites the public to resort to it for the purposes of being received or delivered as passengers to or from trains announced as starting from or stopping at that station, or of having their goods received there for carriage, it is, in my opinion, bound by the Act to afford at that station (to the extent of its

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powers) all reasonable facilities for receiving, forwarding, and delivering such passengers or goods." His Lordship then proceeds to say that a general order to give increased facilities at an existing station would not necessarily be beyond the commissioners' jurisdiction, because it would incidentally be requisite in order to obey it to make some structural alterations, but that the commissioners have no authority by ordering particular works to be done to control the discretion of the company as to the best means of fulfilling their statutory obligations. The commissioners seem, from their judgment in the present case, to have been considerably embarrassed by that authority. First they say that much might be urged against it. Then they distinguish the case of opening a new station from closing one "for which there is an existing public need." But the question before the commissioners was not of closing the Darlaston station. That had been done years before, and an order to reopen it was so very like an order to open a new station that I do not wonder that the case was found difficult to distinguish. A railway company is a corporation formed for the purpose of carrying on a business for the sake of profit. In consideration of the probable benefit to the public they have extraordinary powers such as taking compulsorily the land they require. Generally speaking, however, the Legislature has carefully avoided putting them under any obligation which might involve pecuniary loss. They are not bound to make, or having made, to maintain the line of railway. That they will do so whenever there is a reasonable expectation of profit, is thought so probable that no legislative obligation is imposed upon them. But then it was necessary to put such companies under some control, and this was done by the Railway and Canal Traffic Act 1854. That statute does not enact that railway companies shall make the lines they are authorised to make, or shall maintain them when made. The purpose of it seems to me to fall far short of these objects. While a railway is in existence and is being worked, questions may arise as to whether reasonable facilities are being afforded for traffic of one kind or another at a particular part of the line, and whether undue advantages are being given to some persons at the expense of others. These questions the commissioners may solve, always bearing in mind that where it is a question of reasonable facilities, they must be reasonable as regards the company as well as the public concerned. But it would require very clear and explicit words in the Act to bring me to the conclusion that it was intended to enable the commissioners to determine whether any part of the line was to be constructed or maintained, or the spot at which a station should be placed. I find nothing in the statute about any of those matters. It is not necessary to the present decision to hold that in no possible circumstances could the commissioners have jurisdiction to prevent the closing of an existing station. It is difficult to conceive that any company would do this where there was a chance of profit by keeping it open. But every such case must depend upon its particular circumstances. I am clearly of opinion in the present case that the company were not bound to keep open the Darlaston station, or to run passenger trains over the Darlaston branch at a loss, and that the company did not act illegally under the circumstances in closing that station. The order of the commissioners is intended to compel the railway company to reopen that station, and I am of opinion that it was beyond their jurisdiction to make the order in this case to compel them to do so.

SMITH, L.J.—Two questions arise upon this appeal, and they undoubtedly are of great importance. The first is, whether a railway company which has built and opened a station upon its line for public traffic can at its own will and pleasure close it and pull it down; the second is, whether, having done so, the company can be compelled by the Railway Commissioners to rebuild and re-open it. [His Lordship stated the facts and continued:] It is clear, apart from the Railway and Canal Traffic Act 1854 about which more hereafter, that where the words of an Act of Parliament, by which a railway company is empowered to make a railway, are enabling, as they are in the present case, and not obligatory, no obligation is imposed upon a company to make the contemplated line or any part of it, or any station connected therewith. At one time it was thought otherwise, but this opinion was controverted first by Erle, J. in his judgment in the year 1852 in *Reg.* v. *The York and North Midland Railway Company*, and was finally exploded in the next year in the Exchequer Chamber (1 E. & B. 858), which affirmed the judgment of Erle, J. Lord Wensleydale subsequently in the House of Lords, in *The Edinburgh, Perth, and Dundee Railway Company* v. *Phillip* (2 Macq. 514), spoke of this case as follows. He said "Now it has been clearly settled, though in the first instance there was some doubt about it, that these enabling Acts are not compulsory. It was solemnly decided by the court of error, of which I formed a part, in a case in which the judgment was delivered (and an excellent judgment it was) by the late Jervis, C.J., that permissive words in an Act of Parliament are not obligatory." It appears to me obvious that, if an Act is enabling, so as to impose no obligation to make, it imposes no obligation to maintain, though apart from the Act, if a company desires to open and keep open its line and stations and does so for public traffic, it must whilst so doing maintain its line and station. Apart therefore from the Railway and Canal Traffic Act 1854 the defendants were under no obligation to keep open the old Darlaston station in the year 1887. But the Railway and Canal Traffic Act 1854 has undoubtedly imposed obligations upon railway companies which had not theretofore existed, and gave the Court of Common Pleas, now represented by the Railway Commissioners, jurisdiction to enforce them, and it becomes necessary to examine this Act to see what these obligations are. This Act of 1854, which is called an Act for the better regulation of the traffic on railways and canals, recites that it is expedient to make better provision for regulating the traffic on railways, which includes passengers and their luggage and goods, animals and other things conveyed by a railway company and it then enacts by sect. 2, which is the material section in this case, that every railway shall (this is obligatory), according to its powers, firstly afford all reasonable facilities for the receiving, and forwarding, and delivering of traffic upon its

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railway, and from every station on its railway used for the purposes of public traffic, and secondly, it shall not give undue preference in favour of any particular person or description of traffic, and thirdly, it shall afford all due and reasonable facilities for receiving and forwarding all traffic arriving by a railway which forms part of a continuous line of railway with itself. It also provides by sect. 7 that the only condition the company may impose as regards the carriage of goods is such as shall be adjudged to be just and reasonable. I can find nothing in this Act which either imposes an obligation upon a railway company to make the whole or any part of its line which it does not desire to make, or which obliges a company to build any station which it does not desire to build, and I cannot doubt that this Act of 1854 does not impose either of these obligations upon a company under the obligation to afford all reasonable facilities for receiving, and forwarding, and delivering of traffic, and that this was the opinion of Lord Selborne and Lord Esher, M.R. will be seen upon reading their considered judgments in the case of *The South-Eastern Railway Company* v. *The Railway Commissioners and the Corporation of Hastings* (*ubi sup.*). But it is said that, even if so, where a company has made and uses for public traffic the whole or any part of its line, or has built and uses for such traffic any station thereon, the Act of 1854 has by the words above mentioned imposed the obligation upon the company to maintain and use such line and stations so long as such maintenance and user is necessary for affording reasonable facilities, and that if the company does not do this it fails according to its powers to afford the reasonable facilities mentioned in the Act, and this is how it is put by the applicants. It is not denied on the part of the defendant company that so long as a railway company is working its line with its stations thereon for public traffic upon that line, and from and to those stations, the company is bound to afford the facilities mentioned in that Act, but they deny that there is to be found therein an obligation upon a railway company to continue to maintain and use either the whole or any part of its line, or the whole or any part of its stations, in order to afford such facilities if it does not desire to do so. They do not deny jurisdiction in the commissioners to order proper facilities to be given at stations which are in public use, but they do deny their jurisdiction to order the company to keep all or any part of its line, or all or any part of its stations, open for public traffic. In construing this Act of 1854 it must not be forgotten that just fifteen months prior to its being passed, the Exchequer Chamber, by the unanimous judgment of nine judges, had held, that under an Act enabling a company to make a line, the company was under no obligation to make it or any part of it, and it seems to me necessarily to follow from this as before stated, that under such an Act a railway company is under no obligation to maintain or keep open what it may happen to have constructed. It is, however, said on behalf of the applicants, that with this decision before it, the legislature by the language it has used in sect. 2 of the Act of 1854, has shown that it intended to compel and has compelled every railway company thereafter to maintain and keep open any works it may have made and used for public traffic, so long as such works or any of them might be necessary for affording all reasonable facilities for receiving, forwarding, and delivering traffic upon and from its railway. Now, what are the words which are said to have wrought this great change, and cast this onerous obligation upon the railway companies? They are these: "Every railway company shall, according to its powers, afford all reasonable facilities for the receiving, and forwarding, and delivering of passengers, and their luggage and goods, animals, and other things conveyed by any railway company upon its railways, and from every station of or belonging to the railway used for the purposes of public traffic." It will be seen that there is not a word in this section about the railway company maintaining or using its railway or stations in whole or in part, or rendering the facilities named for any defined or indeed for any period at all; the period for which a line is to be maintained and used, is left precisely where it was before the Act of 1854 became law, the obligation imposed by the Act of 1854 is that "the company shall according to its powers afford all reasonable facilities." But for how long? That is the question. The applicants contend that the company must do so for as long as these facilities are required by the public; but where is this to be found in the Act? There are no words to this effect, and indeed the words which are there are opposed to this contention, namely, the words "used for the purposes of public traffic." In my judgment the true answer to be given to the question "For how long?" is, that a railway company is placed under obligation by the Act of 1854 to afford the reasonable facilities for just so long as, when the Act was passed, it was under an obligation to maintain and use its line and stations and for no longer, which is for so long as it desires to keep open, and does keep open, its line and stations for public traffic. So long as the company does this it must maintain those parts which it desires to keep open, and is keeping open, whether they be the whole or only parts of its undertaking, in such a state as to afford the reasonable facilities mentioned in the Act. This, in my opinion, is what the Act of 1854 enacted, especially when taken in connection, as it must be, with the law as it stood at the time it was passed. If the Legislature was imposing the onerous and novel obligation upon a railway company to maintain its works for some period other than it was then bound to do, some apt words certainly would be found in the Act imposing this obligation and yet the Act is altogether silent upon the subject, though other words are now said to bear that meaning and are pressed into service to do duty for those which cannot be found. I am aware of what has been urged on the respective sides as to the convenience or inconveniences which may arise from one or other construction of the statute. On the one side (*i.e.*, the side of the public), it is said that if this Act of 1854 is not to be read as imposing an obligation upon a railway company to keep its line and its stations open so long as such keeping open affords a reasonable facility, what a disadvantage it would be to the public, and how unreasonable it is not to construe the Act in such a way as to oblige the company to keep its works open for the convenience of the public, and indeed Sir F. Peel, in the case of *The Winsford Local*

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Board v. *The Cheshire Lines Committee* (*ubi sup.*), said that unless sect. 2 of the Act of 1854 was so read, railway companies would be able to make the section practically a nullity. The answer given to this is, that it is not the general habit of railway companies for the sake of spiting their customers to discontinue traffic which self-interest prompts them to continue, and it is said that it is unreasonable that they who are trading companies carrying on business in the interests of their shareholders should be compelled against their wills and against their own interests to go on carrying for the public, especially when the public do not provide the requisite traffic to enable the company to carry on its business otherwise than at a loss. The balance of these conveniences or inconveniences appears to me to be about equal; but, be this as it may, they throw no real light upon the true construction of the Act. I can find nothing in the Act of 1854 to lead me to the conclusion that an obligation is thereby cast upon a railway company to maintain and use its line, or any particular part of its line, or all or any of its stations, if it does not desire to do so. The case of *Reg.* v. *Great Western Railway Company* (*ubi sup.*), has a material bearing upon the obligation of railway companies to maintain and keep open their railways, and is in accord with what I have above written, and I must point out that, although the case of *The South-Eastern Railway Company* v. *Railway Commissioners and the Corporation of Hastings* (*ubi sup.*), which was decided upon the Act of 1854, was cited and dealt with by Lord Coleridge in the court below, neither this Act nor the *South-Eastern* case appears to have been cited in this court, and the learned counsel for the appellant did not then even suggest the construction now sought to be placed upon the Act of 1854. The passage in the judgment of Lindley, L.J. in *Dickson* v. *Great Northern Railway Company* (*ubi sup.*), so much relied upon by the applicants, does not apply to the present case. The Lord Justice points out that the Act of 1854 materially altered the law, in respect of affording reasonable facilities for receiving, forwarding, and delivering traffic, and this undoubtedly is true, and he points out the duty thus imposed was inconsistent with the company's right to refuse to carry any particular class of goods which they have facilities for carrying, but no question was in that case raised as here, as to whether a railway company could rightly close its line or stations or part of its line or any particular station to public traffic. What the Lord Justice was dealing with was a company which was using its railways and stations for public traffic; and what he said was that under these circumstances it would not be affording reasonable facilities to refuse to carry any particular class of goods which the company had facilities for carrying. I find a stronger expression of opinion by Lord Selborne, when Lord Chancellor, in *The South-Eastern Railway Company* v. *Railway Commissioners and the Corporation of Hastings* (*ubi sup.*) as to the construction of the Act of 1854. He states: "A company may carry or not upon its own line as it thinks fit, and if it does so may undertake that business under various conditions and limitations: but if and so far as it does undertake so to carry either passengers or goods traffic, it comes, in my opinion, under the obligation to afford for the purposes of that traffic the facilities required by the first branch of the 2nd section of the Act." For the reasons above, my opinion is that the Act of 1854 does not compel a railway company to go on maintaining and using its railways or stations either in whole or in part, even though by so doing it would afford reasonable facilities for public traffic, and that the defendant company was within its rights in closing its station as it did in 1887, and in ceasing to carry passengers over its branch line, and in subsequently pulling down the station. But there is also the second point which I think equally fatal to the applicants. The passenger traffic was stopped in 1887 to the knowledge of the applicants, and so matters rested until 1892 with the exception that in the meantime the company pulled down its station. The difficulty may be masked by making an application in the verbiage of the Act and by granting an order in that form; but the real case must be looked at, which is, that the applicants are asking the Railway Commissioners to order that the company should rebuild a station at or about the old site and commence passenger traffic thereto; and call it what you will, that is the real object sought to be attained. Even if the company could not have shut up its station in 1887, though, as I have stated, I think it could, there is no jurisdiction in the commissioners under the circumstances which exist now, to order a station to be built, which is in reality the order now appealed against, and which must be done if the applicants are to derive any advantage from their application. The case of *The South-Eastern Railway* v. *The Railway Commissioners and the Corporation of Hastings* (*ubi sup.*) is a conclusive authority that a new station cannot be ordered by the commissioners. In conclusion, I will say that, if the public are to be empowered to impose upon a railway company the obligation to maintain and keep its works open, and if those motives of railway companies "which do not appear upon the surface" that are alluded to by Wills, J. exist, and are to be frustrated, this must be done by an express enactment and not by an attempt to extract from words such as are in the 2nd section of the Act of 1854 a meaning which, when the Act and its history is understood, they do not, and, in my judgment, cannot bear. In my opinion this appeal should be allowed.

Appeal allowed.

Solicitors for the local board, *Ullithorne, Currey*, and *Villiers*, for *J. Corbett*, Darlaston.

Solicitor for the railway company, *C. H. Mason.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

June 23 *and Aug.* 8.

(Before North, J.)

Re Martindale. (*a*)

Contempt of court—Court sitting in private—Publishing proceedings.

On the 1st June North, J. made an order restraining H. from having any communication with M., a female infant who had been made a ward of court, and ordered H. to appear

(*a*) Reported by J. R. Brooke, Esq., Barrister-at-Law.

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before him on the 6th June. On that day H. appeared, and it was then proved that he and M. had been married some weeks before. The judge being satisfied that the marriage was valid, stayed the operation of his former order. H. immediately on leaving the court concocted with a friend a paragraph purporting to be an account of what had taken place in private before the judge, but which was chiefly a puff of H.'s novels, and contained no statement of any fact which came out before the judge, except that H. and M. were married. This paragraph appeared in the Star *of the same date. A paragraph to the same effect appeared the next day in the* Morning, *and was copied in the* Pall Mall Gazette, *and the* People. *In the three last papers, however, it did not appear that the matter had been heard in private, and the editors stated that they did not know it was so heard. Motions were made to commit the editors of all four papers, and H. and his friend the author of the paragraph in the* Star.

Held, that it is a contempt of court to publish an account of any proceedings which a judge has ordered to be heard in private, but that in this case the contempt was not premeditated or intentional and not of a serious character, and, apologies having been made, the justice of the case would be met by ordering H. and the editor of the Star *to pay the costs of the motions against them. The other four motions were dismissed with costs as frivolous and unnecessary.*

THE ward in this matter having been forbidden by her parents to have any communication with the respondent Hueffer, suddenly left her home early in April 1894. Her parents took proceedings to have her made a ward of court, and their solicitor wrote to the respondent Hueffer saying she had been made such a ward. This was not accurate, for she was not actually made a ward until after the date of his letter. On the 1st June North, J. made an order restraining Hueffer from having any communication with the ward, and requiring him to appear before the judge on the 6th June. What occurred on that occasion was thus stated by North, J. in his written judgment:

He did appear. I may add that, to avoid the inconvenience of clearing the court and turning the audience into the adjoining passage, I took the parties concerned into my private room; but this was precisely the same thing as hearing them in this court after the public had left. On that occasion an affidavit by the said respondent was produced in which he stated that he did not know, and had no reason to believe, that the young lady was a ward of court—the falsity of which assertion is proved by his letter above mentioned. His solicitor also said that the parties had been married two or three weeks before; and I stated that, if proper evidence of the marriage was produced, the operation of my order would be stayed. The certificate, when produced, showed that the lady had been represented by the said respondent to be over twenty-one years of age; but when the matter came before me again on the 9th, being satisfied that the false statements made by the respondent to the registrar did not affect the validity of the marriage, although the respondent had laid himself open to criminal proceedings under more than one head, I stayed the operation of the order. At the same time I declined to entertain any application to commit the respondent for contempt, considering that, if he was to suffer imprisonment, it had better be by the sentence of a criminal court in the proceedings to which he had exposed himself.

On the same afternoon the following paragraph appeared in the *Star* newspaper:

A Poet's Love Affair.—A Chancery Court Chapter of "The Queen who Flew."—In Chancery Court No. 2 to-day a rarely romantic story was unrolled before Mr. Justice North, who sat in private to hear the action innocently set down as *In re Martindale*. The action was one to forbid a Miss Martindale, said to be a ward in Chancery, from perpetrating matrimony, the danger arising in connection with the attentions of a young poet and novelist who has already achieved a certain measure of distinction by "The Shifting of the Fire" and other of his books—to wit, Mr. Ford H. Madox Hueffer, of Brook-green, W. Mr. Hueffer is well known as son of the late Dr. Hueffer, the once champion of Wagner in England and musical critic of the *Times*, and as grandson of Mr. Ford Madox Brown. His intimate connection with the Pre-Raphaelite Brotherhood is also marked by the fact that his just-published novel "The Queen who Flew" (significant title) is illustrated by Sir Edward Burne-Jones. The proceedings to-day might have been comparatively tame but for the fact that it turned out that there was no longer any Miss Martindale to protect. That lady became Mrs. Madox Hueffer some three weeks ago. The case stands adjourned for the present.

On the next morning the following paragraph was published by the *Morning* newspaper:

A Young Novelist's Romance.—A romance which has excited much interest in certain literary and artistic circles in London became more widely known yesterday as forming the subject of an action in Chancery Court No. 2 before Mr. Justice North. The cause was *In re Martindale*, and the action taken to prevent the marriage of a Miss Martindale, a minor and a ward in Chancery. When the case came on it was found out that there was no longer a Miss Martindale to be protected, and an adjournment had to be made. In fact the lady had three weeks before been married to the lover whom it was sought to bar—Mr. Ford Madox Hueffer. Mr. Hueffer has already made a certain mark in fiction. He has also published a book of verse, and his last book, "The Queen who Flew," is illustrated by Sir E. Burne-Jones. Mr. Hueffer, is son of the late Dr. Hueffer, the champion of Wagner and the well-known musical critic, and grandson of the late Ford Madox Brown.

This paragraph was copied into the *Pall Mall Gazette* of the 7th June, and the *People* newspaper of the 8th June.

On the 16th June motions were made on behalf of the ward's parents to commit the editors of these four papers for contempt in publishing matters heard by the court in private. The judge was at first asked to hear these motions in private as being matters affecting a ward, but after hearing them so far opened in private as to show the nature of the applications he directed them to be heard in public.

It appeared from the affidavits filed for the *Star* that the paragraph in that paper was in fact written by Mr. Perris, a contributor, from materials supplied to him immediately after the hearing on the 6th June by Hueffer himself, and notices of motion to commit Hueffer and Perris also were at once given.

All the motions came on to be heard on the 23rd June.

Swinfen Eady, Q.C., and *G. Henderson* for the motions.—The paragraph in the *Star* is a plain and gross contempt of court It is a deliberate publication of what the court had directed to be heard in private, as appears from the paragraph

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itself. The offence is made worse by the flippant tone of the paragraph, which appears to be intended to bring ridicule on the whole proceedings. Every one concerned in the publication is guilty of contempt, and ought to be committed; the offence of Hueffer is specially aggravated. Having been present at the proceedings in private, he goes straight away to publish what professes to be an account of them. The paragraph in the *Morning* does not state that the proceedings were in private, but it is plain that the writer had the paragraph in the *Star* before him. He must have known that the proceedings were in private, and the editor cannot escape because he omitted that statement. The editors of the other papers may not have known that the proceedings were in private, for they appear merely to have copied the *Morning*, but they as well as the editor of the *Morning* must bear the responsibility of having accepted contributions from other than the regular sources, and if such contributions turn out to be improper must take the consequences.

S. Hall, Q.C. and *G. Lawrence* for the publishers of the *Morning*.—Motions to commit ought not to be made unless there is some serious ground for committing the person moved against:

Plating Company v. *Farquharson*, 44 L. T. Rep. 389; 17 Ch. Div. 49.

The *Morning* published this paragraph in good faith, and the editor was wholly ignorant that the matter was heard in private at all. If there has been any contempt he apologises, but we submit there has been none. It has never been laid down that it is contempt to publish anything that has been heard in private so long as the publication does not extend to the facts on account of which a private hearing was ordered. Except these facts everything which passes in a court of justice is public property and may be published. This publication could not interfere with the course of justice.

S. Hall, Q.C. and *Vernon Smith* for the *Pall Mall Gazette*.

Butcher for the publishers of the *People*.—There can be no contempt of court in publishing the result of proceedings in court, even if the proceedings were *in camerâ*.

Lawrence v. *Ambery*, 91 L. T. 230.

It cannot be contempt to publish information which is accessible from other sources. The only fact which is really disclosed by this paragraph is that two young people were married, and this marriage had been announced in the *Times* weeks before.

Boome for the *Star* and for Perris.—The court will not exercise its jurisdiction to commit for contempt against the editor of a newspaper, unless there is a wilful intention to prejudice a trial or interfere with the course of justice:

Re O'Malley; Hunt v. *Clarke*, 61 L. T. Rep. 343; 37 W. R. 724.

The *Star* published this paragraph in good faith, and it could not possibly interfere with the course of justice.

Job Bradford for Mrs. Hueffer and Hueffer.—[NORTH J.—I cannot hear you for Mrs. Hueffer, who appears by her guardians.] The guardianship came to an end on her marriage:

Re Potter, 20 L. T. Rep. 355; L. Rep. 7 Eq. 484.

This is a motion in the name of the infant after her marriage against her husband. She has a right to be heard:

Re Sampson and Wall, Infants, 25 Ch. Div. 462.

[NORTH, J.—I cannot hear her. These were cases as to the jurisdiction of the court under the Infants' Settlement Act; they have no application here.] For Hueffer.—The order for hearing in private was only to protect the interest of the ward. So long as she is not injured there is no contempt; as soon as an order is made anyone may publish it. There is no contempt so long as there is no disclosure of facts inconsistent with the desire of the court for privacy; there is no such interference here.

All the respondents' counsel tendered full apologies from their clients in case the Court thought any contempt had been committed.

Swinfen Eady, Q.C. in reply.

Aug. 8.—NORTH, J. (after stating the facts of the case as above).—The material parts of the paragraph in the *Star* may be condensed into this: that on the day in question a rarely romantic story was unrolled before a judge in Chancery sitting in private with reference to a female ward, which proceedings might have been comparatively tame but for the fact that it turned out that the lady had been married to the respondent three weeks before. It was contended before me that the publication of this paragraph did not interfere with or tend to obstruct the course of justice. In this I agree. But this does not conclude the question whether it was a contempt or not. Articles have often been held to be in contempt of court on the ground above mentioned, because published while litigation was pending, which would not have been in contempt if only published after the litigation had been closed. But there may be, and are, publications which amount to contempts of court, although they do not interfere with the course of justice, and have been published when all proceedings are at an end—for instance, it would be idle to suppose that matters occurring with respect to a ward, which could not be published without contempt while the ward was an infant, could be published with impunity so soon as the ward had attained the age of twenty-one years. It was also with great energy contended before me that all proceedings in a court of justice ought to be public, and that there could not be any contempt in publishing what took place in court; but in that I do not agree. The general rule is an excellent one, that legal proceedings should be in public; and if it were departed from the great weight which legal decisions carry with them in this country would be deservedly diminished. But with this rule certain exceptions are proper and necessary. One ground of exception is, that a public hearing would have the effect of disclosing what it is the whole object of the action to keep concealed, as in *Andrew* v. *Raeburn* (31 L. T. Rep. 73; L. Rep. 9 Ch. 522); *Mellor* v. *Thomson* (54 L. T. Rep. 219; 31 Ch. Div. 55); or of making known to the world a secret process, as in the Aniline cases (*Badische Anilin* v. *Levinstein*, 48 L. T. Rep. 822; 24 Ch. Div. 156). The hearing in private wholly or in part of cases in which public decency and morality require it to be done are also familiar, not only in the divorce court but also in the ordinary criminal and civil courts, an instance of

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the latter being *Malan* v. *Young* (6 Times L. Rep. 38); so also cases relating to lunatics are constantly heard in private; and cases as to wards (see *Ogle* v. *Brandling*, 2 Russ. & M. 688) in order that the lunatic or ward may not be prejudiced; and I cannot conceive a clearer contempt of court than that a party concerned, or any person, should proceed forthwith to make known to the world the very matter which the court had deliberately, in the exercise of its discretion, decided ought not to be published. It was said that the case of *Lawrence* v. *Ambery*, only to be found in the LAW TIMES Journal, vol. 91, p. 230, was a decision to the contrary. In that case proceedings for a divorce on the ground of nullity had been heard *in camerâ*, and a newspaper published the result, viz., that a decree for dissolution had been pronounced. It was decided that such publication was not a contempt, as, of course, it was not, any more than the publication of the marriage, in the present case, in the marriage column of the *Times*. But the case, if the very meagre report of it can be trusted, negatives the conclusion sought to be drawn from it; for, as I read it, if what had been published had been any part of what transpired when the court was sitting *in camerâ*, the result would have been different. In the present case I do not believe that any contempt of court was intended, though this in itself would be no excuse for contempt actually committed. The paragraph inserted in the *Star* was so inserted without premeditation, having been concocted and handed in by the respondent Hueffer and his friend Perris merely as an advertisement for the former. Its vulgarity and bad taste are enhanced by the reference to the Court of Chancery and the sitting being in private—references obviously made without any regard to the credit of the lady for the purpose of attracting the attention of readers to a puff, which, if not thus embellished, would have been passed by unnoticed. The paragraph, so far as I have quoted it above, was intended to appear to be, and would be understood, as a concise statement of what took place in my private room; and the disclosure is held out as an inducement to the public to read the whole paragraph. It was said that, as the statement that the marriage had taken place was quite true, it could not be a contempt to state that; but, if the question of contempt depended upon the truth or untruth of the matter published, it would result in this—that there would be no contempt in an accurate disclosure of what passed *in camerâ*, although there would be if the account was a fictitious one, which is absurd. If the element of untruth were necessary, it would be found here in the statement that a rarely romantic story was unrolled. The story was a sad and very commonplace one; and on the day referred to it was not opened or gone into at all. But, as I have already said, there was no contempt in announcing the fact that the ward had become the wife of the said respondent; the contempt was in purporting to give the public information, though meagre, of what the judge had decided ought not to be disclosed by determining to hear the case in private and excluding the public. I do not regard the contempt as a serious one. At the same time it was not mitigated by the line of defence which counsel adopted, the boldness of which cannot be appreciated by anyone who did not hear it. At the same time, however, a proper apology was expressed if the court should be of opinion that a contempt had been committed. Looking at all the circumstances, I think that justice will be met by ordering the printer of the *Star* to pay the costs of the motion to commit him. The respondent Hueffer, who went from the court to his journalist friend and instigated him to write the paragraph in question and procure its insertion in the *Star*, is equally responsible for the publication of the advertisement, and he also must pay the costs of the motion against him. With regard to the other motions, I am much surprised that they have been made at all. I consider them vexatious and an abuse of the process of the court. In *The Plating Company* v. *Farquharson* (*ubi sup.*) the Court pointed out that motions to commit where there was no real ground for committing the party were mere waste of time and ought to be discouraged. See also the observations of the Court of Appeal in *Hunt* v. *Clarke* (*ubi sup.*) to the same effect. I should certainly not hesitate to commit where a real ground for committal is shown, as in the case of a deliberate contempt; but these four motions seem to me puerile. As regards the respondent Perris, the composer of the paragraph in question, I do not suggest for a moment that the part he has taken in the transaction might not have been sufficient to render him liable to committal, if the contempt had been a flagrant one. But I think that, if action was necessary, the proceeding against the *Star* and the respondent Hueffer would have answered every purpose; and that it was not only unnecessary but vexatious to proceed against the writer. I therefore dismiss that motion with costs. The other three motions were against Mr. Hosker, the publisher of a paper called *Morning*; Mr. Hurst, the publisher of the *Pall Mall Gazette*; and Mr. Gray, the publisher of a paper called the *People*. The article in the *Morning* of the 7th June does not show, and Mr. Hosker swears that he did not know, that the proceedings referred to were not in open court; the article in the *Pall Mall Gazette* of the same day states on its face that they were in open court; and that in the *People* of the 10th June also was simply copied from that in the *Morning*, and they were inserted without any knowledge or means of knowledge that the proceedings had been in private. I dismiss these motions with costs. I have hesitated somewhat about the costs because of the line of defence adopted on behalf of the respondents; but, disapproving as I do of these motions having been launched at all, I think the costs should follow the result. I may add this, however, for the guidance of the respondents in the future, that if they really had done what their counsel asserted their right to do with impunity, I should certainly have committed every one of them.

Solicitors: *Wilson* and *Son*; *Lewis* and *Lewis*; *Harrison* and *Davis*; *Sutton, Ommanney*, and *Co.*; *Rollit* and *Sons*; *Shaen, Roscoe*, and *Co.*

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July 26 and 27.

(Before NORTH, J.)

ATTORNEY-GENERAL *v.* THE DEAN, &c., OF CHRIST CHURCH, OXFORD. (*a*)

Endowed Schools Acts 1869, 1873, 1874—*Public Schools Act* 1868—*Endowment—Scholarships in which a public school is interested jointly with others—Jurisdiction of Charity Commissioners.*

By the will of Edward Careswell, dated in 1689, *the income of certain lands was appropriated for the maintenance in the College of Christ Church, Oxford, of eighteen scholars, to be selected from six free schools in the county of Salop, of which Shrewsbury was one. By a scheme settled by the Court of Chancery, in* 1861, *in an action of* Attorney-General *v.* The Dean of Christ Church, Oxford, *it was provided that the scholars should be elected from the named schools in rotation, but that, if no candidate sufficiently qualified should present himself from the school from which the vacancy ought to be supplied, a candidate should be elected from one of the other schools. In* 1890 *the Charity Commissioners proposed to frame a new scheme for the management of the charity, under the Endowed Schools Act, and the trustees of the charity (relators in the action) took out a summons for directions what course they should take as to this scheme, and for leave to bring a scheme of their own into court. By arrangement this summons was adjourned into court for argument as to the jurisdiction of the commissioners and court respectively to make a scheme, the commissioners submitting to be bound by the order of the court as if made in an action. The Endowed Schools Act* 1869 *provides, sect.* 8, *that nothing in this Act, save as in this Act specially provided, shall apply to any school mentioned in sect.* 3 *of the Public Schools Act* 1868, *or to the endowment thereof; and the Endowed Schools Act* 1873, *sect.* 9, *provides that, where two or more schools are jointly interested in any educational endowment, the Endowed Schools Commissioners shall not, without the consent of the special commissioners under the Public Schools Act* 1868, *deal by any scheme with the interest of such last-mentioned school in such endowment. The Endowed Schools Act* 1874, *sect.* 6, *provides that, during the continuance of the power of making schemes under these Acts, "any court or judge shall not, with respect to any endowed school or educational endowment which can be dealt with under the Endowed Schools Acts, make any scheme without the consent of the Committee of Council of Education." The powers of the Endowed School Commissioners had been transferred to the Charity Commissioners, and continued in force. By the Statute Law Revision Act* 1883, *sect.* 9 *of the Endowed Schools Act* 1873 *was repealed, the special commissioners under the Public Schools Act having ceased to exist. Shrewsbury was one of the public schools mentioned in sect.* 3 *of the Public Schools Act.*

Held, that the scholarships were part of the endowment of the schools from which scholars were elected, but that, as the benefit of this endowment was shared by Shrewsbury with other schools, the jurisdiction of the Charity Commissioners to make schemes was not ousted by the fact of Shrewsbury being a public school; that the sole power of making a scheme rested with the commissioners, and the trustees ought not to proceed further with the scheme they had brought into chambers.

(*a*) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

BY his will, dated the 3rd Feb. 1689, Edward Careswell directed and appointed that certain lands should be for ever charged with the maintenance of eighteen scholars at Christ Church, Oxford; or, if they could not be admitted there, at some other college in Oxford, by allowing to each of the said scholars for four years while he remained an undergraduate 18*l.* a year, and, after he commenced Bachelor of Arts, 21*l.* a year for three years until he should commence Master of Arts, and the sum of 27*l.* a year for three years after he should commence Master of Arts and no longer. And he directed that the scholars should be elected from and out of the most ingenious and deserving scholars, natives of the parishes in which his estates lay, or elsewhere in the county of Salop, and of least ability to maintain themselves, of six free schools in the county of Salop, viz. four from Shrewsbury, three from Bridgnorth, four from Newport, three from Shiffnal, two from Wem, and two from Donnington in the parish of Wroxcester. The testator directed that the scholars should be elected by the chief governor or master of Christ Church and the justices of the peace of the hundreds of Bradford, Stottesden, and Brimton, in Salop; and he directed that the number of scholars should be increased if the rents of the property increased, and if the rents should diminish some of the vacancies should not be filled up until the lands again became of sufficient yearly value to maintain the eighteen scholars.

By a codicil, dated the 24th Feb. 1689, the testator gave 10*l.* a year to augment the allowance paid to the minister of the parish of Bobbington, the same to be annually deducted from the allowances appointed for the said scholars.

By an Act of Parliament, 48 Geo. 3, c. 144 (local personal), the fee simple of the estates devised as aforesaid by the testator's will was vested in trustees for the charitable purposes therein mentioned.

On the 11th Feb. 1861 the rents having largely increased, a scheme was made by the Court of Chancery in an action of *Attorney-General* (on the relation of the trustees of the charity) v. *Christ Church, Oxford*, regulating the exhibition.

This scheme provided that the income of the charity funds should be applied, "first in paying to the minister of Bobbington, in the county of Stafford, for the time being the annual stipend of 40*l.*, and next in the maintenance (subject to the subjoined regulations) of eighteen exhibitioners in the College of Christchurch in the University of Oxford," or, under certain circumstances, another college there," and then in the maintenance (subject to further regulations thereinafter contained) of an annual prize to be called the Careswell Prize. The eighteen exhibitioners were to be selected from the schools and in the proportion mentioned in the will. In each school they were to be selected, first from natives of Shropshire, and if no eligible candidate was found among such natives, then from other boys at the school. But if any school which had a vacancy had not a competent scholar, then the candidates were to be selected from the other five schools, giving a

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preference to the natives of Shropshire. The prize was to be an annual prize of 100*l.*, open, without preference, to the competition of all the scholars in the said schools. The amount of the exhibitions was raised to 10*l.* a year for four years if the exhibitioner remained in residence and did not take the degree of B.A. After taking that degree he was to receive 21*l.* a year for three years, raisable to 60*l.* in certain events, and for three years after taking the degree of M.A. 27*l.* a year.

The result of the working of this scheme was, that from 1866 to 1890 fifty-one exhibitions fell vacant, viz., eleven for Shrewsbury school, all of which were taken; ten for Bridgnorth, one of which was taken; ten for Newport, seven of which were taken; and nine for Shiffnal, five for Wem, and six for Donnington, none of which were taken. Of the thirty-two scholarships not taken by the schools to which they were appropriated, thirty were taken by Shrewsbury and two by Newport.

In 1890 the Charity Commissioners proposed to make a new scheme for the regulation of the charity, and thereupon the trustees of the charity took out a summons in this action, dated the 25th July 1890, asking for liberty to bring in their views as to the administration of the charity, and for the direction of the court whether they should take any and what steps in regard to the commissioners' proposal to frame a scheme. This summons was served on the Attorney-General, and he applied to the commissioners for a statement of their views, and ultimately on the 14th Nov. 1892 the summons came before North, J. in chambers, and he expressed an opinion that the commissioners had no jurisdiction to make a scheme, and directed the trustees to bring proposals for a scheme into chambers.

The commissioners, who were not represented in chambers, desired to have the matter fully argued, and, on the request of the Attorney-General, the summons was adjourned into court, the commissioners, who were not parties to the summons, submitting to be bound by the order in the same manner as if an action had been commenced, and they had been made parties.

The sections in the several Endowed Schools Acts on which the arguments turned were the following:—

The Endowed Schools Act 1869 (32 & 33 Vict. c. 56):

Sect. 4. In this Act, unless the context otherwise requires, the term "endowment" means every description of property, real, personal, and mixed, which is dedicated to such charitable uses as are referred to in this Act in whomsoever such property may be vested, and in whosesoever name it may be standing, and whether such property is in possession or in reversion or a thing in action.

Sect. 5. In this Act, unless the context otherwise requires, the term "educational endowment" means an endowment or any part of an endowment which, or the income whereof, has been made applicable or is applied for the purposes of education at school of boys and girls or either of them, or of exhibitions tenable at a school or an University or elsewhere, whether the same has been made so applicable by the original instrument of foundation or by any subsequent Act of Parliament, letters patent, decree, scheme, order, instrument, or other authority, and whether it has been made applicable or is applied in the shape of payment to the governing body of any school or any member thereof, or to any teacher or officer of any school, or to any person bound to teach, or to scholars in any school, or their parents, or of buildings, houses, or school apparatus for any school, or otherwise howsoever.

Sect. 6. In this Act, unless the context otherwise requires, the term "endowed school" means a school which is (or if it were not in abeyance would be) wholly or partly maintained by means of any endowment: Provided that a school belonging to any person or body corporate shall not by reason only that exhibitions are attached to such school be deemed to be an endowed school.

Sect. 8. Nothing in this Act, save as in this Act expressly provided, shall apply: (1) To any school mentioned in sect. 3 of the Public Schools Act 1868, or to the endowment thereof.

Sect. 24. Where part of an endowment is an educational endowment within the meaning of this Act, and part of it is applicable or applied to other charitable uses, the scheme shall be in conformity with the following provisions (except so far as the governing body of such endowment assent to the scheme departing therefrom), that is to say: (1) The part of the endowment or annual income derived therefrom which is applicable to such other charitable uses shall not be diverted by the scheme from such uses. (3) If the proportion applicable to other charitable uses exceeds one half of the whole of the endowment, the governing body of such endowment existing at the date of the scheme shall, so far as regards its non-educational purposes, remain unaltered by the scheme.

The Endowed Schools Act 1873 (36 & 37 Vict c. 87):

Sect. 9. Where two or more schools are jointly interested in an educational endowment, and one of such schools is a school mentioned in sect. 3 of the Public Schools Act 1868, the commissioners shall not, without the consent of the special commissioners for the time being under the Public Schools Act 1868, deal by any scheme with the interest of such last-mentioned school in the endowment; but, with the consent of those commissioners to the dealing with such interest, may, by a scheme under the principal Act, deal with such interest as well as with all other interests in such endowment.

This section was repealed by the Statute Law Revision Act 1883 (46 & 47 Vict. c. 39).

Endowed Schools Act 1874 (37 & 38 Vict. c. 87)

Sect. 6. The powers of making schemes under the Endowed Schools Acts as amended by this Act shall continue in force for a period of five years from the said 31st day of Dec. 1874, and during the continuance of such powers any court or judge shall not, with respect to any endowed school or educational endowment which can be dealt with by a scheme under this Act and the Endowed Schools Acts, or any of such Acts, make any scheme or appoint any new trustees without the consent of the Committee of Council on Education.

The power of making schemes has been from time to time extended by the Endowed Schools Continuance Act 1879 and the Expiring Laws Continuance Acts, and is still subsisting.

Swinfen Eady, Q.C. and *Stallard* for the trustees of the charity.—The Charity Commissioners have no jurisdiction to make a scheme in this case. Their power, if any, must be derived from the Endowed Schools Acts 1869, 1873, and 1874, by the last of which the powers of the Endowed Schools Commissioners are transferred to the Charity Commissioners. But Shrewsbury is a public school scheduled to the Public Schools Act; and by sect. 8 of the Endowed Schools Act 1869 such a school and its endowments are expressly excepted from the commissioners' jurisdiction. The commissioners say that the right to these exhibitions

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is not an endowment of Shrewsbury School; but sect. 7 of the same Act clearly makes an exhibition of this sort an endowment. The commissioners rely upon sect. 6 of the Endowed Schools Act 1874, which ousts the jurisdiction of the court in certain cases. But that only applies where the commissioners have power to make schemes. *Attorney-General* v. *Moises* (stated in Appendix III. to Tudor's Charitable Trusts, 3rd edit., p. 855) is an authority that there is no power to make schemes where part of an endowment is devoted to non-educational purposes. Here there is a non-educational part, for the provision of 40*l.* a year for the minister at Bobbington is a first charge on the property. Shrewsbury has an interest in every exhibition, and therefore the jurisdiction of the commissioners is ousted from the whole, even if, which we do not admit, they could make schemes as to the educational part in which Shrewsbury is not interested. Possibly while the 9th section of the Act of 1873 was in force they might have made a scheme with the consent of the special commissioners, but they cannot now that that section is repealed.

Cozens-Hardy, Q.C. and *Vaughan Hawkins* for the Charity Commissioners.—We contend that the court has no jurisdiction to make a scheme in this case at all, or if any, not without the consent of the Committee of Council on Education. On the point raised by the other side, that part of the endowment being for non-educational purposes ousts the jurisdiction of the commissioners, sect. 24 of the Endowed Schools Act 1869 is conclusive; it makes special provision for the case of endowments partly educational and partly not. *Attorney-General* v. *Moises* (*ubi sup.*) only decided that where more than half an endowment is devoted to non-educational purposes the commissioners cannot interfere with the constitution of the governing body without the consent of that body. That is expressly provided by sub-sect. 3 of sect. 24, and the express provision that the commissioners shall not alter the constitution of the governing body, so far as relates to the non-educational part, shows clearly that the commissioners could deal with a charity part of which, as here, was for non-educational purposes. As to the exemption of Shrewsbury because it is a public school, these exhibitions are not, nor is any part of them, an endowment of Shrewsbury School, and even if part of them was, part is not, and that gives the commissioners jurisdiction over the whole, or at least over the part which is not an endowment of Shrewsbury. But no part is such an endowment. Sect. 6 of the Act of 1869 shows that if such exhibitions were the only endowment of a school it would not be an endowed school at all; that is conclusive. The boys get no advantage till after they leave Shrewsbury.

Swinfen Eady, Q.C. in reply.—A scholarship, whether tenable at the school or at a university, is expressly made part of the endowment by sect. 5 of the Act of 1869.

Cur. adv. vult.

July 27.—NORTH, J.—In this case, which was before me yesterday, it is not necessary to refer to anything earlier than the scheme of 1861. That refers to the original foundation of the charity two centuries before, and provides: [His Lordship stated the scheme as above, and continued:] The effect of the scheme was that the benefits of the exhibitions and prize were not to be enjoyed by any scholar while at any of the schools, but at the University after leaving the school. Now, the question is as to the position of Shrewsbury School, which is one of the schools mentioned in sect. 3 of the Public Schools Act 1868, and therefore within the exception contained in sect. 8 of the Endowed Schools Act 1869. [His Lordship read that section.] The 4th section of that Act defines what an endowment is, and there is no doubt that the Careswell trust funds form an endowment. The 5th section defines what an educational endowment is. But before coming to the section I should say that, for the purpose of considering the position of these schools, it is necessary to look at them separately. Let me take, as an example, one of those which is not within the exception I have read—Bridgnorth. What is the position of Bridgnorth under the scheme? I think that, if the endowment were wholly in respect of exhibitioners from Bridgnorth School, it would clearly be within the Act. Now, the 5th section of the Act is as follows: [His Lordship read it.] As regards that, it is well to bear in mind the observations of Lord Hatherley in *Re Meyricke Fund* (26 L. T. Rep. 596, 600; L. Rep. 7 Ch. 500, 502), showing the universality of that section. "Then it goes on to speak of exhibitions tenable at a school, or at a university, or elsewhere. And then it goes on further, and takes the largest view of what an educational endowment may be by pointing out various purposes which do not seem *primâ facie* to be the immediate purposes of education, but so connected with education as to be within the purport and meaning of the Act. I apprehend that the first intent of the Legislature in framing this Act, which is a highly remedial Act, was that the commissioners should have the largest possible powers; and these general words were used lest anything which might have escaped the attention of the Legislature should afterwards be found unprotected by the supervision and care of the commissioners. Having given these extensive powers, the Legislature proceeded to make certain exceptions, the intention being obviously that everything not immediately in the contemplation of the Legislature should not escape, and that nothing should escape except things to which the attention of the Legislature was expressly directed." That is the spirit in which the section I have just read is to be construed. Now to go to the next section, it says: [His Lordship read sect. 6.] It was said that it was impossible to say that Shrewsbury or Bridgnorth, supposing this to be the only endowment it had, was maintained by means of endowment, inasmuch as this endowment is not for the maintenance of the school at all but for the maintenance of persons who have been scholars in the school after they have left. I do not think that that is the meaning of the term maintenance; it is one of its well-known meanings, but I think it has very clearly a larger meaning here. I think that is shown by the proviso which follows: "Provided that a school belonging to any person or body corporate shall not by reason only that exhibitions are attached to such school be deemed to be an endowed school." That is to say that a school which has exhibitions only is not thereby made an endowed school; but, if it is an endowed school on other grounds, then I

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take it that the exhibitions as well as anything else are part of the educational endowment to which the provisions of the Act are to apply. There would be no reason for making the exception that the school should not, by reason only that exhibitions are attached to it, be deemed to be an endowed school, unless but for the exception the previous definition would have had that result. It will be noticed that the phrase is "exhibitions attached to a school," and I take it it is clear that it refers to exhibitions, such as these are, for the maintenance of the scholar at the University or elsewhere than the school, and it shows, I think, that the exhibitions attached to a school in this sense would clearly bring it within the words "maintained by endowment" in the earlier part of the section, upon which this proviso is an exception. I think, therefore, that the exhibitions in question, if attached to Bridgnorth alone, though they would not alone make it an endowed school, would, having regard to the position the school occupies of being otherwise endowed, be part of its educational endowment, and would be applied for the maintenance of the school within the meaning of the Acts, or, in other words, that the school is in part maintained by them. This is not at all an unreasonable meaning to give to the words, because you may well say that the school is maintained not merely by the funds which pay the masters and maintain the boys, but by any larger application of the fund which has the effect of increasing the attraction of the school, and of benefiting it by leading to its increase in that way. If, therefore, we had to deal with Bridgnorth alone, I think that the Charity Commissioners would have the sole jurisdiction to make schemes with reference to this trust. I do not think it is necessary to decide what the position of matters would be if Shrewsbury were the only school to which the exhibitions attached. It may be assumed for my present purpose that, if Shrewsbury alone had the benefit of the trust, it would not come within the powers of the commissioners. But the case I have to deal with is one where Shrewsbury is within the scheme, and five other schools, which in my opinion are clearly endowed schools within the Act, come within the scheme together with Shrewsbury. The question is, what jurisdiction the commissioners would have as regards framing a scheme for an educational fund applicable for the benefit partly of a school which is a public school under the Public Schools Act and partly of other schools which are not. In my opinion the 24th section shows that the commissioners have jurisdiction to deal with that case. [His Lordship read sect. 24 to the end of sub-sect. 1.] I think this section shows that the power of the commissioners is not confined to that part of the fund which is an educational endowment. I should say that the words of sect. 5 rather favour the view that it is so confined. But I think sect. 24 makes it clear that the commissioners have power over the part of the endowment which is not educational, subject to the limitation and control imposed by that section. To begin with, I do not see the sense of saying in the sub-section I have read, that the part of the endowment which is applicable to uses other than educational is not to be diverted from such uses by the scheme, if the power to make the scheme was limited to that part of the fund which was applicable to educational uses. Then sub-sect. 3 provides that, if the proportion applicable to other charitable uses exceeds one half of the whole endowment, the governing body shall, so far as regards the non-educational purposes, remain unaltered by the scheme. One is at once led there to consider the other alternative. Supposing that the proportion applicable to other charitable uses does not exceed one half, then this provision does not apply, and apparently the governing body may be so affected by the scheme. But if the jurisdiction of the commissioners had been confined to the part devoted to educational purposes, the section would have no place. I think, therefore, looking at that section, that the jurisdiction of the commissioners is not limited to that part of the exhibitions in question available for the five schools which are not public schools, excluding the part available for Shrewsbury which is. Then, I think, that is made clearer still by the 9th section of the Endowed Schools Act 1873. At the time when that Act was passed the Public School Commissioners appointed by the Public Schools Act 1868 were in existence, and the section runs thus: (His Lordship read it.] It is said on one side that that is an enabling section; and on the other side, that it is a disabling section. The meaning I think is this: it is saying that where two or more schools are jointly interested, one being a public school within the Act and the other not, the power of dealing with the educational fund is limited to the case in which the consent of the Public Schools Commissioners is obtained. It can be exercised with their consent, but not without it, and I think that the fair construction of that section is, that it is a section having the effect of preventing something being done which could be done before. It is first of all disabling beyond all question. It says something is not to be done, and then it goes on to point out under what special circumstances that thing may be done. To my mind it throws a great light upon the construction of the 24th section of the Act of 1869, which independently I think had not the effect of limiting the commissioners' jurisdiction to the educational endowments. This section now confirms my construction strongly. Then the section has been repealed by the Statute Law Revision Act 1883 (46 & 47 Vict. c. 39), but that is simply for this reason, that the Public Schools Commissioners had ceased to exist. There was no longer any reason for it, and if it were left standing it would come to this, it would be an absolute veto on dealing with such funds as I am referring to, because it could not be done without the consent of the commissioners, and it could not be done with their consent because there is no such body; the revocation of the section indicates again, to my mind, that when it is out of the way the jurisdiction of the commissioners to deal with such a joint fund exists. Then, if that is so, sect. 6 of the Act of 1874 seems to me to apply; that provides: [His Lordship read it.] Therefore the consent required by that section not having been obtained the court or judge are forbidden to act. The case of *The Attorney-General* v. *Moises* was referred to as leading to a contrary conclusion; that case is stated at p. 855 of the Appendix to Tudor's Charitable Trusts, and not reported elsewhere that I know of. There the Master of the Rolls read sect. 24, sub-

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sect. 3, and pointed out that in that case there was more than half the fund that was not applied to educational purposes, consequently sub-sect. 3 applies, and he says: "It is plain, therefore, that if there was no other Act, the corporation through its head refusing to assent, the commissioners could not by any scheme whatever appoint new trustees, who would have the management of the charity estates or alter the mode of dealing with them." I think that it is only fair to say that, when the Master of the Rolls puts that on the existence of the fund being more than a moiety, his view would have been different in case it had been less than a moiety, the section contemplating the alternative state of things. Then farther on he speaks of there being jurisdiction and exercising jurisdiction. But what is it that is exercised? He says: "An educational endowment in this section clearly means what I will call a pure educational endowment. Now I am not going to interfere with respect to the endowment of the school or the educational endowment. I am not going to appoint new trustees of them. If I appoint new trustees at all, it is only of the old charity estates. The educational endowment consists merely of certain sums out of the charity estates and the school-house. There is no other educational endowment. It appears to me, therefore that that section does not apply to the case of a mixed endowment, where by reason of the dissent of the governing body the Charity Commissioners cannot make a scheme affecting the property. Consequently, in my opinion, the jurisdiction remains." That paragraph was relied on a good deal, but it must be read with the preceding paragraph, which shows to what extent he considered the jurisdiction existed. It was not to interfere in any way with the educational endowment, but to do something wholly outside of it. In my opinion, therefore, this is a case in which, under the 6th section of the Act of 1874 the endowment being one which can be dealt with by scheme under the Acts, the court or judge is not to exercise jurisdiction.

Solicitors: *H. Andrews; Clabon; Solicitor to the Treasury.*

Friday, July 27.

(Before NORTH, J.)

MALLESON *v.* THE GENERAL MINERAL PATENTS SYNDICATE LIMITED. (*a*)

*Company—Company limited by guarantee—Not having a capital divided into shares—Regulations as to share or interest of members in the company's undertaking—*Ultra vires*—Companies Act* 1862, *ss.* 7, 9, 14, 90.

The G. M. Syndicate Limited was incorporated on the 23rd Feb. 1894, *as a company limited by guarantee and not having any capital divided into shares. The amount guaranteed by each member was* 1*l. For the purpose of registration the number of members was declared (by the articles) to be twenty, but the directors were empowered to register an increase. A special resolution of the company was duly passed on the* 13*th June* 1894, *substituting for the articles of association of the company a body of new regulations, which provided that the undertaking of the company should be regarded as divided into* 1400 *shares or interests; that the members of the company at the time at which the regulations came into operation should be deemed to be entitled to these shares in equal proportions; that the number of shares in the undertaking might be increased, and the additional shares so created dealt with in such manner as the directors should think expedient, and any preferential or special rights might be attached to such additional shares; that the shares or interests of any member might be transferred, and should pass to his executors on death; and that a member might be admitted, or permitted to increase his holding on the footing of payment to the company of a specified sum per share or interest, by instalments or otherwise. This was an action by one of the members of the company against the company and the directors to restrain their acting on the new regulations on the ground that they were* ultra vires *as being an attempt to get the benefit of having a capital divided into shares without being subject to the restraints imposed upon such capital by the Companies Acts. The plaintiff now moved for an injunction, and the motion was by consent treated as the trial of the action.*

Held, that the regulations were intra vires; *they were merely attempts, whether successful or not the court expressed no opinion, to define and make it possible to deal with the fractional interests of the members of the company in its undertaking, and did not either limit their liability by the amount of their shares, or attempt to create a capital divided into shares within the meaning of sect.* 14, *and other sections of the Companies Act* 1862.

THE General Mineral Patents Syndicate Limited was registered on the 23rd Feb. 1894 as a company limited by guarantee and not having a capital divided into shares.

The memorandum of association was in the form required for such a company by sects. 7, 9, 14 of the Companies Act 1862, and fixed the amount which each member undertook to contribute to the assets of the company in the event of its being wound-up at 1*l.* The articles of association fixed the number of members at twenty, but gave the directors power to register an increase in the number of members at any time. The rest of the articles consisted of an adoption of the clauses of Table A. with trifling modifications, and omitting all the clauses relating to shares and capital.

At general meetings of the company, held on the 13th June 1894 and the 11th July 1894, a special resolution was duly passed and confirmed, "that the new regulations submitted to this meeting be and they are hereby adopted as the regulations of the company to the exclusion of and in substitution for the regulations contained in the company's articles of association.

The new regulations contained the following:

4. In order to determine the proportions in which the members for the time being of the company are interested in the company, the undertaking of the company shall be deemed to be divided into a specified number of shares or interests, and the members shall be deemed to be interested in the company in proportion to the number of such shares or interests for the time being registered in their respective names as hereinafter provided, and until

(*a*) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

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otherwise determined by special resolution the undertaking of the company shall be deemed to be divided into 1400 shares or interests numbered 1 to 1400 inclusive.

5. The members of the company at the time when these regulations come into operation shall be deemed to be entitled to the said 1400 shares or interests in equal proportions.

6. The number of shares or interests into which the company is to be deemed to be divided may, at any time, by special resolution, be increased to such extent as may seem expedient, and any additional shares or interests resulting from such increase may be appropriated and dealt with in such manner as the directors think expedient. Any preferential, qualified, or special rights, privileges, or conditions may be attached to any such additional shares or interests. The additional shares shall be numbered 1401 onwards.

7. Persons may become members of the company by original subscription, or by admission, or transfer, or by succession. The subscribers to the company's memorandum of association are members by original subscription. Any person who hereafter desires to become a member by admission or to increase his holding in the company must apply in writing to the company for admission to membership or for an increased holding, and must state in such application the number of shares or interests, or additional shares or interests, in respect of which he desires to become a member, and if there are any unappropriated shares or interests it shall be for the directors to accept or reject such application, and in the former case to determine the number of shares or interests in respect of which such applicant shall be admitted to membership or permitted to increase his holding, and the applicant shall become a member interested, or additionally interested, in accordance with such determination.

8. The register of members of the company to be kept pursuant to sect. 25 of the Companies Act 1862 shall, in addition to stating the names, addresses, and occupations (if any) of the members of the company, state the number of shares or interests in the company constituting the interests of such members respectively, and the distinguishing numbers of such shares or interests respectively.

9. Any member may be admitted to membership, or be permitted to increase his holding, on the footing that he is to pay to the company in respect of the shares or interests constituting his interest or any of them a specified sum per share or interest, either by instalments or when called for by the directors or otherwise, and the registered holder for the time being of any shares or interests in respect of which any money is so made payable shall pay the same as and when the same shall become due, but save as aforesaid and save as provided by the memorandum of association, membership shall not impose on the member any liability to any calls or contributions.

This was an action brought by Colonel Malleson, one of the original members of the company, against the company, for a declaration that the regulations set out above numbered 4 to 9 in the new regulations of the company were *ultra vires* and illegal, and for an injunction to restrain the defendant company and the directors thereof from acting on the said clauses.

It was stated in the evidence that the Registrar of Joint Stock Companies had recently, acting on the direction of the Board of Trade, refused to register companies with similar regulations embodied in their articles.

The plaintiff now moved for an injunction.

Everitt, Q.C. and *Macnaghten* for the plaintiff.—The whole scheme of the Companies Act 1862 is that there should be two possible classes of companies, the one limited by shares and the other by guarantee. A company limited by guarantee may have a capital divided into shares, but if they have they are bound by all the provisions of the Act as to capital. These new regulations are an attempt to enable a company limited by guarantee to have a capital which can be dealt with like other share capital, but shall be free from all the restraints of the Act; and that cannot be done. Sect. 7 of the Act of 1862 defines the two different ways of limiting liability; sects. 8 and 9 provide for the memorandum of association in each case, the difference being that, where the liability is limited by shares, the amount of capital and division into shares must be stated; where the limit is by guarantee, the amount which each member undertakes to contribute in the case of a winding-up must be stated instead. Then sect. 14 provides for the articles of association, which are made compulsory in the case of a company limited by guarantee, and it provides, "They shall in the case of a company, whether limited by shares or unlimited, that has a capital divided into shares, state the amount of capital with which the company proposes to be registered." These regulations are an attempt to evade that provision. Sect. 25, providing for a register of members, and sect. 26 which requires an annual return to the registrar would be defeated by this scheme. In the *Ooregum Gold Mining Company* (66 L. T. Rep. 427; (1892) A. C. 126) Lord Macnaghten's judgment, 66 L. T. Rep. 431; (1892) A. C. 146, deals with sect. 25. The scheme of that section assumes that where capital is divided into shares in any way, the amount to be paid upon the shares should be fixed and known. Sect. 90, too, which provides for a winding-up, could not be worked with such regulations as these.

Swinfen Eady, Q.C. and *A. J. Chitty*.—A company limited by shares is bound to show shares of a fixed amount, but there is no such obligation where the liability is limited by guarantee. There is no statutory limit to the amount of the guarantee, and in a company so limited the *ad valorem* duty is calculated on the number of members, so there is no reason for fixing the amount of the capital or shares. There is no enactment that every company which has capital must divide it into shares. Sect. 26, which provides for the transmission of the share or other interest of members of a company, distinctly recognises the possibility of their having interests which are not shares of a fixed amount. The plaintiff's argument must apply, if it is good at all, to unlimited companies and to cost-book mining companies. But that would make it impossible to register a perfectly solvent partnership as an unlimited company, or to register a cost-book mining company at all, though their registration is distinctly contemplated by the Act. The Act does not prevent the formation of a company with a class of members who do not hold shares:

Re Albion Assurance Society; Winstone's case, 40 L. T. Rep. 838; 12 Ch. Div. 239.

There is nothing in the Act to prevent companies limited by guarantee trading, or to compel them if they trade to alter their constitution. [NORTH, J. referred to sect. 90.] That applies to the case of a company registered under the Act as limited by guarantee, but having a capital divided into shares.

Everitt, Q.C. in reply.

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NORTH, J.—In my opinion, this motion is founded on a deluded belief that the company has done something which it has not done. I do not see that it has either done anything which according to the Act it should not have done, or abstained from doing anything which according to the Act it should have done. The case seems to me to lie in a nutshell. [His Lordship read the 8th and 9th sections of the Companies Act 1862.] Therefore there are two modes in which a company may be formed—the one where its liability is limited by shares, the other where it is limited by guarantee. Then I do not think I need refer to any other section until we come to the 14th, which says: "The memorandum of association may in the case of a company limited by shares," *i.e.*, formed under sect. 8, "and shall in the case of a company limited by guarantee," *i.e.*, formed under sect. 9, "or unlimited, be accompanied when registered by articles of association prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient." Then the section proceeds thus as to the articles: "The articles shall be expressed in separate paragraphs numbered arithmetically. . . . They shall, in the case of a company, whether limited by guarantee or unlimited, that has a capital divided into shares, state the amount of capital with which the company proposes to be registered; and in the case of a company, whether limited by guarantee or unlimited, that has not a capital divided into shares, state the number of members with which the company proposes to be registered, for the purpose of enabling the registrar to determine the fees payable on registration; in a company limited by guarantee, or unlimited, and having a capital divided into shares, each subscriber shall take one share at the least, and shall write opposite his name in the memorandum of association the number of shares he takes." There the phrase is used several times, "having a capital divided into shares," and the argument addressed to me has been in reality that that is the same thing as being a company limited by shares, because such a company either has its capital divided into shares, or if it has not it ought to have, and the whole contention before me is, that this company, which clearly was formed in the first instance as a company limited by guarantee, and was not and was never intended to be anything but that, and was never intended to cease to be that, has by operation of the resolution it has passed become something else—become a company which ought to have a fixed capital, and ought to have that fixed capital divided into a certain number of shares. I do not think that is the basis upon which the company has gone at all. I do not think they either mean to have a fixed capital, or to divide that fixed capital into any number of shares. They are attempting, for some reason which I do not thoroughly understand, and which I very much doubt whether they can successfully accomplish, to ascertain in some way, and still keeping themselves as a company limited by guarantee to express fractionally, the amount of the interests in the company of the several members. As I said, what good will it do them. I do not quite know. But that is a totally different thing from fixing the capital, which is neither fixed nor proposed to be fixed. In my opinion, you cannot have a company with a capital divided into shares within the meaning of the phrase used in the Act of Parliament where you do not have a capital at all—where the company is not under the obligation of having a capital at all, but is a company formed upon the basis of limitation by guarantee. A good many of the sections which were referred to no doubt are somewhat difficult to construe if the phrases "limited by shares" and "having capital divided into shares" really mean the same thing; but, in my opinion, they do not, and the comments made upon the various subsequent sections upon the footing that they do mean the same thing really have no bearing on the case. In my opinion the plaintiff has mistaken the position of the company, and I must dismiss the motion with costs.

By consent the hearing of the motion was treated as the trial of the action, and the action dismissed without costs.

Solicitors: *S. Jacomb Hood*; *Stretton, Hilliard, Dale*, and *Newman*.

Friday, Aug. 3.

(Before NORTH, J.)

ATTORNEY-GENERAL v. THE VESTRY OF CAMBERWELL. (a)

Vestry—Improper expenditure of rates—Obtaining decision of legal point as to rights of water company—Advising resistance to legal charge—Injunction—Metropolis Local Management Act 1855 (18 & 19 *Vict. c.* 120), *s.* 92.

The Camberwell Vestry are a select vestry created by the Metropolis Local Management Act 1855. *A part of the parish of Camberwell is supplied by the Lambeth Waterworks Company. By their Act* (11 *Vict. c. vii., s.* 37) *the Lambeth Company were bound to supply water for domestic purposes at fixed rates therein specified. Sect.* 39 *of this Act provided that domestic purposes should not include baths, horses, cattle, or washing carriages, or any trade or business, but that the company might supply water for such purposes at such price as they and the consumer should agree on. Assuming that the word baths in this section included fixed baths in a dwelling-house, the water company had made a charge of* 10*s. a year for such baths in addition to their assessed rate. This charge was at times objected to, and an action* (Walker *v.* The Lambeth Waterworks Company) *was brought upon a special case to determine the question of their right to charge it. On the* 11*th April* 1894 *Chitty J. delivered judgment in this action, deciding that the company were entitled to make the charge. A conference of vestries and district boards in South London was shortly afterwards held to consider and report on the charges made for water supply in South London, at which the Camberwell Vestry were represented. This conference passed resolutions that the question of the right to charge for fixed baths was not fairly raised in* Walker *v.* The Lambeth Waterworks Company, *that immediate steps should be taken to obtain a final declaration of the law on the subject, and in the meantime the consumers of water supplied by the Lambeth Company should be advised to refuse to agree to pay the said charge for the supply of water to fixed baths, and that each*

(a) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

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vestry should be asked to contribute to the costs of obtaining such a declaration in proportion to the rateable value of its parish. In pursuance of this resolution circulars were issued to the ratepayers urging them to refuse to pay the charge without ceasing to use the water. The costs of these circulars were part of the costs to which the vestry were asked and had agreed to contribute. This action was brought by the Attorney-General on the relation of the Lambeth Waterworks Compaay, who were large ratepayers in the parish, to restrain the vestry from expending any money out of the rates in contributing towards the costs of obtaining a declaration of law as to the right of the Lambeth Company to make the said charge, or in doing any act to aid persons in resisting such charge.

Held, that there was nothing in the Metropolis Local Management Act 1855, *or in the general powers of vestries before that Act, to give the vestry power to spend the rates in this way, and the injunction must be granted.*

THE Lambeth Waterworks Company had the right of supplying, among other places, the greater part of the parish of Camberwell.

Under their private Act (11 Vict. c. vii., s. 37) the company were bound to supply water for domestic purposes in return for a certain rate assessed on the value of the house.

Sect. 39 of the Act provided that domestic purposes should not include "water supplied for baths, horses, cattle, or washing carriages, or any trade or business," and the company were thereby empowered, but not compelled, to supply water for other than domestic purposes at such rent and upon such terms and conditions as should be agreed upon between the company and the person desiring such a supply.

The company had for many years interpreted this section to apply to fixed baths in dwelling-houses, and had made a charge of 2*s.* 6*d.* per quarter for every such bath in addition to their rate fixed according to the value of the house.

Some time in 1892 the vestries of South London, including the defendants, appointed some of their members to form a conference for the purpose of considering the right of the company to make such a charge. This conference issued circulars to ratepayers who were supplied with water by the plaintiff company, advising them to refuse to pay the charge for fixed baths, and giving them other advice as to the method to be pursued, by tendering in advance the amount of their rate less such charge.

On the 11th April 1894 Chitty, J. decided, in an action of *Walker* v. *The Lambeth Waterworks Company* (71 L. T. Rep. 75), brought before him by way of special case, that the company were not bound to supply water for fixed baths, except under special agreement.

On the 23rd April the said conference held a meeting and passed the following resolutions:

1. That this conference is of opinion that the question of the right of the Lambeth Waterworks Company to charge for water used in baths in private dwelling-houses was not fairly raised in the case agreed upon by the company and Mr. Samuel Walker, and laid before Mr. Justice Chitty on the 11th April 1894, and that immediate steps should be taken to obtain a final declaration of the law on the matter.

2. That pending obtaining a final decision, the consumers of water supplied by the Lambeth Waterworks Company be advised to continue to refuse to agree to pay the charge of 10*s.* made by the company for each fixed bath.

3. That each vestry be asked to contribute the costs incurred in obtaining such a declaration of the law in proportion to the rateable value of the parishes taking part in such action.

On the 25th April the special water committee of the Camberwell Vestry reported to the vestry the above resolutions of the conference, and advised that the vestry should contribute as asked, and on the same day the vestry resolved that the vestry should contribute to the costs as desired by the conference.

In pursuance of these resolutions circulars continued to be issued advising the ratepayers not to pay the charge for fixed baths, and as to the best way of tendering their water rates without such charge. It was alleged, and not disputed, that the vestry had contributed, or intended to contribute, to the expense of issuing these circulars.

On the 22nd June this action was brought by the Attorney-General on the relation of the company, who were large ratepayers in the parish, for an injunction to restrain the defendants from spending any part of the rates in contributing to the costs of obtaining a declaration of the law as to the right of the company to make a charge for water supplied to a fixed bath, or doing any other act with the object of aiding persons to resist payment of any such charge.

The plaintiffs now moved for an injunction in the above terms.

Swinfen Eady, Q.C. and *Yate Lee* for the motion.—The water company are very large ratepayers in the parish. The vestry are spending the rates, towards which we contribute, in getting up an agitation to induce people to go on using the company's water, but to refuse to pay what the law declares the company is entitled to. The judgment of Chitty, J. in *Walker* v. *The Lambeth Company* (*ubi sup.*) was a considered judgment, and it has not been appealed from, and for the present at least must be considered to be the law. There is no power whatever in a vestry, either by common law or statute, to spend the rates in agitating for the alteration of the law, or in procuring a judicial statement of what the law is. Only a part of the ratepayers of Camberwell are supplied by our company, and the houses so supplied which have fixed baths are only 2670 out of a total of 38,000 houses.

S. Hall, Q.C. and *P. S. Stokes* for the vestry.—The company have been sending round notices that they will not supply water for fixed baths except by agreement, and the vestry has a right to send round other notices advising people not to agree. The defendants are the vestry of a parish named in schedule A. of the Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120), and have succeeded to all the powers of the old open vestry as well as those conferred by the Act. Sect. 92 of the Act provides that all "expenses of the paving, lighting, watering, cleansing, or improving any parish, or any part of any parish, mentioned in the schedules, and all other expenses in relation to the regulation, government, or public concerns of any such parish or part, or of the inhabitants thereof . . . shall be deemed expenses incurred in the execution of this Act, and shall be defrayed accordingly;" *i.e.*, out of

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the rates. The supply of water to this parish, the health of which is in charge of the vestry, is a matter of public concern, and the vestry are entitled to spend money in securing it. The company enforce this charge by cutting off the water, but by the Public Health Act 1891 (54 & 55 Vict. c. 76, s. 48 (1), a house insufficiently supplied with water is a nuisance, and it is the duty of the vestry to abate it. The charge prevents people having fixed baths, and makes them resort the more to the public baths and washhouses, which are supplied partly at the expense of the rates; and it also thereby increases the danger of an epidemic. The local authorities will have at some time to buy out the water companies, and to get rid of this charge would diminish the price. All this makes this charge a matter of public concern, and the vestry is entitled to test its legality. In any case the company are not entitled to an interlocutory injunction; they have known of these circulars since April, and only now complain. They can only bring the action as ratepayers; the sum spent in these circulars is wholly unimportant, and the proper remedy is to get the auditor to surcharge it.

Swinfen Eady, Q.C. in reply.—*The Attorney-General* v. *The Vestry of Bermondsey* (48 L. T. Rep. 445; 23 Ch. Div. 60) shows that an injunction will be granted, though there might be a surcharge.

NORTH, J.—I think the vestry is in the wrong in the course which they have taken in this matter. There has been a question—a serious and very important question—raised as to whether the water company can legally make a charge for water supplied to fixed baths. That has been made the subject of an agreed statement of facts, and solemnly argued before Chitty, J., who has given an elaborate judgment upon the point. Without remembering the details, I know that the matter was fully gone into by him. That decision was given in April, and, so far as I am aware, there has been no appeal from it. It may be taken, therefore, that the present law is settled by that decision. It is said that the defendants, the Vestry of Camberwell, wish to have the matter fought over again. There is nothing to prevent a party having it fought over again in a legitimate way; and if any other person considers he is improperly charged for a fixed bath by the waterworks company, he can do what the plaintiff in the other action did, namely, take such proceedings as may be necessary to have a decision whether the waterworks company are in the wrong in what they have done. But he will be bound by the decision in the case which has already been decided. If there are material matters which were not brought before the court upon that occasion, he will have an opportunity of bringing those matters forward. It has been said that that was a judgment obtained on an agreed statement of facts; but there is no harm in that, unless it is meant to say that material facts were kept back in that case. I have asked what was kept back, and I was told there was one fact which the parties think might have been brought forward, which was not brought forward. Any party who chooses to take another proceeding may bring forward that fact in a lawful way, and if it is a fact which makes his case differ from the other case that was decided, the court before whom it comes will give effect to that difference in the facts, and will decide the case properly. But that is not what is complained of in the present case. The Camberwell Vestry, and other vestries—I do not know whether they started it or not but at any rate they are promoting—an agitation for the purpose of resisting what has been decided to be the lawful claim of the water company by inducing persons who are supplied with water—not to refuse to take the water—that is not the point at all—but to take the water and refuse to pay for it, although it has been decided that the charge is a lawful one. And they are urged to do this without any step being taken towards having the point fought over again. It has been said that I ought not to restrain the vestry from taking proceedings or contributing towards the cost of proceedings, to obtain a declaration of what the law ought to be. But what I am told is, that they are not going to do this, they have not done it themselves, and they are not going to take any proceedings, and the question is whether they shall be allowed to provide money out of the rates for the purpose of assisting other persons in taking steps for the purpose of getting rid of a decision which has existed some time, and which has not been made the subject of an appeal. In my opinion they are not justified in employing the ratepayers' money for any such purpose. But this is to be said, that what they are doing is totally different—they are supporting an agitation to defeat the claim of the water company by persuading people not to pay. Those are not lawful means at all; they have started a plan of campaign, by which persons who ought to pay according to the law for water supplied to fixed baths are to be induced to take the water, and yet to resist the payment to which the company are entitled. In my opinion that is altogether illegal, and I have no doubt that it is not a matter to which the rates can be properly applied. It is not a lawful public concern, and therefore, in my opinion, the injunction must go. I intended to refer to the resolutions which have been passed at the conference of two or three vestries. [His Lordship read the first resolution above set out.] I have already said that, if it is suggested that the point was not fairly raised, any material fact which was not discovered then can be brought forward in a fresh case, but for myself I have no doubt that it was brought forward fully. Then the next resolution is, "that pending obtaining a final decision, the consumers of water supplied by the Lambeth Waterworks Company be advised to continue to refuse to agree to pay the charge of 10s. made by the company for each fixed bath." I know from the evidence that they are not to be advised to discontinue the use of a fixed bath, and it is obvious that what is meant is that they are to continue to refuse to pay the charge of 10s., which has been decided to be the lawful charge by the company for each fixed bath, and to continue to use the baths notwithstanding. It is an improper use of the rates to print circulars giving that advice. Then the next resolution is, "that each vestry be asked to contribute to the costs incurred in obtaining such a declaration of the law in proportion to the rateable value of the parishes taking part in such action." I have pointed out that the vestry is not taking, and does not intend to take, any steps towards obtain-

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ing such a declaration. Then the only question is as to the form of the injunction.

After some conversation an injunction was granted restraining the vestry "from expending any money out of the general or other rates of the parish of Camberwell towards the costs incurred, or to be incurred, in obtaining a declaration of the law as to the right of the company to make a charge for water supplied to a fixed bath, or in doing any other act with the object of instigating or aiding persons to resist payment of any such charge, but this injunction is not to prevent the vestry from resisting any claim made against them by the company in respect of such rate."

Solicitors: *Bell, Stewards, May,* and *How*; *Marsden* and *Son.*

Saturday, Aug. 11.

(Before NORTH, J.)

Re KIDD; BROOMAN *v.* WITHALL. (*a*)

Locke King's Acts (17 *&* 18 *Vict. c.* 113, 30 *&* 31 *Vict. c.* 69, 40 *&* 41 *Vict. c.* 34)—*Equitable charge — Lien for unpaid purchase money — Money agreed to be paid by lessor for purchase of ground rents from lessee—Building agreement.*

On the 16*th April* 1883 *K. agreed to lease two plots of land to H. on building leases for terms of ninety-nine years at ground rents amounting in the whole to* 180*l. per annum. The agreement contained provisions binding the lessee to erect a certain number of houses, and the lessor to grant a lease of each house as soon as finished, and a special provision that, so soon as the lessee had taken a sufficient number of leases to secure by the ground rents thereby reserved the total rent of* 180*l., the lessor should either convey to the lessee the fee simple of the remaining land for a payment of* 50*l., or at the option of the lessor the lessee should sell to the lessor the ground rents to be created out of the land not then already leased when the same should have been created, at the price of twenty-two years' purchase; such ground rents not being in any case more than one-sixth of the rack-rent value of the houses on which the same were secured. Leases of a sufficient number of houses to secure the* 180*l, were granted in the lifetime of K., and the executors of H., who were carrying out the agreement after his death, gave K. notice that they were ready to take a conveyance of the remaining land. K. declared her option to purchase the ground rents. The number and amount of the ground rents to be created was practically agreed in K.'s lifetime. She died before the matter was completed, having by her will specifically devised the land comprised in the agreement with H. to trustees upon trust to sell, and stand possessed of the proceeds in trust for B. and her children, and gave all her residuary real and personal estate upon other trusts. K.'s trustees carried out the agreement by purchasing the ground rents at the price of* 1298*l. An order had been made for the administration of K.'s estate.*

Held, on further consideration, that H.'s executors had an equitable charge of the nature of a vendor's lien for unpaid purchase money on the land comprised in the agreement within the meaning of Locke King's Acts, and that the 1298*l. must be paid by the specific devisees, not by the testatrix's general estate.*

(*a*) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

BY a building agreement dated the 16th April 1883 Mrs. Kidd agreed to lease and William Hodson agreed to take two plots of ground at Wood Green for ninety-nine years from Lady-day 1883, at the rent after the first three years of 180*l.* per annum. The lessee agreed to erect within four years from the date of the agreement two houses upon one plot and twenty houses upon the other. Leases were to be granted of each house when completed at a ground rent of one-sixth, the estimated rack-rent to be fixed by the lessor's surveyor, and the agreement contained the following provision:

Provided always, that if and when the lessee has taken a sufficient number of leases to secure by the ground rents thereby reserved the said total ultimate annual rent of 180*l.*, then the lessor will either convey to the lessee in fee simple, in consideration of the due performance of this agreement, and of 50*l.* to be paid by the lessee, all such parts of the two plots of ground as should not have been included in any lease (subject only to such covenants binding the lessee as to the user of the land as would have been contained in leases under the agreement) or at the option of the lessor the lessee shall sell to the lessor the ground rents to be created out of the land not then already leased when the same shall have been created, at the price of twenty-two years' purchase of the amount of such ground rents, such ground rents not being in any case more than one-sixth of what in the opinion of the surveyor shall be the actual rack-rent value of the houses on which the same shall be secured.

By a supplemental agreement dated the 27th July 1888, and made between Mrs. Kidd and the executors of William Hodson, whose death was therein recited, the executors agreed to complete the carrying out of the agreement, and the time for completion of the houses was extended to the 24th June 1890.

On the 17th May 1890 the 180*l.* mentioned in the original agreement having been secured by the leases already granted, Hodson's executors gave Mrs. Kidd a notice that they were prepared to take a conveyance in fee of the remainder of the land, and asked whether she elected to convey it or to purchase the ground rents when created.

On the 31st July 1890 she gave notice that she desired to purchase the ground rents.

Mrs. Kidd, the lessor, died on the 7th Dec. 1890. At that time the surplus lands had not been demised, but the terms on which they should be demised had been agreed, and seven leases comprising the whole of the surplus lands had been prepared, though not executed.

By her will, dated the 26th Dec. 1890, Mrs. Kidd had specifically demised the property at Wood Green, comprised in the said building agreement, to her trustees upon trust for sale, and to invest the proceeds and pay the income thereof to Mrs. Burt for her life, with remainder to her children.

The testatrix gave her residuary real and personal estate to the same trustees upon trust for sale and conversion, and, after payment of certain legacies and annuities, to stand possessed of the proceeds upon the trusts to be declared by a codicil to her said will, but she never executed any such codicil.

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The will was duly proved by the trustees on the 4th Feb. 1891.

By an indenture, dated the 6th Nov. 1891, and made between W. Hodson's executors of the one part and Mrs. Kidd's trustees of the other part, after reciting the agreement, and the declaration of option to purchase the ground rents above stated, and reciting, as the fact was, that it had been agreed between Hodson's executors and Mrs. Kidd in her lifetime that the seven houses which had not already been leased should be leased to the said executors in the parcels and at the rents expressed in the several leases mentioned in the schedule, and that the sum of 1298*l.*, being twenty-two years' purchase of such rents, was the sum to be paid by Mrs. Kidd to the said executors in pursuance of the said agreement; it was witnessed that the said executors, in consideration of the sum of 1298*l.* then paid to them by Mrs. Kidd's trustees, released to the said trustees the said seven houses freed and discharged from all the interest therein of the said executors, but subject to and with the benefit of the said leases set out in the schedule. The leases, which were executed at or about the same time, were made by Mrs. Kidd's trustees to the executors of W. Hodson.

On the 23rd Jan. 1892 an order for the administration of Mrs. Kidd's estate was made in an action brought by her brother, who was one of her next of kin, against her trustees.

The action now came on for further consideration. The only question raised was whether the 1298*l.* so paid by the trustees ought to be paid out of the property given in trust for Mrs. Burt and her children, or out of Mrs. Kidd's residuary estate.

Gent and *Lightwood* for the plaintiffs.—The money which the testatrix had agreed to pay was purchase money for the ground rents to be created out of the interest which Hodson's executors had in the land, and for this sum they had an equitable charge or lien upon such interest. At the time of the testatrix's death she had two distinct interests in the land which had not been leased. She had the reversion expectant on the ninety-nine years' leases which Hodson's executors were entitled to have granted free of ground rent. She had also a right, under the agreement and her declaration of option, to have the ground rents created; *i.e.*, she was purchaser of a part of the interest of Hodson's executors. The interest so purchased she devised specifically in trust for Mrs. Burt and her children. They claim the ground rents and they must pay the purchase money.

Swinfen Eady, Q.C. and *Locke*, for the trustees and another of the next of kin, were stopped by the Court.

Cozens-Hardy, Q.C. and *P. H. Gregory* for Mrs. Burt and her children.—There was no purchase or sale of any interest in land. The testatrix had only one interest, not two. She had the reversion, and the right to these ground rents was part of the reversion. If there was any purchase at all, it was merely a purchase of Hodson's covenant to buy these ground rents; he had no interest in the land, and there was not, and could not be, any charge or lien upon any interest in land within the meaning of Locke King's Acts. *Hood* v. *Hood* (29 L. T. Rep. O. S. 398; 5 W. R. 747) is an authority that the first Act (30 & 31 Vict. c. 69) did not extend to a lien for unpaid purchase money. If the case is within any of the Acts, it must be the first amendment Act (30 & 31 Vict. c. 69), where the words (sect. 2) are: "The word mortgage shall be deemed to extend to any lien for unpaid purchase money upon any lands or hereditaments purchased by a testator." Here the testatrix has not purchased any lands or hereditaments.

NORTH, J.—I need not trouble you, Mr. Gent. Although the Acts known as Locke King's Acts required and have received a great deal of correction on account of what I cannot but say were considerable blunders in the original Act, I do not think that even now the Acts are well expressed to meet the particular state of facts in the case before me. But it is certainly within the spirit of the Acts, and I think it comes within the words. Here there was an agreement that the testatrix should grant leases of the whole land at a gross rent. Leases were granted at rents up to the full amount of the gross rent, and there was left some surplus land which the lessee was entitled to have leased to him without any rent. The agreement provided that the lessee should have this land conveyed to him in fee simple, paying 50*l.* for the difference between the fee and the leasehold interest to which he was entitled, or at the option of the lessor she might purchase the ground rents to be created in respect of this surplus land. She exercised this option, and then an arrangement was made by which the surplus land was to be subject to ground rents amounting to 50*l.* in favour of the lessor. The only way in which this could be done was by the lessor granting leases reserving rents, but that could only be done with the lessee's consent. Then you find that the lessor is to have those leases created in her favour upon paying a price calculated according to the amount of the rents. The lessor, therefore, had at her death two interests in the land. I cannot assent to Mr. Hardy's way of putting it, that the two were really one; at any rate, they may be divided into two for the purpose of consideration. One of these was the right to receive the rents during ninety-nine years, and the other to enter into possession of the land at the end of the ninety-nine years. The second of these was her's under the original agreement; but the right to receive rents depended on the arrangement made afterwards. It is stipulated for by the words of the original agreement; but if that agreement stood alone it would have been difficult to carry it out, for there are no means provided for fixing the rent. But when the lessor had given notice to exercise her option, and the parties had agreed, as they did, that there should be seven leases and had fixed the amount of the rents, the bargain was complete, and all that remained was to work it out. That was the state of things at the testatrix's death. I think that, when the bargain was complete but not worked out the lessee was entitled to say that he would not be a party to carrying out the arrangement by which these rents were to be created by the lessor unless he were paid his money. The money, therefore, was unpaid purchase money for the ground rents. I think it would be very hard if the devisees were able to take these ground rents during the term—which are presently payable, not part of the reversion which the testatrix was

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entitled to without payment—and have the purchase money paid out of the residue. But I am not here to decide the case on the ground of hardship. There can be no doubt that this case is within the scope of the cases to which the Acts were meant to apply. There may be some question whether it comes within the words, but I think it does. It must be declared that the 1298*l.* paid for these ground rents is a charge upon the property specifically devised in trust for Mrs. Burt and her children.

Solicitors: *C. R. Sawyer* and *Ellis*; *W. H. Withall* and *Co.*; *J. J. Chapman*, agent for *Long, Durnford*, and *Lovegrove*, Windsor.

Wednesday, Aug. 4.

(Before NORTH, J.)

SINCLAIR *v.* JAMES. (*a*)

Practice—Partition—Incumbrances on whole estate—Incumbrances on plaintiff's share—Right to partition—No reasonable cause of action—Striking out statement of claim—Order XXV., r. 4.

A., who was the owner of an undivided third share of the estates in two counties, devised by the will of B., brought an action for partition or sale. The statement of claim showed that the estates in each county were subject to a separate mortgage made by the testator, and that the share of the plaintiff was also subject to two mortgages made by the plaintiff or his predecessor in title. All the mortgagees were made defendants to the action, and the plaintiff asked for the usual inquiry what persons were interested in the property, and whether their shares were incumbered, and what incumbrances there were on the estates. The mortgagees of the entirety of the estates in one county and the mortgagees of the plaintiff's share now moved that the statement of claim should be struck out. There was a similar motion by the mortgagees of the entirety of the estate in the other county.

Held, that the plaintiff was not entitled to proceed with the partition action against the wishes of the mortgagees of his own share, and that the statement of claim showed no cause of action against any of the mortgagees, and must be struck out, and the action dismissed as against them. By consent, the action was at the same time dismissed against the owners of the other third share.

THE plaintiff in this action was entitled under the will of Lady Sinclair to an undivided third share of certain estates in the counties of Durham and Lancashire, which had been devised by the will of William Standish Carr Standish to Lady Sinclair and her two sisters Mrs. Paulet and Mrs. Lucy.

At the time of Mr. Standish's death, the whole of the Durham estates were subject to a mortgage to the defendants, Hermon, Hill, and James, and the whole of the Lancashire estates were subject to a mortgage to the Law Life Assurance Society. Both these mortgages were subsisting at the date of this action.

The plaintiff's undivided share was also subject to a mortgage made by Lady Sinclair to the defendant James, and to a mortgage made by the plaintiff to the defendant Thomas Brewis.

One of the other undivided shares was vested in the defendants, James and W. Paulet as trustees.

This was an action for partition to which all the mortgagees above mentioned were made defendants as well as the persons beneficially interested.

The statement of claim set out the facts above stated, and claimed that the real estates devised by the will of W. S. C. Standish might be partitioned, or in the alternative sold, and the usual inquiries made, viz., who were the persons interested in the said hereditaments and in what shares; whether they had charged or incumbered their shares, and what charges or incumbrances were existing on the said hereditaments and property, and an account of what was due in respect thereof.

The defendants, James, Hermon, and Hill, and Thos. Brewis, now moved that the statement of claim might be struck out and the action dismissed.

There was a similar motion by the Law Life Assurance Society.

Everitt, Q.C. and *Dickinson* for the first motion.—James, Hermon, and Hill have an overriding mortgage over the whole property; no cause of action is shown against them, for the court cannot compel them to consent to a partition, and they are not necessary parties to a partition action:

Swan v. *Swan*, 8 Price, 518;
Watkins v. *Williams*, 3 Mac. & G. 622, 634.

James and Brewis are mortgagees of the plaintiff's share, and the plaintiff is not entitled either to a partition or a sale without redeeming them:

Gibbs v. *Haydon*, 47 L. T. Rep. 184; 30 W. R. 726.

Arnold Herbert for the defendant James.

S. Hall, Q.C. and *Methold* for the Law Life Assurance Society.

Swinfen Eady, Q.C. and *Willis Bund* for the plaintiff.—All the mortgagees are properly made parties. They are clearly interested in the question whether there should be a sale, and the court is asked here to express its opinion as to the expediency of a sale. This it will not do in the absence of any parties interested:

Re Hardiman; *Pragnell* v. *Batten*, 16 Ch. Div. 361.

If the mortgagees were not made parties their existence would have been disclosed by the inquiries, which are in the common form, and they must have been served. If the paramount mortgagees do not consent to a sale, a partition can be made subject to the mortgage:

Waite v. *Bingley*, 21 Ch. Div. 674.

If the objection is valid it should have been taken by defence. There is no ground for striking out the statement of claim.

NORTH, J.—As regards the mortgagees of the whole estate, I think that the case is governed by the authorities cited by Mr. Everitt. A partition clearly cannot affect them. It is said that they are interested in the question of sale or no sale. But I do not think that makes them necessary parties to the action. I do not think, therefore, that as against them the statement of claim shows any reasonable ground of action. As regards the mortgagees of the plaintiff's undivided share, it cannot be said that they have no interest in t

(*a*) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

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question, for, if there was a partition, they would become mortgagees of a share in severalty instead of an undivided share in the whole. But the plaintiff has no right to make such a change in the mortgaged property without first redeeming the mortgage. *Gibbs* v. *Haydon* (*ubi sup.*), before Fry, J., is in point, and has never been dissented from. I must therefore allow both applications.

By consent the action was also dismissed as against the persons beneficially entitled.

Solicitors: *Spencer Whitehead*, agent for *Milward* and *Co.*, Birmingham; *Walters, Deverell*, and *Co.*; *Fredk. Wolfe*.

July 13, 14, *and Aug.* 7.

(Before STIRLING, J.)

McILQUHAM *v.* TAYLOR. (*a*)

Covenant—Construction—Covenant to pay money or transfer fully paid up shares—Formation of company with preference and ordinary shares—Breach of covenant—Liability of covenantor.

By deed dated Dec. 2, 1892, *the defendant covenanted with the plaintiffs that he the defendant would "within twelve calendar months from the date thereof pay the sum of* 1000*l. to or otherwise transfer into the names of the said" plaintiffs "*1000*l. worth of fully paid up shares in a company to be formed by the said defendant within the said twelve months as aforesaid, for working the said mines and premises, the capital of such company not to exceed* 12,000*l." The defendant formed a company which was registered with a capital of* 12,000*l., divided into preference and ordinary shares. The defendant shortly after the incorporation of the company executed a transfer to the plaintiffs of* 100 10*l. ordinary shares, but no contract was registered under sect.* 25 *of the Companies Act* 1867, *and consequently* 100 *fully paid up shares were not transferred to the plaintiffs within the twelve months.*

Held, that the company formed by the defendant, was not one in which the plaintiffs could be compelled to accept shares, and that the defendant was, in accordance with the principle of Studholme *v.* Mandell (1 *Ld. Raym.* 279), *bound to perform the other alternative, and pay* 1000*l.*

THIS was an action brought to recover a sum of 1000*l.* claimed to be due under a covenant contained in an indenture dated Dec. 2, 1892. The facts of the case as stated below are taken from the judgment of Stirling, J. The indenture in question was an assignment of a leasehold mine situate in the parish of Llanbadarnfawr, in the county of Cardigan, and held under a lease dated the 4th April 1889, which mine was at the date of the deed vested in John Paull and Griffith Williams.

This indenture which was expressed to be made between J. Paull and G. Williams of the first part, the plaintiffs of the second part and the defendant of the third part after reciting an agreement by the parties of the first part, to transfer the mine to the parties of the second part, proceeded:

Whereas the said Henry Enfield Taylor [the defendant] has since agreed with the said J. McIlquham and W. Michell, for a transfer to him of the said lease of the 4th April 1889, and all the machinery and plant new being in or upon the said demised premises for the remainder of the term subject to the payment of the rents and royalties, and the performance of the covenants and conditions contained therein for the sum of 2000*l.*, the sum of 1000*l.* to be paid on the day of the date of these presents, and the sum of 1000*l.* being the balance thereof in fully paid up shares in a company to be formed by the said H. E. Taylor, for working the said mines and premises.

There followed an assignment of the leasehold premises. Then came the following covenant by the defendant:

That he the said H. E. Taylor will within twelve calendar months from the date hereof pay the sum of 1000*l.* to, or otherwise transfer into the names of the said J. McIlquham and W. Mitchell, 1000*l.* worth of fully paid up shares in a company to be formed by the said H. E. Taylor, within the said twelve months as aforesaid, for working the said mines and premises, the capital of such company not to exceed 12,000*l.*

A company was formed by the defendant, and registered on the 20th Nov. 1893, a very short time before the expiration of the twelve calendar months. The memorandum of association stated that among the objects of the company were to be "the taking transfers, adopting and carrying out either with or without modifications of a certain indenture of lease, dated the 4th April 1889, between the Queen's Most Excellent Majesty of the first part, George Culley, a commissioner of woods of the second part, and John Paull and the said Griffith Williams of the third part, an agreement dated the 14th March 1892, made between James McIlquham and William Michell of the one part, and Henry Enfield Taylor of the other part, and an assignment dated the 2nd Dec. 1892," of even date with the assignment above mentioned, and the company was to take power to work the mines.

Clause 5 of the memorandum ran thus:

The capital of the company is 12,000*l.* divided into 1200 shares of 10*l.* each, of which 600 are hereby declared to be ordinary or "B" shares. The company has power from time to time to increase its capital, and to issue any shares in the original or increased capital as ordinary, preferred, deferred, and guaranteed shares, and to attach to any class or classes of such shares any preferences, rights, privileges, and conditions, or to subject the same to any restrictions or limitations that may be determined by any special resolution of the company passed before the issue of the shares affected thereby.

Then article 3 provided:

The company shall, as speedily as possible after the incorporation of the company take transfers of, adopt and carry out either with or without modifications a certain indenture of lease dated the 4th April 1889, made between the Queen's Most Excellent Majesty of the first part, George Culley a commissioner of woods of the second part, and John Paull and Griffith Williams of the third part; an agreement dated the 14th March 1892, made between James McIlquham and William Mitchell of the one part, and Henry Enfield Taylor of the other part, and an assignment dated the 2nd Dec. 1892.

The 4th article ran thus:

The company shall as speedily as possible after the incorporation of the company enter into an agreement with the said Henry Enfield Taylor, to allot to him, credited as fully paid up 600 B. shares in the company to the nominal amount of 6000*l.*, and the sum of 4000*l.*

(*a*) Reported by JOHN SANDERSON, Esq., Barrister-at-Law.

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in cash, or 400*l.* A. shares of the company also credited as fully paid up, to the nominal amount of 4000*l.* as the purchase money for the said lease, agreement, and assignment.

So that of the capital of the company the defendant was to take 10,000*l.*

Article 5 provided as follows:

The capital of the company shall be 12,000*l.* divided into 600 A. shares of 10*l.* each, with 10*l.* per cent. per annum preference, and 600 B. shares of 10*l.* each, which are to be allotted as mentioned in article 4. The A. shares only are offered for subscription, and will be payable as follows: 2*l.* per share on application, 2*l.* on allotment, and the balance within three months from the date of allotment.

Shortly after the incorporation of the company 100 shares were allotted to the plaintiffs. The defendant, on the 23rd Nov. 1893, sent to them an executed transfer of 100 B. shares, and on the 30th Nov. the secretary of the company sent to them the certificate for such 100 shares, but these shares were issued before any contract had been registered at the office of the Registrar of Joint Stock Companies, and consequently they were not effectively fully paid up shares.

The result was that 100 effectively fully paid up shares were not transferred or allotted to the plaintiffs within the twelve calendar months, and consequently there was a breach of the contract.

Subsequently the contract was registered with the Registrar of Joint Stock Companies, so that the shares could have been allotted.

The evidence, however, showed that the shares of the company never had any remarkable value.

Grosvenor Woods, Q.C. and *Griffith Jones* for the plaintiffs.—The promisor may elect to perform either branch of the alternative, but having elected one branch of the alternative he must perform that branch:

Deverill v. *Burnell*, 28 L. T. Rep. 874; L. Rep. 8 C. P. 475: 42 L. J. 214, C. P.

The allotment and transfer of 100 B. shares were not a compliance with the covenant. They were not worth 1000*l.*, and are not 1000*l.* worth of shares. We claim 1000*l.* under the covenant, or in the alternative 1000*l.* worth of shares. The express covenant fixes the amount of the damages. The covenant is to hand over the shares described, and on failure so to do to hand over a sum of 1000*l.* [STIRLING, J.—Where there is an alternative contract the measure of damages is that which is least beneficial to the covenantee.] But not where it is a case of payment of money: (Leake's Law of Contracts, 588, 589, 3rd edit.) [STIRLING, J.—Is it not all a question of construction?] No doubt. Here there is an obligation to pay this sum, or to hand over the shares within a limited time. The defendant cannot satisfy his obligation after the time has elapsed, for shares are fluctuating, and time is of the essence of the contract. By forming such a company as this the defendant has rendered himself unable to perform one alternative. If one alternative cannot be performed, the other must be:

Barkworth v. *Young*, 28 L. T. Rep. O. S. 199; 4 Drew. 1.

We refer to the case only for the general principle laid down by Kindersley, V.C. The defendant cannot insist on our taking shares in a company where the shares are not of equal value. We could not safely take shares if the defendant was entitled to give us B. shares:

Hutton v. *The Scarborough Cliff Hotel Company Limited*, 13 L. T. Rep. 57; 2 Dr. & Sm. 521; 11 Jur. N. S. 849.

Graham Hastings, Q.C. and *Bramwell Davis* for the defendant.—Here the covenant is to pay a sum of money or to transfer shares, a case exactly the converse of *Deverill* v. *Burnell* (*ubi sup.*). Assuming that it is an alternative contract, as the alternative has to be for the benefit of the covenantor, not of the covenantee (*Cockburn* v. *Alexander*, 12 L. T. Rep. O. S. 349; 6 C. B. Rep. 791), the plaintiff is entitled to damages for breach of the covenant to transfer shares. That is all that the plaintiff is entitled to ask for, if he is entitled to anything, and as the shares were absolutely worthless when a breach occurred, he is not entitled to anything. The only stipulation is that the company is to have only a certain amount of capital. It would have been open to the defendant with two classes of shares, to transfer whichever he thought best. In some cases the preference shares would be the more valuable; in other cases the ordinary shares. There is nothing requiring the defendant to transfer A. shares, or to prevent the defendant forming a company with two classes of shares.

G. Woods in reply.—The defendant cannot rely upon the recital to cut down the force of the covenant. There is no authority to show that the covenantor may choose. *Deverill* v. *Burnell* shows no more than that Bovill, C.J. thought so. It was clear that the money was meant to represent the value of the shares. How can they say we will give you a thousand shares which are worth nothing? Where an impossibility applies to one alternative, the other must be performed. The constitution of the company is not of the kind that was contemplated:

Hutton v. *The Scarborough Cliff Hotel Company*, 13 L. T. Rep. 59; 2 Dr. & Sm. 525, 526.

[STIRLING, J. referred to *Robinson* v. *Robinson* (18 L. T. Rep. O. S. 293, 295; 1 De G. M. & G. 247, 257, 258).] Here the defendant is bound to form his company with capital in equal shares. It is impossible to tell which are the more valuable shares, and it is impossible to tell which I am entitled to receive. It is impossible to say that the B. shares, or the shares which he could give us, were fully paid up:

The Ooregum Gold Mining Company of India Limited v. *Roper*, 66 L. T. Rep. 427, 432; (1892) A. C. 125, 147;

Re Eddystone Marine Insurance Company Limited, 69 L. T. Rep. 363; (1893) 3 Ch. 9:

Re Westmoreland Green and Blue Slate Company; Bland's case, 69 L. T. Rep. 700; (1893) 2 Ch. 612.

Can the defendant say this is a company the shares in which ought to be forced upon us under his contract? We submit we are entitled to the money. On the view against us 1000*l.* is the measure of damages. [STIRLING, J.—Your argument comes to this, that the company is merely a name.]

Cur. adv. vult.

Aug. 7.—STIRLING, J., in delivering a written judgment, after stating the facts of the case as above set out, proceeded:—Under those circumstances it is contended on behalf of the plaintiffs

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that the contract in question is one to hand over and transfer the shares described in the covenant, and in default of so doing to pay 1000*l.*, and it is said in consequence of default made by the plaintiffs the 1000*l.* is payable. For this the case of *Deverill* v. *Burnell* (28 L. T. Rep. 874; L. Rep. 8 C. P. 475; 42 L. J. 214, C. P.) is cited. For the defendant it is argued that the covenant is to perform one of two alternatives, either within twelve months to pay the 1000*l.* or transfer the shares; that the result of the breach is that the defendant has become liable to pay damages, but in assessing the damages they are to be assessed on the footing that the defendant was entitled to select for performance that alternative which was the least burdensome to him in accordance with the law laid down in the cases of *Cockburn* v. *Alexander* (12 L. T. Rep. O. S. 349; 6 C. B. Rep. 791) and *Robinson* v. *Robinson* (18 L. T. Rep. O. S. 295; 1 De G. M. & G. 257, 258). It is said that as the shares in the company formed by the defendant were worthless, the plaintiff is entitled to nominal damages only. To this it is answered that the defendant has disabled himself from performing the second alternative by forming the company which he did with the capital divided into preference and ordinary shares; and, secondly, that even if the covenant be alternative, he must, under the circumstances, perform that branch of it which provides for payment in cash. I have come to the conclusion that the plaintiff is right in this latter contention, and consequently it becomes unnecessary to say what was the strict construction of the covenant. I think that the shares which the defendant undertook to hand over, or "otherwise to transfer" in the language of the covenant, were to be shares in a company in which the shareholders all stood on a footing of equality. If the case had been one of partnership then it is provided by the Partnership Act of 1890 (53 & 54 Vict. c. 39), sect. 24, in accordance with the law previously existing, that "the interests of partners in the partnership property, and their rights and duties in relation to the partnership, shall be determined subject to any agreement expressed or implied between the partners by the following rules: (1) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm." Therefore in the absence of express stipulation, the partners stand upon an equal footing. In an agreement to form a partnership I apprehend the same rule would be applicable, and that an agreement for partnership not defined anywhere as to the shares which the partners are to take, would mean a partnership on equal terms. As regards the position of shareholders in a company in which nothing is said in the memorandum of association as to any preference or priority between the shareholders *inter se*, the law may not at the present moment perhaps be absolutely definite. The matter has recently been considered in the House of Lords in the case of *The British and American Trustee and Finance Corporation* v. *Couper* (63 L. J. 425, Ch.). I think I cannot do better than read the remarks of Lord Macnaghten, at p. 434 (63 L. J., Ch.). He says: "It seems to have grown out of the decision in the case of *Hutton* v. *Scarborough Cliff Hotel Company*, which was relied on for the respondent. In that case the company's memorandum of association declared that the capital was divided into a certain number of shares. There was nothing in the memorandum or in the articles to indicate that the shares might be of different classes. The directors found that they could not issue the whole as ordinary shares. A special resolution was passed authorising the directors to issue a certain number as preference shares. The proposed issue was restrained at the suit of an ordinary shareholder on the ground mainly that although the company had passed a special resolution authorising the issue of preference shares, they had not in terms altered one of the original articles which provided for equality among shareholders in respect of dividends. The company then passed a special resolution altering the obnoxious article. They were again met by an application for an injunction, and the injunction was granted by Kindersley, V.C., on the ground that there was an implied stipulation in the memorandum of association that all the shareholders should stand on an equal footing as to receipt of dividends, and that what was proposed to be done was contrary to the very nature of a joint stock company, and was an alteration in the constitution of the company. It is difficult to understand what the learned Vice-Chancellor meant by the expression 'constitution of the company,' and it is difficult to deal with an 'argument resting on a phrase so vague.' Nor is it easy to understand the Vice-Chancellor's view that equality among shareholders in respect of dividends was an 'implied stipulation in the memorandum.' There is nothing in the Act of 1862, or in any other Act requiring the memorandum to contain any reference to the rights of shareholders *inter se*. The division of the capital into shares of a certain fixed amount which must appear in the memorandum would not be altered or affected by issuing some of the shares as preference shares. The practical result of the decision has been that except in cases coming within the rule laid down in *Harrison* v. *The Mexican Railway Company*—a decision which has not met with universal acceptance—no company limited by shares that has not taken power by its memorandum to issue preference shares has been able to raise additional capital in the manner most advantageous to its shareholders and its creditors. It seems to me that the decision in *Hutton* v. *Scarborough Cliff Hotel Company* was not founded upon a sound view of the Companies Act 1862, and I respectfully dissent from it. I have the less hesitation in expressing this view, because I find that Cotton, L.J. has disapproved of the chief ground upon which the decision was based. "In reality," he says in *Guinness* v. *Land Corporation of Ireland*, "it is not by implication from the construction of the memorandum that the equality of the shareholders as regards dividends arises, but by the implication which the law raises as between partners, unless their contract has provided the contrary." Lindley, L.J., in a later case (*Re South Durham Brewery Company*, 53 L. T. Rep. 931; 31 Ch. Div. 270, 271), takes the same view: "I agree that the equality of shareholders as regards dividends is not an implied condition of the memorandum, but I doubt whether it is necessary to have recourse to the doctrine of partnership. It seems to me that if the sum of the interests of persons concerned

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in a joint adventure is divided into shares of an equal amount distinguished by numbers for the purpose of identification, but with no other distinction between them express or implied, it follows as a self-evident proposition, that the interest of the shareholders in respect of their shares as regards dividend and everything else must be equal." The law then is that under an ordinary memorandum of association according to which the capital is divided into shares of equal amount, the interests of the shareholders are equal in all respects. Whether in a company so constituted preference shares can be issued is a question the final decision of which has not yet been given, although perhaps in the present state of the authorities it may be concluded in the first instance by *Hutton* v. *The Scarborough Cliff Hotel Company* (*ubi sup.*). However this may be, if preference shares were to be issued, a resolution of the company would be necessary to sanction the issue, and every shareholder would have an opportunity of voting on the question. Here the shares were to be shares in a company to be formed by the defendant, the capital of such company not to exceed 12,000*l.* In the absence of express stipulation that means, in my judgment, a company having its capital divided into shares, all of which were to stand on the same footing. If a company with preference or priority as regards part of its capital had been contemplated, I can hardly doubt that the agreement would have contained the stipulation as to the proportion of the preference capital and the ordinary capital, and as to whether the shares which were to be taken in payment were to be of one class or the other, or if both, in what proportions. It seems to me that it cannot have been intended to be for the defendant, Mr. Taylor, to say whether the capital, except 100 shares, should be issued as preference shares, carrying any rate of preference interest which he might think fit to determine. In my judgment, therefore, the company which was formed by the defendant was not one in which the plaintiffs could be compelled to accept shares. That being so, I think the defendant is bound to perform the other alternative of the covenant. On that I may refer to the case of *Studholme* v. *Mandell* (1 Ld. Raym. 279). It seems to me that that is an authority in such a case as the present that the default in the performance of the alternative, the act being due to the act of the defendant who might have formed the company in a different way, he is bound to perform the other alternative. Consequently there must be judgment for the plaintiff for 1000*l.* with costs.

Solicitors for the plaintiffs, *Robert Jenkins*, for *Smith, Owen*, and *Davis*, Aberystwith.

Solicitors for the defendants, *Daniel Jones*, for *Arthur Johnson Hughes*, Aberystwith.

QUEEN'S BENCH DIVISION.

Friday, Aug. 3.

(Before MATHEW and KENNEDY, JJ.)

LONDON COUNTY COUNCIL (apps.) v. WORLEY (resp.). (a)

Metropolis Management Acts—Height of buildings—Penalty for continuing offence—Six months notice from the commission or discovery of offence—Metropolis Management Act 1862 (25 & 26 *Vict. c.* 102), *ss.* 85 *and* 107.

Sect. 85 *of the Metropolis Management Act* 1862 (25 & 26 *Vict. c.* 102) *provides that no building (except a church or chapel) shall be erected on the side of a new street of less width than fifty feet, which shall exceed in height the distance from the external wall or front of such building to the opposite side of such street without consent, &c., nor shall the height of such building be increased so as to exceed such distance, &c., and the section goes on to say, "and every person committing any offence under this enactment shall be liable to a penalty of 5l., and in case of a continuing offence to a further penalty of 40s. for every day during which such offence shall continue after notice."*

Sect. 107 *of the Act provides that no person shall be liable for the payment of any penalty, "unless the complaint respecting such offence has been made before a justice within six months next after the commission or discovery of such offence."*

The builders of the structure after a conviction against them for an offence under sect. 85 *of the statute finished the work, and left the premises; the appellants therefore proceeded for continuing penalties against the respondent, the owner of the structure. The magistrate dismissed the summons now taken out by the appellants against the respondent for continuing penalties.*

Held, that the respondent was liable for penalties for continuing the offence, as proceedings had been taken by the appellants within six months after the offence complained of had been committed.

CASE stated by one of the police magistrates of the metropolis.

On the 7th March 1894 the appellants summoned the respondent for having committed an offence under the 85th section of the Metropolis Management Amendment Act 1862 (25 & 26 Vict. c. 102), by unlawfully erecting a building on the south side of Kensington Court, being a new street of a less width than fifty feet, exceeding in height the distance from the external wall or front of such building to the opposite side of such street, without the consent in writing of the London County Council, and having continued the offence by constructing the building, and by permitting and suffering the building to continue erected above the height without such consent, after notice from the County Council, contrary to 25 & 26 Vict. c. 102; sect. 85, and 51 & 52 Vict. c. 41.

On the hearing it was proved or admitted that the building had been erected for the respondent as owner, and under his directions, and had been carried above the height specified in sect. 85 of 25 & 26 Vict. c. 102, under his directions, and after notice from the appellants to the builders that

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

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proceedings would be taken if such height were exceeded, which notice was brought by them to the knowledge of the respondent, and the respondent thereupon communicated with the appellants by letter, and informed them that he was the owner of the building, and that Messrs. Lawrence and Sons were employed by him to erect it, and that they had given up possession of the building on the 8th Feb. 1893, and that the respondent on the date in the summons mentioned was and still continued in possession of the building as owner thereof. It was also admitted that the building still remained above the specified height.

On the 7th Sept. 1893, the present respondent Robert J. Worley, the owner of the building, applied to the appellants, the London County Council, to give their consent *nunc pro tunc* to the erection of the building beyond the height specified in the statute, and on the 16th Oct. 1893 the appellants refused to give such consent, and gave notice thereof to the respondent.

It was also proved or admitted that a penal notice had been served on the respondent by the appellants on the 23rd Dec. 1893, requiring him to comply with the requirements of the law in respect of the building subject to the penalty and continuing penalties in the statute 25 & 26 Vict. c. 102, sect. 85, provided that a similar notice had been served on the builders, Messrs. Lawrence and Sons, on the 7th Oct. 1892, which had been brought immediately to the notice of the respondent.

It was contended on behalf of the respondent that he was not liable to any penalty for the continuing offence, and that he was not liable to the penalty for the original offence because proceedings had not been taken against him within six months of the commission or discovery of such offence, and in support of this contention sect. 107 of 25 & 26 Vict. c. 102, and sect. 11 of 11 & 12 Vict. c. 43, were referred to.

It was contended on behalf of the appellant that the limitation of time within which proceedings could be taken did not apply in the case of a continuing offence, that the respondent had in fact committed the original offence, and that he was liable to the continuing penalties for continuing the offence after the penal notice served on him on the 23rd Dec. 1893.

The magistrate held that sect. 107 of 25 & 26 Vict. c. 102, and sect. 11 of 11 & 12 Vict. c. 43, applied, and that the summons was out of time.

The question for the opinion of the court was, whether the determination of the magistrate was right in point of law.

Sect. 85 of the Metropolis Local Management Amendment Act 1862 (25 & 26 Vict. c. 102), provides that:

> No building except a church or chapel shall be erected on the side of any new street of a less width than fifty feet, which shall exceed in height the distance from the external wall or front of such building to the opposite side of such street, without the consent in writing of the Metropolitan Board of Works (now by 51 & 52 Vict. c. 41, the London County Council); nor shall the height of any building so erected be at any time subsequently increased so as to exceed such distance without such consent; and in determining the height of such building the measurement shall be taken from the level of the centre of the street immediately opposite the building up to the parapet or eaves of such building; and every person committing any offence under this enactment shall be liable to a penalty of 5*l*., and in case of a continuing offence to a further penalty of 40*s*. for every day during which such offence shall continue after notice from the said board (now county council), to be recovered by summary proceeding.

Sect. 107 provides that:

> No person shall be liable for the payment of any penalty or forfeiture under the recited Acts, or this Act, or any bye-law made by virtue thereof, for any offence made cognisable before a justice unless the complaint respecting such offence has been made before such justice within six months next after the commission or discovery of such offence.

Sect. 11 of the Summary Jurisdiction Act 1848 (11 & 12 Vict. c. 43), provides that:

> In all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose.

Poland, Q.C. and *Avory* for the appellants.—The appellants were entitled to serve upon the respondent a notice in conformity with the statute that he would be liable for continuing penalties unless the building in question is erected in conformity with the statute, and not having complied with this provision of the statute, is liable for these penalties, although a conviction was obtained against the builders of the building, and not against the respondent the owner. Complaint had been made before a magistrate within six months after the commission of the offence, in compliance with sect. 107 of the statute; the continuing offence by the owner runs from the time the respondent had notice from the appellants. They cited *London County Council* v. *Lawrence* (69 L. T. Rep. 344; (1893) 2 Q. B. 228), which was the appellants' case against the builders of the structure in question, also:

> *Wallen* v. *Lister*, 70 L. T. Rep. 348; (1894) 1 Q. B. 312;
> *Rumball* (app.) v. *Schmidt* (resp.), 46 L. T. Rep. 661; 8 Q. B. Div. 603;
> *Metropolitan Board of Works* v. *Anthony*, 54 L. J. 39, M. C.;
> *Reg.* v. *Catholic Life and Fire Assurance and Annuity Institution Limited*, 48 L. T. Rep. 675;
> *Higgins* (app.) v. *Guardians of the Poor of the Northwich Union* (resps.), 22 L. T. Rep. 752.

Dickens, Q.C. and *C. F. Lloyd*.—The respondent is not liable for a continuing offence; he has not been convicted of the original offence, and therefore it cannot be said that proceedings have been taken against him within six months of the commission or discovery of the offence according to sect. 107 of the statute. If the statute does not create the limitation, the appellants might come down year after year upon a *bonâ fide* purchaser, and serve him with notice of a continuing offence. Proceedings should have been instituted within six months of the commission or discovery of the offence, and when once the appellants have proceeded against and obtained a conviction against the owner of the building for his original offence, the owner becomes liable to pay continuing penalties if he does not comply with the terms of the statute. The respondent never has been convicted of the original offence, and therefore cannot be pro-

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ceeded against for penalties for a continuing offence. That these proceedings should have been instituted against the respondent within six months of the commission of the offence seems to be more clearly shown by sect. 11 of 11 & 12 Vict. c. 43 (Jervis' Act), which is a similar section to sect. 107 of the present Act, and which provides that where no time is mentioned for making a complaint such complaint shall be made, and the section goes on to say, "and the information shall be laid within six months from the time when the matter arose; here there was no information laid against the respondent within that time.

Poland, Q.C. in reply.

MATHEW, J.—I have very little doubt that the respondent is liable to pay continuing penalties. The offence with which he is charged is for continuing to keep erected a building which has been erected contrary to sect. 85 of the Metropolis Management Act 1862 (25 & 26 Vict. c. 102). That section after stating what shall be the limit to the height of certain buildings, unless the consent of the appellants be obtained, goes on to say that "every person committing any offence under this enactment shall be liable to a penalty of 5*l*., and in case of a continuing offence, be liable to a further penalty of 40*s*. for every day during which such offence shall continue after notice" from the appellants. There are, therefore, two offences contemplated by what I have just read, a committing the offence, and continuing to commit the offence, and sect. 107 of the Act then says that no person shall be liable for penalties under the Act, or for any offence cognisable before a justice, "unless the complaint respecting such offence has been made before a justice within six months next after the commission or discovery of such offence." This only means that the local authority shall not proceed for a penalty for an offence which shall not have been committed within six months of the date of the summons. This is the only limitation put upon the local authorities. If some limitation was not put, all that the builder, or the owner, or whoever might be proceeded against, would have to do (according to what has been contended on behalf of the respondent) would be to sell the building to some oneelse, and to get out of the Act altogether. The Act itself does not prevent this being done, but the Legislature contemplated the appellants doing their duty promptly. In this case the complaint has been made within six months after the commission or discovery of the offence, and the respondent is now continuing to commit that offence by keeping up the structure in question. I am therefore of opinion that the magistrate was wrong in dismissing this summons, and the case therefore must be remitted to him to be dealt with.

KENNEDY, J. concurred.

Case remitted to the magistrate.

Solicitor for the appellants, *Blaxland*.

Solicitors for the respondent, *Poole* and *Robinson*.

House of Lords.

April 13, 16, 17, *and July* 31,

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, ASHBOURNE, MACNAGHTEN, and MORRIS.)

NORDENFELT v. MAXIM-NORDENFELT COMPANY LIMITED. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Covenant in restraint of trade—General restraint—How far reasonable—Public policy.

The common law rule which distinguished particular from general restraints of trade in covenants, and treated the former as exceptions from the general rule that such covenants were invalid, is no longer applicable to the altered conditions of commerce. The question is whether the restriction is reasonable in reference to the interests of the parties concerned, and to the interests of the public, in the circumstances of each case.

A covenant, unlimited in space, not to carry on for the space of twenty-five years "the trade or business of a manufacturer of guns, gun-mountings or carriages, gunpowder, explosives, or ammunition," held valid in the case of a manufacturer of artillery, whose customers consisted almost exclusively of national Governments, as not being unreasonable as between himself and his vendees, or contrary to public policy.

Judgment of the Court of Appeal affirmed.

THIS was an appeal from a judgment of the Court of Appeal (Lindley, Bowen, and Smith, L.JJ.), reported in 68 L. T. Rep. 833, and (1893) 1 Ch. 630, who had reversed a judgment of Romer, J. reported in 67 L. T. Rep. 469.

The action was brought by the respondent company against the appellant claiming an injunction, specific performance of a covenant, and damages.

The facts appear fully in the reports in the courts below, and in the judgments of their Lordships.

The sole question on the appeal was, whether a covenant entered into by the appellant was void as being in restraint of trade and against public policy.

The appellant appealed *in formâ pauperis*.

The appellant appeared in person and contended that the covenant was oppressive and went beyond what was reasonably necessary for the protection of the other side: see per Cotton, L.J. in *Davies* v. *Davies* (58 L. T. Rep. 209; 36 Ch. Div. 359); per Lord Campbell, C.J. in *Tallis* v. *Tallis* (1 E. & B. 391); per Lord Langdale, M.R. in *Whittaker* v. *Howe* (3 Beav. 383). The decision of the Court of Appeal has greatly extended the old rule of law. A limit of time has never been held to make good a covenant which was void as being unlimited in space. In this case there is no limit. It extends over the whole world: see per Fry, J. in *Rousillon* v. *Rousillon* (42 L. T. Rep. 679; 14 Ch. Div. 351). A covenant not to carry on a trade anywhere in the world is bad as being against public policy. None of the recognised exceptions apply to this case. The rule is that a general restraint is always void, a partial restraint only

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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if it is unreasonable, which depends upon the circumstances of the case. This distinction has been recognised for 250 years, as is pointed out by Bowen, L.J. in the court below. A restraint which is unlimited as to area is bad even if limited as to time. *Mills* v. *Dunham* (64 L. T. Rep. 712; (1891) 1 Ch. 576) was misunderstood by Smith, L.J. The Court of Appeal laid down the law correctly, but did not apply it correctly to the facts of this case. The restraint here comes under none of the recognised exceptions to the general rule, but is a "general restraint," and as such is void. If it is not to be considered as "general" but as "partial," it is unreasonable, first, as being injurious to the State. [Lord WATSON.—How is it injurious to the British State that you should be prevented from making guns for foreign countries our possible enemies?] I am prevented from employing my large experience in suggesting any improvements here in England. Secondly, it goes beyond what is necessary for the protection of the company, as they are protected by their patents till they expire. Thirdly, it is oppressive as preventing me from earning my living at my own trade. I did not sell under this covenant. I had sold before this to the original company. [The LORD CHANCELLOR.—Can it ever be against the public policy of this country to restrain a man from carrying on business abroad? It might tend to bring the business here.]

Sir *R. Webster*, Q.C. and *W. F. Hamilton*, for the respondents, supported the judgments of the Court of Appeal.—The onus is on the appellant to show that, under the circumstances, the restraint is excessive for the protection of the company. An unlimited restraint is not necessarily bad: see *Rousillon* v. *Rousillon* (*ubi sup.*). The adequacy of the consideration does not enter into the case:

Gravely v. *Barnard*, 30 L. T. Rep. 863; L. Rep. 18 Eq. 518.

The policy of the law must vary from time to time with changing circumstances. See the observations in

Evanturel v. *Evanturel*, 31 L. T. Rep. 105; L. Rep. 6 P. C. 1.

The appellant was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

July 31.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell).— My Lords: The question raised by this appeal is, whether a covenant entered into between the parties can be enforced against the appellant, or whether it is void as being in restraint of trade. The covenant in question was contained in an agreement of the 12th Sept. 1888, and was in these terms: "(2) The said Thorsten Nordenfelt shall not during the term of twenty-five years from the date of the incorporation of the company, if the company shall so long continue to carry on business, engage, except on behalf of the company, either directly or indirectly in the trade or business of a manufacturer of guns, gun mountings, or carriages, gunpowder, explosives, or ammunition, or in any business competing or liable to compete in any way with that for the time being carried on by the company, provided that such restriction shall not apply to explosives other than gunpowder, or to subaqueous or submarine boats, or torpedoes, or castings or forgings of steel or iron, or alloys of iron or of copper. Provided also that the said Thorsten Nordenfelt shall not be released from this restriction by the company ceasing to carry on business merely for the purpose of reconstitution or with a view to the transfer of the business thereof to another company, so long as such other company taking a transfer thereof shall continue to carry on the same." The agreement also provided that the appellant should, for seven years from the incorporation of the respondent company, retain the share qualification of a director, and should act as managing director of the company, at a remuneration of 2000*l.* a year, together with a commission upon the net profit of the company. Before directing attention to the particular terms of the covenant, and to the considerations to which it gives rise, it is necessary to advert to the position of the parties at the time that the agreement was entered into. The appellant had, prior to March 1886, obtained patents for improvements in quick-firing guns, and carried on, amongst other things, the business of the manufacture of such guns and of ammunition. In that month he procured the registration of a limited liability company, which was to take over his business, with the business assets and liabilities. On the 5th March 1886 an agreement was made between the appellant and the Nordenfelt Gun and Ammunition Company, by which the company was to purchase the goodwill of the appellant's business, and all the stock, plant, and patents connected therewith; he covenanting to act as managing director for a period of five years, and so long as the Nordenfelt Company should continue to carry on business "not to engage, except on behalf of such company, either directly or indirectly in the trade or business of a manufacturer of guns or ammunition, or in any business competing or liable to compete in any way with that carried on by such company." The agreement for purchase was duly carried into effect, and the price was paid to the appellant, namely, 237,000*l.* in cash, and 50,000*l.* in paid-up shares of the company. In July 1888 negotiations were entered into for the amalgamation of the Nordenfelt Company and the Maxim Gun Company, and for the transfer of their businesses and assets to a new company, to be called the Maxim-Nordenfelt Guns and Ammunition Company. By an agreement for the amalgamation of the two companies, dated the 3rd July 1888, and made between the Maxim Company, the Nordenfelt Company, and P. Thane, on behalf of the new company, the Nordenfelt Company agreed that they would procure the appellant to enter into the agreement which was afterwards embodied in the instrument of the 12th Sept. 1888. The respondents were incorporated on the 17th July 1888, and on the 8th Aug. the agreement of the 3rd July was adopted by the company. It is to be noted that at the time when this agreement was entered into, to which the Nordenfelt Company was a party, the appellant was managing director of that company, and that, in the memorandum of association of the amalgamated company which was signed by the appellant, the objects of the company were stated to be, *inter alia*, not only the adoption of the agreement of the 3rd July,

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but also "to acquire, undertake, and carry on as successors to the Maxim Gun Company and the Nordenfelt Guns and Ammunition Company, the goodwill of the trade and businesses heretofore carried on by such companies and each of them, and the property and rights belonging to or held in connection therewith respectively." This is of importance because the appellant in a forcible argument pointed out that the judgment of the Court of Appeal was largely founded on the fact that the covenant in question was entered into in connection with the sale of the goodwill of the appellant's business, and was designed for the protection of the goodwill so sold, and he contended that this was an error, inasmuch as there was no sale by him of the goodwill on that occasion, he having already parted with it to the Nordenfelt Company, the later sale being by that company and not by him. I think it is impossible to accede to this contention. Upon the sale by the appellant to the Nordenfelt Company, the goodwill was conveyed to them, and was protected by a covenant in some respects larger than the one he entered into in Sept. 1888, but it was limited to the time during which that company should carry on business; it therefore necessarily ceased when the Nordenfelt Company and the Maxim Company were absorbed by the new company. But in the agreement for the amalgamation (to the making of which, as I have said, the appellant was a party) the covenant which the Nordenfelt Company undertook to obtain from the appellant was to be in addition to the transfer by the Nordenfelt Company of the full benefit of any obligations which Mr. Nordenfelt was then under to that company, and by the terms of the memorandum of association of the new company, the object was, as I have shown, stated to the world to be the acquisition of the goodwill of the Nordenfelt Company. In view of these facts, I think that the case must be treated on precisely the same footing as if the obligations of the covenant under consideration had been undertaken in connection with the direct transfer to the respondents of the goodwill of the appellant's business and with the object of protecting it. The appellant mainly relied upon the fact that the covenant was general, that is to say, unlimited in respect of area, and argued that it was therefore void. I think it was long regarded as established, as part of the common law of England, that such a general covenant could not be supported. In early times all agreements in restraint of trade, whether general or restricted to a particular area, would probably have been held bad; but a distinction came to be taken between covenants in general restraint of trade, and those where the restraint was only partial. The distinction was recognised and given effect to by Lord Macclesfield (then Parker, C.J.) in his celebrated judgment in *Mitchel* v. *Reynolds* (1 P. Wms. 181; 1 Smith's L. C.). That was a particular restraint, and the covenant was held good, the Chief Justice saying "that wherever a sufficient consideration appears to make it a proper and a useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained. But with this constant diversity, namely, where the restraint is general not to exercise a trade throughout the kingdom, and where it is limited to a particular place; for the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shown by-and-by." And at a later part of the judgment, after dividing voluntary restraints by agreement into those which are, first, general, or secondly, particular as to places, or persons, he formulates with regard to the former, the following proposition: "General restraints are all void, whether by bond, covenant, or promise, &c., with or without consideration, and whether it be of the party's own trade or not." In the case of *Master, &c., of Gunmakers* v. *Fell* (Willes, 388), Willes, C.J. said the general rule was "that all restraints of trade which the law so much favours, if nothing more appear, are bad . . . but to this general rule there are some exceptions, as, first, if the restraint be only particular in respect to the time or place, and there be a good consideration given to the party restrained." As I read the authorities, until the cases to which I shall call attention presently, the distinction between general and particular restraints was always maintained, and the latter alone were regarded as exceptions from the general rule, that agreements in restraint of trade were bad. In the case of *Horner* v. *Graves* (7 Bing. 735), Tindal, C.J. said: "The law upon this subject (*i.e.* restraint of trade) has been laid down with so much authority and precision by Parker, C.J. in giving the judgment of the Court of King's Bench in the case of *Mitchel* v. *Reynolds*, which has been the leading case on the subject from that time to the present, that little more remains than to apply the principle of that case to the present. Now the rule laid down by the court in that case is, 'that voluntary restraints, by agreements between the parties, if they amount to a general restraint of trading by either party, are void, whether with or without consideration, but particular restraints of trading, if made upon a good and adequate consideration, so as it be a proper and useful contract,' that is, so as it is a reasonable restraint only, 'are good.'" After stating that the case then before the court did not "fall within the first class of contracts as it certainly did not amount to a general restraint," he proceeded to consider whether the particular covenant was a good one. It is true that in a later part of his judgment the following passage occurs: "In the case above referred to, Parker, C.J. says, 'a restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good;' which are rather instances and examples than limits of the application of the rule, which can only be at last, what is a reasonable restraint with reference to the particular case." But I cannot, in view of the passage which I have quoted from the earlier part of his judgment, understand this as an indication of opinion on the part of Tindal, C.J. that there was no distinction in point of law between general and particular restraints; that in the case of both alike the only question is whether in the particular case the restraint is reasonable. If so, it could hardly be said that the law had been laid down with precision by Parker, C.J. nor could such contracts be accurately divided into two classes, if every particular case, whether it fell within the one class or the other, was, in point of law, to be dealt with in precisely the same manner. I am confirmed in this view of Tindal, C.J.'s opinion by his judgment in the subsequent case of *Hinde* v. *Gray* (1 Man. & Gr. 195). In that case the defendant had entered

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into a covenant with the plaintiffs, to whom he had demised a brewery in Sheffield, that he would not, during the continuance of the demise, carry on the trade of brewer or agent for the sale of beer in Sheffield or elsewhere; but would, so far as the same should not interfere with his private avocations, give all the advice and information in his power to the plaintiffs with regard to the management and carrying on of the brewery. The breach alleged was that the defendant had solicited and obtained orders for ale not purchased of the plaintiffs nor brewed by them, and that large quantities of ale had thereunder been delivered and sold. There was a demurrer to this breach; judgment was given for the defendant, Tindal, C.J. saying that it was "assigned on a covenant which according to a case of *Ward* v. *Byrne* (5 M. & W. 548) was void in law." This is, to my mind, only intelligible if *Ward* v. *Byrne*, which was the case of a bond conditioned not to follow or be employed in the business of a coal merchant for nine months, was regarded as establishing, as a matter of law, that a covenant in general restraint, though limited in point of time, was void; unless it were so, I do not see how it could be regarded as determining that the covenant in question in *Hinde* v. *Gray* was void; or, indeed, as an authority in the case of any covenant not practically identical in all respects. It is clear that there are material distinctions between the circumstances of the two cases; and, if the only question was whether the covenant was reasonable in view of the particular circumstances, considerations might well be urged (as indeed they were by the learned counsel for the plaintiffs) why the case then before the court should not be regarded as governed by *Ward* v. *Byrne*; but Tindal, C.J. did not proceed to inquire whether, under the particular circumstances appearing on the record in *Hinde* v. *Gray*, the covenant was a reasonable one, or was wider than was requisite for the protection of the plaintiffs, but treated the case as concluded, as matter of law, by authority. I need not further refer to *Ward* v. *Byrne*, except to say that, although the learned judges in that case did express an opinion that the covenant exceeded what was necessary for the protection of the covenantee, they seem to me to recognise that covenants for a partial restraint, and these only, are exceptions from a general rule invalidating agreements in restraint of trade. In that case, the attempt was made unsuccessfully to maintain, that a covenant otherwise general might be regarded as a particular restraint if limited in point of time—a contention for which some colour was afforded by the language used in earlier cases. The views which I have expressed appear to me to have been entertained by that very learned lawyer Mr. John William Smith, as shown by his notes to *Mitchel* v. *Reynolds* (1 Smith's L. C.). He lays down the law thus: "In order, therefore, that a contract in restraint of trade may be valid at law the restraint must be, first, partial, secondly, upon an adequate or, as the rule now seems to be, not on a mere colourable consideration; and there is a third requisite, that it should be reasonable." This exposition of the law has further the very weighty sanction of Willes, J. and Keating, J., who, after the death of Mr. J. W. Smith, edited the notes to his collection of leading cases. In the year after the decision of *Hinde* v. *Gray* the case of *Whittaker* v. *Howe* (3 Beav. 383) came before Lord Langdale, M.R. Howe had covenanted not to practice as a solicitor in any part of Great Britain for twenty years, having sold his business to the plaintiff. In spite of this he commenced again practising in London where he had previously carried on business. On an application for an interlocutory injunction it was contended that the covenant was void. The Master of the Rolls refused to accede to this contention and granted the injunction. It was of course clear that a covenant not to practise in London, as he was in fact doing, would have been good, and it was natural that his conduct should not find favour in the eyes of the court. But the question was whether so extensive a covenant as that entered into could be supported. The case of *Mitchel* v. *Reynolds* was cited in argument; but neither *Ward* v. *Byrne* nor *Hinde* v. *Gray* appear to have been brought to the notice of the court. Lord Langdale expressed himself thus, (*Whittaker* v. *Howe*. 3 Beav. 394): "Agreeing with the Court of Common Pleas, that in such cases 'no certain precise boundary can be laid down within which the restraint would be reasonable, and beyond which excessive; having regard to the nature of the profession, to the limitation of time, and to the decision that a distance of 150 miles does not describe an unreasonable boundary, I must say, as Lord Kenyon said in *Davis* v. *Mason* (5 Term Rep. 118), 'I do not see that the limits are necessarily unreasonable, nor do I know how to draw the line.'" The learned judge distinctly indicated that he had not arrived at an irrevocable conclusion for he added: "In the progress of the case it may become necessary to consider further the points which have been raised, but at present I am of opinion that the right claimed by Mr. Howe to act in violation of the contract for which he has received consideration, is to say the least so doubtful, that he cannot be permitted to take the law into his own hands." It is not necessary to consider whether the decision can be supported, though it was regarded by Willes, J. and Keating, J. as questionable, and it is certainly difficult to see why, if a covenant not to practise as an attorney in Great Britain is good, a covenant such as was in controversy in *Hinde* v. *Gray* should have been pronounced bad in point of law on demurrer. But I cannot accept it as a weighty authority on the question whether it was regarded as a rule of the common law that a general covenant in restraint of trade was void, in view of the authorities to which I have already referred. There have been differing expressions of opinion on the subject by distinguished equity judges in more recent times. I will only mention two of these in which the existence of the rule I have been considering has been questioned. In the case of *The Leather Cloth Company* v. *Lorsont* (21 L. T. Rep. 661; L. Rep. 9 Eq. 345) James, V.C. said: "I do not read the cases as having laid down that unrebuttable presumption which was insisted upon with so much power by Mr. Cohen. All the cases when they come to be examined, seem to establish this principle, that all restraints upon trade are bad as being in violation of public policy, unless they are natural and not unreasonable for the protection of the parties in dealing legally with some subject-matter of

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contract." And again, in *Rousillon* v. *Rousillon* (42 L. T. Rep. 679; 14 Ch. Div. 351), Fry, J. thus expressed himself: "I have therefore, upon the authorities, to choose between two sets of cases, those which recognise and those which refuse to recognise this supposed rule; and, for the reasons which I have mentioned, I have no hesitation in saying that I adhere to those authorities which refuse to recognise this rule, and I consider that the cases in which an unlimited prohibition has been spoken of as void, relate only to circumstances in which such a prohibition has been unreasonable. I do not intend to throw doubt on what was decided in these cases, for reasons which will appear hereafter, but I respectfully differ from the view which appears to be indicated that there was not at any time a rule of the common law distinguishing particular from general restraints, and treating the former only as exceptions from the general principle that contracts in restraint of trade are invalid. The discussion on which I have been engaged is, it must be admitted, somewhat academic. For, in considering the application of the rule, and the limitations, if any, to be placed on it, I think that regard must be had to the changed condition of commerce and of the means of communication which have been developed in recent years. To disregard these would be to miss the substance of the rule in a blind adherence to its letter. Newcastle-upon-Tyne is for all practical purposes as near to London to-day as towns which are now regarded as suburbs of the metropolis were a century ago. An order can be sent to Newcastle more quickly than it could then have been transmitted from one end of London to the other, and goods can be conveyed between the cities in a few hours and at a comparatively small cost. Competition has assumed altogether different proportions in these altered circumstances, and that which would have been once merely a burden on the covenantor may now be essential if there is to be reasonable protection to the covenantee. When Lord Macclesfield emphasised the distinction between a general restraint not to exercise a trade throughout the kingdom and one which was limited to a particular place, the reason which he gave for the distinction was that "the former of these must be void, being of no benefit to either party, and only oppressive, as shall be shown by-and by." He returns to the subject later on, when giving the reasons why all voluntary restraints are regarded with disfavour by the law, in these terms: "Thirdly, because, in a great many instances, they can be of no use to the obligee; which holds in all cases of general restraint throughout England; for what does it signify to a tradesman in London what another does at Newcastle? And surely it would be unreasonable to fix a certain loss on one side, without any benefit to the other. The Roman law would not enforce such contracts by an action: (see Puffendorf, lib. 5, c. 2, s. 3; 21 H. 7, 20.)" There are other passages in the judgment where this view is enforced. There is no doubt that, with regard to some professions and commercial occupations, it is as true to-day as it was formerly, that it is hardly conceivable that it should be necessary, in order to secure reasonable protection to a covenantee, that the covenantor should preclude himself from carrying on such profession or occupation anywhere in England. But it cannot be doubted that in other cases the altered circumstances to which I have alluded have rendered it essential, if the requisite protection is to be obtained, that the same territorial limitations should not be insisted upon which would in former days have been only reasonable. I think, then, that the same reasons which led to the adoption of the rule require that it should be frankly recognised that it cannot be rigidly adhered to in all cases. It appears to me that a study of Lord Macclesfield's judgment will show that, if the conditions which prevail at the present day had existed in his time, he would not have laid down a hard and fast distinction between general and particular restraints, for the reasons by which he justified that distinction would have been unfounded in point of fact. Whether the cases in which a general covenant can now be supported are to be regarded as exceptions from the rule which I think was long recognised as established, or whether the rule is itself to be treated as inapplicable to the altered conditions which now prevail, is probably a matter of words rather than of substance. The latter is perhaps the sounder view. When once it is admitted that, whether the covenant be general or particular, the question of its validity is alike determined by the consideration whether it exceeds what is necessary for the protection of the covenantee, the distinction between general and particular restraints ceases to be a distinction in point of law. I think that a covenant entered into in connection with the sale of the goodwill of a business must be valid where the full benefit of the purchase cannot be otherwise secured to the purchaser. It has been recognised in more than one case that it is to the advantage of the public that there should be free scope for the sale of the goodwill of a business or calling. These were cases of partial restraint. But it seems to me that, if there be occupations where a sale of the goodwill would be greatly impeded, if not prevented, unless a general covenant could be obtained by the purchaser, there are no grounds of public policy which countervail the disadvantage which would arise if the goodwill were in such cases rendered unsaleable. I would adopt in these cases the test which in a case of partial restraint was applied by the Court of Common Pleas in *Horner* v. *Greaves* (7 Bing. 735) in considering whether the agreement was reasonable. Tindal, C.J. said: "He could not see how a better test could be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favour of whom it is given, and not so large as to interfere with the interests of the public; whatever restraint is larger than the necessary protection of the party can be of no benefit to either; it can only be oppressive, and, if oppressive, it is, in the eye of the law, unreasonable." The tendency in later cases has certainly been to allow a restriction in point of space which formerly would have been thought unreasonable, manifestly because of the improved means of communication. A radius of 150 or even 200 miles has not been held too much in some cases. For the same reason I think a restriction applying to the entire kingdom may in other cases be requisite and justifiable. I must, however, guard myself against being

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supposed to lay down that if this can be shown the covenant will in all cases be held to be valid. It may be, as pointed out by Lord Bowen, that in particular circumstances the covenant might nevertheless be held void on the ground that it was injurious to the public interest. I turn now to the application of the law to the facts of the present case. It seems to be impossible to doubt that it is shown that the covenant is not wider than is necessary for the protection of the respondents. The facts speak for themselves. If the covenant embraced anything less than the whole of the United Kingdom it is obvious that it would be nugatory. The only customers of the respondents must be found amongst the Governments of this and other countries, and it would not practically be material to them whether the business were carried on in one part of the United Kingdom or another. So far I have dealt only with the covenant in relation to the United Kingdom. The appellant appeared willing to concede that it might be good if limited to the United Kingdom; but he contended that it ought not to be world-wide in its operation. I think that, in laying down the rule that a covenant in restraint of trade unlimited in regard to space was bad, the courts had reference only to this country. They would, in my opinion, in the days when the rule was adopted, have scouted the notion that, if for the protection of the vendees of a business in this country it were necessary to obtain a restrictive covenant embracing foreign countries, that covenant would be bad. They certainly would not have regarded it as against public policy to prevent the person whose business had been purchased and was being carried on here from setting up or assisting rival businesses in other countries; and for my own part I see nothing injurious to the public interests of this country in upholding such a covenant. When the nature of the business and the limited number of customers is considered, I do not think the covenant can be held to exceed what is necessary for the protection of the covenantees. I move your Lordships, therefore, that the judgment appealed from be affirmed, and the appeal dismissed.

Lord WATSON.—My Lords: The order appealed from directs that, for five-and-twenty years from and after the 17th June 1888, the appellant shall, if and so long as the respondent company or any company taking a transfer of its business shall continue to carry on business during that period, be restrained from engaging, "either directly or indirectly in the trade or business of a manufacturer of guns, gun mountings or carriages, gunpowder explosives, or ammunition (except explosives other than gunpowder) or subaqueous boats or torpedoes, or castings or forgings of steel or iron, or alloys of iron or of copper." The prohibition is not confined to English, or even to British soil; it extends to every part of the surface of the globe available for the purpose of carrying on the process of manufacture. The order does nothing more than enforce, according to its terms, an undertaking given to the respondent company by the appellant, upon the occasion of their taking over in the year 1888, from the Nordenfelt Company, the extensive business which had been established by the appellant, and had been transferred by him to the latter company in March 1886. At the bar of the House, the appellant, for the first time, pleaded that the undertaking given by him to the respondent company was without adequate consideration, and could not warrant the injunction of which he complains. I have all along been satisfied, for the reasons explained by the Lord Chancellor, which I shall not repeat, that the plea is groundless, and that, for the purposes of this appeal, the appellant stands in the same position as if his undertaking had been given to the Nordenfelt Company, in consideration of the full price which was paid to him by that company for the stock and goodwill of his business. The main question discussed in the courts below, and the only question which, in my opinion, it is necessary for your Lordships to decide, is raised by the appellant's contention that the personal restraint to which he has agreed to submit, being unlimited in space, is contrary to the recognised policy of English law, and is therefore incapable of being enforced by an English court. The decisions at common law and in equity, which bear more or less directly upon the question thus arising, are very numerous. They have been reviewed by the learned judges of the Appeal Court, who all arrived at the same conclusion by independent lines of reasoning, which are occasionally divergent. Some of the more important of those cases have been noticed by the Lord Chancellor, and will be criticised by my noble and learned friend, Lord Macnaghten. I have, as in duty bound, read and considered all the cases cited, but I do not propose to refer to them in detail. I shall simply endeavour to indicate the considerations which have led me to concur with your Lordships in affirming the order of the Court of Appeal. With regard to the facts of this case, I have only to observe that they are, from a legal point of view, exceptional. Their parallel is not to be found in any of the reported cases; but they are such as may naturally be expected to occur, in the altered and daily altering conditions under which trade is conducted in modern times. The manufacturing department of the business, which the appellant sold in 1886 was, and still is, carried on at extensive works in England and in Sweden. The business might be said to be local in that sense, but in that sense only. The area which it supplies was and is practically unlimited. The customers who buy the products, which the appellant agreed he should not manufacture, are necessarily a limited class, but they are to be found all over the world. They include, or strictly speaking, consist of governments and potentates, great and small, civilised and savage, who, for purposes offensive or defensive desire to possess, and have the means of paying for, Nordenfelt guns with suitable ammunition. It does not seem to admit of doubt that the general policy of the law is opposed to all restraints upon liberty of individual action, which are injurious to the interests of the State or community. Nor is it doubtful that courts will rightly refuse to enforce any compact by which an individual binds himself not to use his time and talents in prosecuting a particular profession or trade, when its enforcement would obviously or probably be attended with these injurious consequences. But it must not be forgotten that the community has a material interest in maintaining the rules of fair dealing between man and man. It suffers far greater injury from the infraction of these rules than from contracts in

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restraint of trade. I think it is now generally conceded, that it is to the advantage of the public to allow a trader, who has established a lucrative business, to dispose of it to a successor by whom it may be efficiently carried on. That object could not be accomplished if, upon the score of public policy, the law reserved to the seller an absolute and undefeasible right to start a rival concern the day after he sold. Accordingly it has been determined judicially, that in cases where the purchaser, for his own protection, obtains an obligation restraining the seller from competing with him, within bounds which having regard to the nature of the business are reasonable, and are limited in respect of space, the obligation is not obnoxious to public policy, and is therefore capable of being enforced. Whether, when the circumstances of the case are such that a restraint unlimited in space becomes reasonably necessary in order to protect the purchaser against any attempt by the seller to resume the business which he sold, a covenant imposing that restraint must be invalidated by the principle of public policy, is the substance of the question which your Lordships have to consider in this appeal. The earlier decisions which were chiefly, if not exclusively, by the courts of common law, contain abundant dicta, which, if literally followed, would sustain the plea upon which the appellant relies. These dicta broadly state the rule to be that a general restraint of trade, or in other words a restraint unlimited as to space, is void, because it is contrary to the commercial policy of England. The same proposition is frequently to be found in the later common law cases. To me it seems very natural that the law should have been laid down in these broad terms. The rule of policy, as originally understood and administered, struck at all restraints, whether partial or general. It was relaxed, by these decisions, in the case of partial restrictions which were held to be reasonable. I feel that, had I occupied the seat of the learned judges who pronounced them, I should probably have used the same language which they employed with reference to unlimited restraints. They never imagined that any business should attain such wide dimensions, that it could not be reasonably protected from the invasion of the seller, except by subjecting him to a restraint unlimited in space. I am under the impression that, had they conceived the possibility of such a case occurring, the rule might have been expressed in somewhat different terms. I think that, as stated, it was meant to involve the assumption that there could be no such case. A series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal. The course of policy pursued by any country, in relation to and for promoting the interest of its commerce, must, as time advances, and as its commerce thrives, undergo change and development from various causes which are altogether independent of the action of its courts. In England at least it is beyond the jurisdiction of her tribunals, to mould and stereotype national policy. Their function when a case like the present is brought before them is, in my opinion, not necessarily to accept what was held to have been the rule of policy a hundred or a hundred and fifty years ago, but to ascertain with as near an approach to accuracy as circumstances permit, what is the rule of policy for the then present time. When that rule has been ascertained, it becomes their duty to refuse to give effect to a private contract which violates the rule, and would, if judicially enforced, prove injurious to the community. No one of the noble and learned lords before whom this appeal was heard has had the least difficulty in holding that the injunction granted was reasonably necessary in order to protect the respondent company's business from the aggressive acts threatened and commenced by the appellant. Nor, so far as I understand, have noble and learned lords had any hesitation in coming to the conclusion with the learned judges of the Appeal Court, that there is no existing rule of public policy which can be effectively pleaded in bar of the injunction. For my own part I am very clearly of opinion that no violence is done to the canon laid down by the common law courts, in affirming that a restraint which is absolutely necessary in order to protect a transaction which the law permits in the interest of the public, ought to be regarded as reasonable, and cannot in deference to political ideas which are now obsolete, be regarded as in contravention of public policy. Were it necessary I should be prepared to affirm that, in the year 1888 there was not, and that there does not now exist, any imperial rule of policy which requires that a restraint, having that effect only, shall be treated as a nullity because it is unlimited in space in circumstances such as occur in the present case. I venture to doubt whether it be now, or ever has been, an essential part of the policy of England to encourage unfettered competition in the sale of arms of precision to tribes who may become her antagonists in warfare. I also doubt whether, at any period of time, an English court would have allowed a foreigner to break his contract with an English subject in order to foster such competition. When the series of cases from the earliest to the present time are carefully considered, I think they will be found to record the history of a protracted struggle between the principle of common honesty in private transactions on the one hand, and the stern rule which forbade all restraints of trade on the other. In my opinion it does not admit of dispute that the ancient rule has had the worst of the encounter, and has been gradually losing ground in all the courts. I do not think that between the courts of common law and equity there has been much, if any, real difference of opinion. But I am bound to say that the language used by equity judges is on the whole more in consonance with the commercial policy of the country than some of the favourite dicta of the common law courts. I purposely say some of those dicta, because I find in the opinions of many common law judges of the highest eminence, a clear and liberal recognition of the wider views of policy, which I suspect have influenced your Lordships in the decision of this appeal. The Lords Justices were agreed, and I understand that your Lordships are also agreed, as to the result of this case. A controversy has arisen as to the principle upon which that result ought to be reached. To my mind, it is not a matter of practical importance, whether the admission of a restraint, unlimited in space, be regarded as a novel exception from the general

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rule which forbids all restraints, or as an extension of the exception upon that rule which has admitted limited restraints. I have no desire to interfere with anybody's freedom of choice between these alternatives. I am content to state that, in my opinion, the judgment which your Lordships are about to pronounce goes no farther than to adopt to new circumstances an old and sound exception to the general rule.

Lord ASHBOURNE.—My Lords: I concur in the judgment moved by the Lord Chancellor. The sole question is whether the covenant referred to is void, or whether it is capable of being enforced against the appellant. I think it is quite clear that the covenant must be taken as entered into in connection with the sale of the goodwill of the appellant's business, and that it was entered into with the plain and *bonâ fide* object of protecting that business. The appellant has argued that he is not bound by the covenant, and that it is void, as being opposed to public policy, and, being general, unrestricted as to area. The cases that have been referred to are interesting and important as showing the history, growth, and development of an important branch of our law. In considering them it is necessary to bear in mind the vast advances that have since the reign of Queen Elizabeth taken place in science, inventions, political institutions, commerce, and the intercourse of nations. Telegraphs, postal systems, railways, steam, have brought all parts of the world into touch. Communication has become easy, rapid, and cheap. Commerce has grown with our growth, and trade is ever finding new outlets and methods that cannot be circumscribed by areas, or narrowed by the municipal laws of any country. It is not surprising to note that our laws have been also expanded, and that legal principles have been applied and developed so as to suit the exigencies of the age in which we live. The appellant practically seeks to ignore the altered conditions of to-day, and to rely upon a rigid application of what he conceives to be the meaning of some decisions given in other generations, and this without taking note of the facts of the cases, or of the conditions of the time when they occurred. His argument practically is, that his covenant is in general restraint of trade, and that, if it be so, regardless of whether it is reasonable, whether it only affords a fair protection to his covenantees, it must be held to be void. In the early times all agreements in restraint of trade were discountenanced; but by degrees, as the exigencies of an advancing civilisation demanded, this was found to be too rigid, and our judges considered in each case what was reasonable and necessary to afford fair protection. This is apparent in the important judgment of Lord Macclesfield in *Mitchel* v. *Reynolds*. That was the case of a partial restraint of trade, and the judgment referred to the great distinction between a covenant in general restraint of trade and such a covenant as he was then dealing with. According to the then state of English life it would be hard to conceive that a covenant in general restraint of trade could ever be reasonable, and no imagination could then conceive that it could ever be needed for the fair protection of anyone. It is easy to understand how a distinction for convenience came to be thus expressly noted between general and partial restraints of trade. Tindal, C.J., in *Horner* v. *Graves* (7 Bing. 735), points out in reference to this judgment of Lord Macclesfield: "The Lord Chief Justice says 'a restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good,' which are rather instances and examples than limits of the application of the rule, which can only be at last, what is a reasonable restraint with reference to a particular case." Reference to this judgment of Lord Macclesfield, and to this distinction between covenants in general and partial restraint of trade, is found naturally in numerous cases. It appeared to afford a convenient nomenclature, and to be probably suited for some cases, but I respectfully concur with Tindal, C.J., in the words already quoted, that the covenants were not "limits of the application of the rule, which can only be at last what is a reasonable restraint with reference to a particular case." I do not know that there is a single reported case whose facts are clearly known, where a covenant in general restraint of trade clearly reasonable in itself, and only affording a fair protection to the parties, has been held to be void. One can readily see that such covenants might be extravagant and unnecessary, quite unreasonable, and not at all required for fair protection, and then the fact that they were general and not partial would be a distinction entitled to great weight. Thus I can well understand the existence of the distinction being kept alive and noted in so many cases, though this would not at all imply or require that the reasonableness of a covenant and the fact that it only afforded fair protection should ever be put aside or ignored. In former days the arguments used showed how different were the circumstances of those times. Discussions are to be found as to ten-mile limits, and fifty miles, and as to the distances of one English town from another—then considerable topics; but now often trivial having regard to present means of locomotion. The cases show a great variety of circumstances—different professions and trades—cases of apprenticeship, and sales of goodwill. Each case has had to be considered on its own facts. It is really impossible to divide all cases into the two categories of covenants in general and partial restraint of trade requiring distinct treatment, and needing different policies. However it is accomplished, the law must work in harmony with the requirements of the times, and must advance and develop with the growth of our national life and institutions. Whether there ever was an effective and acknowledged rule, requiring all covenants in restraint of trade to be divided into two broad categories of general or partial restraint with the test of reasonableness openly and expressly applied to partial restraints, whilst it was ostensibly denied to general restraints though in reality applied under the guise of an exception whenever the exigencies of life and business required it; or whether assuming the rule to have been once known and recognised it can now be accepted as applicable to the conditions of our present life; or whether all restraints upon trade have been always really governed by the one test, what is a fair protection and what is reasonable are inquiries of interest on which legal minds may differ. I do not regard the distinction as of any practical importance, because as in the present case the inquiry as to the validity of all covenants in respect of trade must, I am disposed to think,

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now ultimately turn upon whether they are reasonable, and whether they exceed what is necessary for the fair protection of the covenantees. There may be differences of opinion as to the history of covenants in restraint of trade, as to distinctions from time to time taken in nomenclature; but I believe in the result there is no real difference of opinion, and that all your Lordships hold the covenant in the present case to be good and valid for reasons which do not very seriously differ. I do not pursue the controversy suggested by Bowen, L.J., as to the judgments of Lord Langdale, James, V.C., and Sir Edward Fry, in the three cases so often referred to, but, as will appear from what I have already said, I should find much difficulty in accepting all his criticisms, much as I respect his ability and research. Lindley, L.J. clearly in his judgment recognised the tendency of modern decisions, and said expressly the opinion "that the only test by which to determine the validity or invalidity of a covenant in restraint of trade given for valuable consideration was its reasonableness for the protection of the trade or business of the covenantee," was "the doctrine to which the modern authorities have been gradually approximating." Having regard to the facts of the present case, to the nature of the business, to the class and number of customers, I think the covenant reasonable, and not larger than the protection of the respondents required. I do not see anything to lead to the conclusion that the covenant is injurious to the public interest. I entirely agree with the Lord Chancellor in the propriety and prudence of not saying a word which would imply that such an important topic was ignored or lost sight of. I concur in the suggested judgment.

Lord MACNAGHTEN.—My Lords: The appellant, Thorsten Nordenfelt, a Swedish gentleman, a person of much intelligence, as his able address to your Lordships proved, and of great skill in certain branches of mechanical science, had established in England and Sweden a valuable business in connection with the manufacture of quick-firing guns. His customers were comparatively few in number, but his trade was world-wide in extent. He had upon his books almost every monarch and almost every State of any note in the habitable globe. In 1886 Mr. Nordenfelt sold his business to a limited company, which was formed for the purpose of purchasing it. At the same time, and as part of the same transaction, he entered into a restrictive covenant with the purchasers intended to protect the business in their hands. In 1888 the purchasers transferred their business to the respondents, a limited company established with the object of combining the Nordenfelt business with a similar business founded by a Mr. Maxim. The transfer was made with the concurrence of Mr. Nordenfelt. Without his concurrence and co-operation it is plain that it would not have been made at all. On the occasion of the transfer, and as part of the arrangement, Mr. Nordenfelt entered into a restrictive covenant with the respondents. This covenant was in some respects wider, in others less wide, than the covenant with the original purchasers. But it was in lieu of, and in substitution for, that covenant, which of course would have been kept alive if Mr. Nordenfelt had declined to come into the new arrangement. In these circumstances I think that the Court of Appeal were right in regarding the covenant which Mr. Nordenfelt entered into with the respondents as a covenant made upon the occasion of the sale of his business, and as depending for its validity upon the principles and considerations applicable to such a case. The stipulation was that Mr. Nordenfelt should not, during the term of twenty-five years from the date of the incorporation of the company, if the company should so long continue to carry on business, "engage except on behalf of the company either directly or indirectly in the trade or business of a manufacturer of guns, gun-mountings or carriages, gunpowder, explosives, or ammunition"—so far the covenant has been held good; then came the words—"or in any business competing or liable to compete in any way with that for the time being carried on by the company." A proviso was added to the effect that such restriction should not apply to explosives other than gunpowder, or to subaqueous or submarine boats or torpedoes, or casting or forgings of steel or iron, or alloys of iron or of copper. The latter part of the covenant, which extends to all competing businesses, may be disregarded. In view of the manifold objects of the company, as set out in their memorandum of association, it was held by the Court of Appeal to be void; and there is no appeal from that part of the decision. The proviso also, I think, may be put aside. It is one of the circumstances to be taken into consideration as bearing upon the question of the reasonableness of the agreement; but it is not, I think, essential to the validity of this covenant. Mr. Nordenfelt admittedly has broken the earlier part of the covenant. His contention is that the whole covenant is void in law as being a covenant in restraint of trade—unlimited in space. And the only point which your Lordships have to decide is whether that part of the covenant which the appellant has broken is valid. For it cannot be disputed that the covenant is severable, and that part may be good though part be void. The learned judges of the Court of Appeal have come to the conclusion that the earlier part of the covenant is valid. But though they all arrive at one and the same result, they approach the question from somewhat different points of view. Lindley, L.J. expressed his opinion that the doctrine "that the only test by which to determine the validity or invalidity of a covenant in restraint of trade given for valuable consideration was its reasonableness for the protection of the trade or business of the covenantee," was "the doctrine to which the modern authorities have been gradually approximating." But he could not, he said, "regard it as finally settled, nor indeed as quite correct." He thought it ignored "the law which forbids monopolies, and prevents a person from unrestrictedly binding himself not to earn his living in the best way he can." In the particular circumstances of the present case he considered that the earlier part of the covenant was not contrary to public policy. Apart from public policy, he thought it reasonable, not being wider than was "reasonably necessary for the protection of the interests of the covenantee." The late Lord Bowen considered that it was the established common law doctrine—a rule to be gathered from the books "with perfect ease," though certain equity judges had ignored the rule, or misunderstood the law—that in the case of contracts in general restraint

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of trade the courts had nothing to do with the reasonableness of the transaction. That was an inquiry which appertained only to partial restraints. Contracts in general restraint of trade he defined as "those by which a person restrains himself from all exercise of his trade in any part of England." "Scores of cases," he added, "have proceeded on this basis, and those who dispute the rule can only do so, as it seems to me, by disregarding the judgments and opinions of an uncounted number of unanimous common law judges." But then he thought that the rule, being a rule based on reason and policy, might admit of exceptions; and treating the present case as an exception, he, too, thought the agreement limited to the first part of the covenant reasonable in itself, and not contrary to public policy. Smith, L.J. came to the same conclusion, thinking that there was no hard and fast rule "that every covenant in restraint of trade is *ipso facto* void if it is unlimited as to space," and being apparently of opinion that the restraint in the present case, though unlimited in space, might yet be regarded as partial owing to the circumstance that certain trades or branches of trade in which the appellant had been engaged were reserved to him by the proviso attached to the covenant. No doubt it is one thing to say that all exceptions to the general rule that the policy of the law is against restraints of trade are referable to one and the same principle, and that the only true test is, what is a reasonable restraint in the particular case. It is another thing to say that restraints of trade are divisible into two distinct categories—partial restraints, and general restraints—that reasonableness is a test applicable to partial restraints and inapplicable to general restraints, but that the rule admits of exceptions; and that when you have found an exceptional case, you may apply to it the very same test which is applicable to partial restraints. There is a distinction certainly; but whether there is a substantial difference, it is perhaps unnecessary to inquire. Assuming the rule to be that general restraints are void as being contrary to public policy and not on any other ground, an exception must surely arise, if exceptions are admissible at all, as soon as you find that the particular case under consideration is not contrary to public policy, and so not opposed to the principle on which the rule is founded. Thinking, as I do, that the distinction, if it exists, is of no practical importance, I should have been content with expressing my concurrence in the result at which the Court of Appeal has arrived if it had not been for certain passages in the very able and elaborate judgment of the late Lord Bowen, from which I respectfully dissent. Having laid down what he considered to be the common law rule, Lord Bowen proceeds to observe that "the first cloud upon the clear sky of the common law narrative comes in the equity decision of Lord Langdale, M.R., in *Whittaker* v. *Howe* (3 Beav. 383), in 1841," a decision to which he applies the word "inexplicable." "Everything," says Lord Bowen, "appears clear in the case except the judgment of the court. The covenant was not a covenant in partial, but in general restraint of trade; and the restraint of trade being a general one, the court had nothing to do with the reasonableness of the transaction; Lord Langdale, nevertheless, begins by stating that the question was whether the restraint intended to be imposed upon the defendant was reasonable; and he cites as a guide for himself the words of Tindal, C.J., in *Horner* v. *Graves* (7 Bing. 735)." Then, after pointing out that *Horner* v. *Graves* was a case of limited restraint, Lord Bowen adds, "Lord Langdale thus appears to miss the whole point of the common law classification, and treats the matter before him in the wrong category." Dealing with the judgment of James, V.C., in the *Leather Cloth Company* v. *Lorsont* (21 L. T. Rep. 661; L. Rep. 4 Eq. 345), Lord Bowen says that his "language seems calculated in several passages to confuse, and not to throw light upon our conceptions of the established common law doctrine." "The Vice-Chancellor's expressions," he observes, "are at times coloured by the same kind of misapprehension of the common law as that which pervades the judgment of Lord Langdale in *Whittaker* v. *Howe*." Observations of a similar kind are made in reference to the judgment of Sir Edward Fry, in *Rousillon* v. *Rousillon* (42 L. T. Rep. 679; 14 Ch. Div. 351). My Lords, this appears to me to be a very grave censure—graver, I think, than Lord Bowen could have supposed or intended—because in such cases it was undoubtedly the duty of equity to follow the common law. The province of the court was to give effect to common law rights. If the covenant was void at common law, a court of equity would have erred grievously in attempting to enforce it by injunction. If the question had been doubtful it would have been the duty of the court, at least in the time of Lord Langdale, to leave the parties to their common law rights, or to take the opinion of a court of common law, as was done in the case of *Bunn* v. *Guy* (4 East, 190), and by Lord Langdale himself in the case of *Nicholls* v. *Stretton* (7 Beav. 42; 10 Q. B. 346). Criticism so unsparing seems to invite or provoke inquiry. One cannot do otherwise than test the ground at each step. I have read, I think, every reported case upon the subject, and I must say, with the utmost deference to Lord Bowen's opinion, that I cannot help thinking that Lord Langdale, and James, V. C., and Sir E. Fry, have rightly apprehended the common law doctrine as it may be traced in the books, and as it is expounded by some of the leading authorities on the subject in modern times. In the age of Queen Elizabeth all restraints of trade, whatever they were, general or partial, were thought to be contrary to public policy, and therefore void: (*Colgate* v. *Bacheler*, Cro. Eliz. 872.) In time, however, it was found that a rule so rigid and far reaching must seriously interfere with transactions of every day occurrence. Traders could hardly venture to let their shops out of their own hands; the purchaser of a business was at the mercy of the seller; every apprentice was a possible rival. So the rule was relaxed. It was relaxed as far as the exigencies of trade for the time being required, gradually and not without difficulty, until it came to be recognised that all partial restraints might be good, though it was thought that general restraints, that is, restraints extending throughout the kingdom must be bad. Why was the relaxation supposed to be thus limited? Simply because nobody imagined in those days that a general restraint could be reasonable, not because there was any interest or essential distinction between the two cases. "Where the restraint is general," says Lord Macclesfield, in *Mitchel* v. *Reynolds*

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(1 P. Wms. 181; 1 Smith's L. C.), "not to exercise a trade throughout the kingdom," the restraint "must be void, being of no benefit to either party, and very oppressive, as shall be shown by and by." Later on he gives his reason. "What does it signify," he says, "to a tradesman in London what another does at Newcastle; and surely it would be unreasonable to fix a certain loss on one side without any benefit to the other." "Any deed," says Best, C.J., in *Homer* v. *Ashford* (3 Bing. 326), "by which a person binds himself not to employ his talents, his industry, or his capital, in any useful undertaking in the Kingdom, would be void, because no good reason could be imagined for any person's imposing such a restraint on himself." The true view at the present time, I think, is this: The public have an interest in every person's carrying on his trade freely; so has the individual. All interference with individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule. But there are exceptions; restraints of trade and interference with individual liberty of action, may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed, it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interest of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. That, I think, is the fair result of all the authorities. But it is not to be supposed that that result was reached all at once. The law has changed much, even since *Mitchel* v. *Reynolds*. It has become simpler and broader too. It was laid down in *Mitchel* v. *Reynolds* that the court was to see that the restriction was made upon a good and adequate consideration, so as to be a proper and useful contract. But in time it was found that the parties themselves were better judges of that matter than the court, and it was held to be sufficient if there was a legal consideration of value; though, of course, the quantum of consideration may enter into the question of the reasonableness of the contract. For a long time exceptions were very limited. As late as 1793 it was argued that a restriction which included a country town, and extended ten miles round it, was so wide as to be unreasonable: (*Davis* v. *Mason*, 5 T. Rep. 118.) It was said, and apparently said with truth, that up to that time restrictions had been confined to the limits of a parish, or to some short distance, as half a mile. But Lord Kenyon, in his judgment, observed that he did not see that the limits in question were necessarily unreasonable. "Nor do I know," he added, "how to draw the line." The doctrine that the area of restriction should correspond with the area within which protection is required is an old doctrine. But it used to be laid down that the correspondence must be exact, and that it was incumbent on the plaintiff to show that the restriction sought to be enforced was neither excessive nor contrary to public policy. Now the better opinion is that the court ought not to hold the contract void unless the defendant "made it plainly and obviously clear that the plaintiff's interest did not require the defendant's exclusion, or that the public interest would be sacrificed," if the proposed restraint were upheld. To a certain extent different considerations must apply in cases of apprenticeship, and cases of that sort on the one hand, and cases of the sale of a business or dissolution of partnership on the other. A man is bound an apprentice because he wishes to learn a trade, and to practice it. A man may sell because he is getting too old for the strain and worry of business, or because he wishes for some other reason to retire from business altogether. Then there is obviously more freedom of contract between buyer and seller than between master and servant, or an employer and a person seeking employment. When the question is how far interference with the liberty of an individual in a particular trade offends against the interest of the public, there is not much difficulty in measuring the offence and coming to a judgment on the question. The difficulty is much greater when the question of public policy is considered at large, and without direct reference to the interests of the individual under restraint. It is a principle of law and of public policy that trading should be encouraged, and that trade should be free; but a fetter is placed on trade, and trading is discouraged if a man who has built up a valuable business is not to be permitted to dispose of the fruits of his labours to the best advantage. It has been said that if the restraint be general. "the whole of the public is restrained," a phrase not, I think particularly accurate, or perhaps, particularly intelligible. It has been said that when a person is debarred from carrying on his trade within a certain limit of space he will carry it on elsewhere, and thus the public outside the area of restriction will gain an advantage which may be set off, as it were, against the disadvantage resulting to the public within the limited area. That is, perhaps, a just observation in a case of apprenticeship, and cases of that sort. But it is, I think, rather a fanciful way of looking at the matter in the case of a sale of goodwill. Applied to that sort of case, it seems to me to be just one of those unrealities which tend to confuse this question. What has the public to hope in the way of future service from a man who sells his business, meaning to trade no more? Is it likely that he will begin the struggle of life again, working at his old trade or profession in some remote place where he has no interest and no connections? Is the possibility that he may do so a factor to be taken into consideration? Now, when all trades and businesses are open to everybody alike, it is not very easy to appreciate the injury to the public resulting from the withdrawal of one individual. When Lord Kenyon was pressed with an argument as to the injury to the public in Thetford, that would result from denying them the services of a particular surgeon, he answered that the public were not likely to be injured by an agreement of this kind. "Every other person" he added, "is at liberty to practise as a surgeon in this town." Then I cannot help thinking that there is a good deal of common sense in the way in which Lord Campbell looked at this question. A retired partner in the canvassing trade of a publishing business being under a restrictive covenant, claimed the right to disseminate his publications within the area of restriction. He appealed to public policy. "It is clear," said

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Lord Campbell, "there would be evil if the law justified such a breach of contract; but it is by no means clear there would be any compensating good to the public from the publications intended by the defendant to be so made in violation of his promise to the plaintiff." That of course is not decisive in itself. It is an element for consideration of more or less weight according to circumstances. But Lord Campbell's observation seems to bring into contrast two principles which have to be adjusted in all these cases; freedom of trade, and freedom of contract: (*Tallis* v. *Tallis*, 1 E. & B. 391.) Sir Edward Fry's view was that the cases in which an unlimited prohibition has been spoken of as void relate only to circumstances in which such a prohibition has been unreasonable. Lord Bowen cites this passage, and meets it with the following question, "Is it not a truer view that the courts have never, as a rule, even entered on the consideration of the circumstances of any particular case where the prohibition has been unlimited as to area?" That question seems to go to the root of the matter. May I venture to put it to the proof? Since the date of *Mitchel* v. *Reynolds* how many cases have there been in which a general prohibition has come before a court of common law for discussion or decision? So far as I can discover there are two, and two only: *Ward* v. *Byrne* (5 M. & W. 548) and *Hinde* v. *Gray* (1 M. & G. 195). In *Hinde* v. *Gray* the point was disposed of during the argument, on the presiding judge observing that the particular covenant under consideration had been held invalid in *Ward* v. *Byrne*. That observation was repeated in the judgment, and nothing more was said. The covenant in question there was as little reasonable, though perhaps, not quite so absurd, as the covenant in *Ward* v. *Byrne*. *Hinde* v. *Gray*, therefore, does not help one much. There remains the case of *Ward* v. *Byrne*. In that case an unlimited restraint was imposed on a coal merchant's clerk; when once he left his master's employment he was not for nine months to earn his daily bread anywhere as a coal merchant, or a coal merchant's clerk, or in any capacity connected with the business of a coal merchant—an absurd and unreasonable stipulation if ever there was one. The only wonder is, that when the case first came before the court on an argument as to the construction of the covenant, the vice of the contract passed unnoticed. Afterwards there was a motion in arrest of judgment on the ground that the covenant was void. How was that application dealt with? Did the court abstain from entering on the consideration of the particular circumstances? Why, the main if not the only ground of objection was the unreasonableness of such a restriction in the particular circumstances of the case. "This restriction," observes the Chief Baron, "extends to all parts of England, and to every species of engagement by which this person during that time could gain a livelihood by his trade. What protection could the plaintiff require to such an extent as this? Can it be supposed that the plaintiff's trade could be prejudiced by this man's entering into the service of a coal merchant in Scotland? The obligation which the defendant undertakes by his bond is, that he shall neither be nor serve a coal merchant in any capacity for nine months. That goes so far beyond what the plaintiff could require that it is an unreasonable restriction: it is void on both grounds. It is against the principles and policy of the law as to any restraints on trade, and the right of every man to be at liberty to struggle for his own existence in the exercise of any lawful employment; and it is beyond what is necessary for the protection of the plaintiff or what the justice of the case demands." Nothing can be plainer than the view of the Chief Baron: all restraints of trade, if there is nothing more, are regarded with disfavour by the law; this restraint is unnecessary and unreasonable. The judgment of Parke, B. is, I think, substantially to the same effect, but it is so important that I shall reserve it for separate consideration presently. Gurney, B. followed the same line of argument. "What is there," he asks, "in the trade of a coal merchant in London, whose interest could be injured by any person setting up as a coal merchant or assisting another person in that trade at Exeter or York? All these considerations, it will be observed, were wholly beside the point if there was in force a simple rule to the effect that the court has nothing whatever to do with the reasonableness of the transaction in the case of general restraints. There is no higher authority upon this subject in modern times than Tindal, C.J. He had more to do with moulding the law on this head, and bringing it into harmony with common sense than all the judges since Lord Macclesfield's time put together. You will hardly find any judgment in reference to restraint of trade delivered by any court in England or America during the last sixty years, in which some passage is not cited from some judgment of Tindal, C.J. In *Horner* v. *Graves* (7 Bing. 735), Tindal, C.J. delivered the considered judgment of the court. In the course of it he had occasion to refer to the passage in *Mitchel* v. *Reynolds*, which is supposed to be the origin, or at least the earliest embodiment of the doctrine, that a different principle applies to general restraints and partial restraints; "Parker, C.J.," he observes, "says, a 'restraint to carry on a trade throughout the kingdom must be void; a restraint to carry it on within a particular place is good,' which are rather instances and examples than limits of the application of the rule, which can only be at least what is a reasonable restraint with reference to the particular cases." It is quite true that *Horner* v. *Graves* was a case of partial restraint; but here we have Tindal, C.J. dealing with the case of a general restraint as well as the case of a partial restraint. With both cases pointedly before him, and in reference to the one as well as to the other, he says that the only rule is, what is a reasonable restraint with reference to the particular case. I do not find that this passage has ever been questioned, nor is there in the books so far as I can discover any authority conflicting with it, except the judgment of Lord Bowen in the present case. It may, perhaps, be objected that passages are to be found in the judgments of Tindal, C.J. as well as in the judgments of other judges, in which it is said that general restraints are void without adverting to any reason for their invalidity. That, no doubt, is so, and, indeed, in this very judgment there is such a passage. But is it not fair to conclude that Tindal, C.J. thought general restraints bad, not because there was an arbitrary law to that effect—a hard and fast rule which judges had

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learned by rote, and the origin of which it was forbidden to explore, but because a general restraint was an example, a typical example if you will, of an unreasonable contract. It does not seem to me to affect the question in the very least how often the dictum may be found repeated, if on the one hand it is not accompanied by any reason or explanation, and, on the other, it appears without any authoritative statement that the proposition had become a rule which was neither to be questioned nor explained. It is merely a dictum after all, because there is no reported case, except, perhaps, *Ward* v. *Byrne*, in which it could have had any bearing upon the decision. Certainly it is no wonder that judges of former times did not foresee that the discoveries of science, with their practical results, might in time prove general restraints in some cases to be perfectly reasonable. When that time came it was only a legitimate development —it was hardly even an extension—of the principle on which exceptions were first allowed to admit unlimited restraints into the class of allowable exceptions to the general rule. I would now turn to the judgment of Baron Parke, in the case of *Ward* v. *Byrne*, which was decided in 1839, eight years after the decision in *Horner* v. *Graves*. The learned judge begins by stating the circumstances of the case, and the leading principle laid down in *Mitchel* v. *Reynolds*, that the public have an interest in every person carrying on his trade freely. Then he cites as a guide for himself the words of Tindal, C.J. in a case of limited restraint; the very thing for which Lord Langdale is so much blamed. He could not, he said, express the rule more clearly than it had been done by Tindal, C.J. in *Hitchcock* v. *Coker* (6 A. & E. 439), where he says: "We agree in the general principle adopted by the Court of Queen's Bench, that where the restraint of a party from carrying on a trade is larger and wider than the protection of the party with whom the contract is made can possibly require such restraint must be considered as unreasonable in law, and the contract which would enforce it must be therefore void." Oddly enough, that is a reproduction of the very passage which Lord Langdale selected as his guide; only he took it from *Horner* v. *Graves* directly; Parke, B. took it from the judgment on appeal in *Hitchcock* v. *Coker*. There it is attributed to Lord Denman, who does no more than quote the passage which Lord Langdale cites from *Horner* v. *Graves*. Then Parke, B. observes, and he repeats the observation more than once, that there is no authority in favour of the position that there can be a general restriction limited only as to time. He might, I think, have said with equal truth, that there was no case since *Mitchel* v. *Reynolds*, in which the question had come before the court for consideration. In conclusion he says: "This case falls within the rule laid down by Tindal, C.J., viz., that this is a general prohibition from carrying on trade which is more extensive than the interests of the party with whom the contract is made can possibly require. On that ground I think the judgment ought to be arrested." What did Parke, B. mean there by the rule laid down by Tindal, C.J.? There is no rule to be found laid down by Tindal, C.J. in those words or to that effect, except in the passage I have cited from *Horner* v. *Graves*. Parke, B. may have been referring to *Horner* v. *Graves*, or he may have been referring to some opinion well known to him, though it is not to be found in any reported judgment. In either case that would be a strong confirmation of the argument I am endeavouring to present to your Lordships. But the argument seems to me to be irresistible if Parke, B. thought that the rule as he expressed it, and as applied to a case of general prohibition, was fairly to be deduced from a similar rule laid down in a case of partial restraint. With regard to Lord Langdale's judgment in *Whittaker* v. *Howe*, I have some difficulty in understanding what the objection to it is, even on the view which Lord Bowen takes in reference to partial and general restraints, unless his view was, as one passage in his judgment which has already been cited seems to indicate, that a restraint limited to England is to be considered as a general restraint nowadays, when England is only part of the United Kingdom as much as it was when the three kingdoms were separate. I cannot think that *Whittaker* v. *Howe* requires much explanation. There is a homely proverb current in my part of the country which says you may not "sell the cow and sup the milk." That is just what Mr. Howe tried to do. He was a solicitor in large practice. He sold his business for a good round sum to two younger practitioners, and covenanted not to practise on his own account in England or Scotland. In order to hold the business together his name was kept in the firm, and he remained in the office drawing a handsome salary. Then there was a quarrel, and he carried off surreptitiously all the papers he could lay his hands on; he set up in the immediate neighbourhood; and he tried to steal the business he had sold. His defence was that a covenant so wide was against public policy. But it did not occur to him to return the price; that he kept in his pocket. Lord Langdale evidently thought the public would not greatly suffer if Mr. Howe withdrew for a time from the ranks of an honourable profession. I cannot think he was very wrong. It seems almost absurd to talk of public policy in connection with such a case. It is a public scandal when the law is forced to uphold a dishonest act: would the public find suitable compensation in the privilege of employing an unprincipled lawyer practising in violation of his solemn engagement? And it must be borne in mind that the firm remained, though one member retired into private life. Lord Langdale thought on the evidence before him, that the restraint was not unreasonable, although it extended to the whole of England and Scotland. Whether he was right or wrong in that view it is impossible to say without knowing what the evidence was. Undoubtedly some solicitors have correspondents in almost every business centre in the kingdom. At any rate that particular point does not seem to have been contested in the argument, and it lay on the defendant to prove the area of restriction unreasonable. I venture to think that the decision in *Whittaker* v. *Howe* was right. And, further, whether the restraint in that case ought to be regarded as general or as partial, I think the decision was in accord with the opinions of Tindal, C.J. and Parke, B. Nor can I, with all deference to Patteson, J. understand how anybody could suppose that *Whittaker* v. *Howe*, in which the restraint was held to be

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reasonable, conflicts with *Ward v. Byrne*, where the restraint was plainly unreasonable and held to be so. Now, in the present case it was hardly disputed that the restraint was reasonable, having regard to the interests of the parties at the time when the transaction was entered into. It enabled Mr. Nordenfelt to obtain the full value of what he had to sell; without it the purchasers could not have been protected in the possession of what they wished to buy. Was it reasonable in the interests of the public? It can hardly be injurious to the public, that is the British public, that a person is prevented from carrying on a trade in weapons of war abroad. But apart from that special feature in the present case, how can the public be injured by the transfer of a business from one hand to another? If a business is profitable there will be no lack of persons ready to carry it on. In this particular case the purchasers brought in fresh capital, and had at least the opportunity of retaining Mr. Nordenfelt's services. But then it was said there is another way in which the public may be injured. Mr. Nordenfelt has "committed industrial suicide," and as he can no longer earn his living at the trade which he has made peculiarly his own, he may be brought to want and become a burden to the public. This seems to me to be very far fetched. Mr. Nordenfelt received over 200,000*l.* for what he sold. He may have got rid of the money, I do not know how that is. But even so I would answer the argument in the words of Tindal, C.J.: "If the contract is a reasonable one at the time it is entered into, we are not bound to look out for improbable and extravagant contingencies in order to make it void:" (*Rannie v. Irvine*, 7 M. & G. 969.) For the reasons which I have given, I think the only true test in all cases, whether of partial or general restraint, is the test proposed by Tindal, C.J.:—What is a reasonable restraint with reference to the particular case? I think that the restraint in the present case is reasonable in every point of view, and therefore, I agree that the appeal should be dismissed.

Lord MORRIS.—My Lords: I entirely concur in the judgment and the reasons for it given by the Lord Chancellor. But I desire to express my opinion that, without going through the numerous cases which have been so exhaustively dealt with in the Court of Appeal and by your Lordships, the weight of authority up to the present time is with the proposition that general restraints of trade were necessarily void. It appears, however, to me that the time for a new departure has arisen, and that it should be now authoritatively decided that there should be no difference in the legal considerations, which would invalidate an agreement whether in general or partial restraint of trading. These considerations I consider are whether the restraint is reasonable and is not against the public interest. In olden times all restraints of trading were considered *primâ facie* void. An exception was introduced when the agreement to restrain from trading was only from trading in a particular place and upon reasonable consideration, leaving still invalid agreements to restrain trading at all. Such a general restraint was in the then state of things considered to be of no benefit even to the covenantee himself; but we have now reached a period when it may be said that science and invention have almost annihilated both time and space. Consequently there should no longer exist any cast-iron rule making void any agreement not to carry on a trade anywhere. The generality of time or space must always be a most important factor in the consideration of reasonableness though not *per se* a decisive test. If the consideration of reasonableness or of public interest is the rule the appellant, in my opinion, has no case. The portion of his business which consisted of manufacturing guns and gunpowder explosives, was one which would almost altogether be with Governments, foreign as well as at home, and wherever carried on would necessarily be in injurious competition with the respondents; nor does the substitution of a company for the appellant in the manufacture of guns and ammunition appear to me to injuriously affect the public interest.

Order appealed from affirmed, and the appeal dismissed.

Solicitors for the appellant, *Munns* and *Longden*.

Solicitors for the respondents, *Wilson, Bristows*, and *Carpmael*.

Supreme Court of Judicature.

COURT OF APPEAL.

Friday, July 27.

(Before the LORD CHANCELLOR (Herschell), LINDLEY and DAVEY, L.JJ.)

Re McHENRY; McDERMOTT *v.* BOYD; *Ex parte* LEVITA. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Bankruptcy—Purchase of claims of creditor—Undisclosed agreement between bankrupt and creditor for payment by bankrupt to creditor of additional sum—Validity—Annulment of bankruptcy with consent of creditors.

To obtain the annulment of a bankruptcy a large sum, but insufficient to discharge in full the claims of the bankrupt's creditors, was placed in the hands of trustees to enable them to buy up all claims against the bankrupt. The trustees negotiated with each of the bankrupt's creditors separately, and obtained an assignment of his claim on paying him the smallest sum he was willing to take for it. While these arrangements were proceeding between the trustees and the creditors, the bankrupt made an agreement with one of the creditors to the effect that, if the creditor would assign his claim to the trustees for a certain sum, the bankrupt would pay the creditor an additional sum; and the creditor, on the faith of that agreement, assigned his claim to the trustees for the sum agreed on. All the claims of the bankrupt's creditors were bought up by the trustees, and an order annulling the bankruptcy was obtained without disclosing the agreement, either to the court or to the other creditors. The discharged bankrupt died without having paid the additional sum agreed on. A decree for the administration of

(*a*) Reported by J. TRUSTRAM and W. C. BISS, Esqrs., Barristers-at-Law.

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his estate was obtained, and the creditor carried in a claim for that sum against the estate.

Held, that it was not necessary to mention the agreement to the court, as it was merely a collateral one between the debtor and this one creditor; that the other creditors had not been injured by it, as all the creditors were not acting on a common basis, but each creditor made his own bargain with the trustees; and therefore there had been no fraud on the bankruptcy law, and the estate of the discharged bankrupt was liable for the amount.

Decision of North, J. reversed.

THIS was a claim against the estate of J. McHenry in an action for the administration of his estate made by Emile Levita for 6000*l.* in respect of a debt of 25,000*l.* due from J. McHenry.

On the 25th March 1886 J. McHenry was adjudicated a bankrupt, and Gustave Henrich Levita claimed to be a creditor for 37,000*l.*, but was admitted to prove for 25,000*l.*, although the claim was opposed by J. McHenry. This debt was assigned by Gustave Henrich Levita to Emile Levita.

In 1889 it was desired by certain persons interested in J. McHenry's affairs to obtain an annulment of his bankruptcy; and, with this view, a sum of 40,000*l.* was placed in the hands of Messrs. Hore and Wontner for the purpose of enabling them to buy up all claims against J. McHenry. The creditors were informed of the fact of this sum having been placed with Messrs. Hore and Wontner for that purpose; and since the claims against McHenry amounted to nearly half a million of money it was necessary for them to reduce their claims, otherwise the 40,000*l.* would have been wholly insufficient to buy up J. McHenry's liabilities, and the plan could not have been carried out.

Messrs. Hore and Wontner placed themselves in communication with all the creditors, whether their claims had been actually proved or not, and bought up the claims for the smallest sums the creditors were willing to accept for them. A separate arrangement was made in the case of each creditor, and a separate assignment of his debt was obtained from him.

One of the creditors treated with was Emile Levita, in respect of the proof for 25,000*l.*, which had been assigned to him by Gustave Henrich Levita, and which he ultimately agreed to assign to Messrs. Hore and Wontner for 2000*l.* In pursuance of this agreement an assignment was made as follows:

This indenture made the 20th day of Dec. 1889, between Emile Levita, of Gresham House-court, London, merchant (hereinafter called the vendor), of the one part, and Frederick Willoughby Ranken Hore, of 52, Lincoln's-inn-fields, and St. John Wontner, of 19, Ludgate-hill, both in the city of London, solicitors (hereinafter called the purchasers), of the other part. Whereas the vendor is, or claims as assignee from Gustave Henrich Levita to be, the creditor of James McHenry, of Oak Lodge, Addison-road, in the county of Middlesex, for the sum of 25,000*l.*, and whereas the said James McHenry was by an order of the High Court of Justice in Bankruptcy, dated the 25th day of March 1886, adjudicated a bankrupt, and the said Gustave Henrich Levita has proved in such bankruptcy proceedings for the sum of 37,839*l.* 2*s.* 9*d.*, and such proof has been admitted to the extent of twenty-five thousand pounds; and whereas the vendor has agreed with the purchasers to sell to them the said debt or claim at the price of 2000*l.*; now this indenture witnesseth that, in consideration of the sum of 2000*l.* on or before the execution hereof paid by the purchasers to the vendor, the receipt whereof the vendor doth hereby acknowledge, he, the vendor, as beneficial owner, doth hereby assign unto the purchasers all that the said debt or claim for the sum of 25,000*l.* so as aforesaid owing, or claimed by the vendor to be owing, by the said James McHenry to the vendor as assignee of the said Gustave Henrich Levita, and all other moneys (if any) owing to the vendor as such assignee as aforesaid by the said James McHenry, to hold the same unto the purchasers absolutely. In witness, &c.—E. LEVITA.

In order to induce Emile Levita to assign his debt of 25,000*l.* to Messrs. Hore and Wontner for 2000*l.*, J. McHenry signed the following undertaking, after adding the words "as an equitable settlement of disputed accounts:"

Jan. 17, 1890.

Dear Sir,—In consideration of your having at my request executed an assignment to Messrs. Hore and Wontner of a claim erroneously admitted against my estate, which had been assigned to you by your brother Gustave, I undertake as soon as possible after closing of the arbitration arranged between me, Bischoffsheim, and Goldschmidt, to pay you the sum of six thousand pounds agreed between us as an equitable settlement of disputed accounts, and am, always faithfully, JAMES McHENRY.

On the 24th of Feb. 1890, on the petition of J. McHenry, supported by his creditors, an order was made annulling his bankruptcy. It appeared from the petition that Emile Levita's proof for 25,000*l.* had been assigned to Messrs. Hore and Wontner for 2000*l.*, but the agreement by J. McHenry to pay Emile Levita the additional 6000*l.* was not disclosed to the court.

On the 26th May 1891 J. McHenry died. Emile Levita then carried in a claim for the 6000*l.* against the estate of J. McHenry in the action which had been brought by a creditor for administration of the estate; and the chief clerk allowed the claim.

A summons was taken out on the 3rd March 1894, by Edward Robert McDermot, one of the executors of J. McHenry and one of the defendants in the action, for the administration of his estate, asking that the certificate of the chief clerk might be varied by disallowing the claim by Levita for 6000*l.* against the estate.

The evidence comprised two affidavits by Emile Levita in support of his claim, and also certain correspondence between J. McHenry and Emile Levita, including a letter by Levita of the 19th Dec. 1889, in which he thanked McHenry for his "very considerate offer," but there was nothing to show what offer was referred to.

Herbert Reed, Q.C. and *F. A. Broxholm* for the summons—The promise by McHenry to pay the 6000*l.* to Emile Levita if he assigned his debt for 25,000*l.* to the trustees was a promise made without consideration, and was only a private collateral bargain. They referred to

Hall v. *Dyson*, 17 Q. B. 785;
Murray v. *Reeves*, 8 B. & C. 421;
Jackman v. *Mitchell*, 13 Ves. 581;
Robson v. *Calye*, 1 Doug. 228.

All the facts of the case ought to have been brought before the court on the petition for the annulment of McHenry's bankruptcy, but the court was not informed of all the facts when the order for annulment was made. [NORTH, J. referred to *Steele* v. *Hoe*, 14 A. & E. 431.] It

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would practically be a double payment if 2000*l.* were paid by the trustees and 6000*l.* by McHenry's estate for the same debt. Under the circumstances the claim for 6000*l.* from McHenry's estate is not such a claim as ought to be allowed.

Sir *A. Watson*, Q.C. and *Clauson* for Emile Levita.—The chief clerk was right in allowing the claim for 6000*l.* In order that the summons may succeed it must be shown by the other side (1) that the matter was in the nature of a composition or scheme of arrangement with creditors; (2) that there was an advantage gained by Levita over the other creditors; and (3) that the arrangement between McHenry and Levita was not disclosed to the other creditors of McHenry. All the cases cited by the other side are cases in which there was a composition. Here the transactions between the trustees and each creditor for the purchase of his claim were independent of each other. [North, J.—Why was not the whole arrangement in reference to the sale of Levita's claim stated in the deed of assignment by Levita to the trustees?] It was not necessary to do so. Then no advantage over the other creditors of McHenry was obtained by Levita. [North, J.—Equality between the creditors is not the essence of the matter so long as the whole arrangement is disclosed; but if the creditors are only informed of part of the transaction the matter is very different.] It is necessary for the other side to prove that an advantage was gained by Levita over the other creditors. They referred to

Jackman v. *Mitchell* (*ubi sup.*);
Smith v. *Salzmann*, 9 Ex. 535;
Ex parte Milner; *Re Milner*, 53 L. T. Rep. 652; 15 Q. B. Div. 605.

In the present case there is no suggestion of a composition. There is no evidence to prove that the transaction was unknown to the other creditors, and there was no general arrangement with the creditors. The question is, whether any other creditor was influenced by what Levita did, and we submit no other creditor was. They referred to

Davidson v. *McGregor*, 8 M. & W. 755;
Howden v. *Haigh*, 11 A. & E. 1033.

Levita was not a party to the application for the annulment of McHenry's bankruptcy. McHenry was as bad as Levita in respect to this arrangement, and the executor of McHenry, who makes this application, is in no better position than McHenry.

F. A. Broxholm in reply.—There are cases where there was no composition which show that a secret agreement with a creditor is sufficient to vitiate any arrangement with creditors. He referred to

Hall v. *Dyson* (*ubi sup.*).

Ex parte Milner; *Re Milner* (*ubi sup.*), and other cases cited by the other side, as far as they are applicable to the present case, are in my favour. The petition for annulment of McHenry's bankruptcy did not disclose the secret agreement with Levita, and the order annulling the bankruptcy shows that that agreement was kept back from the court. If Levita's claim for the 6000*l.* is good, two sums would be paid for the same debt, and the words of the assignment to Messrs. Hore and Wontner, "and all other moneys (if any) owing to the vendor as such assignee as aforesaid by the said James McHenry," would vest the right to the 6000*l.* in Messrs. Hore and Wontner.

North, J.—His Lordship read the two affidavits by Levita and the letter of the 19th Dec. 1889, from Levita to McHenry and proceeded:—There is no evidence to show what the "very considerate offer" mentioned by Levita in his letter of the 19th Dec. 1889 was. Did it refer to an offer by McHenry to pay Levita 6000*l.*? The real transaction is very much in doubt. Before signing the memorandum of the 17th Jan. 1890, which was sent to him for his signature, McHenry altered it and added the words "as an equitable settlement of disputed accounts." That would appear to be a pure fiction. There is no trace of any disputed accounts. The claim of Levita is in respect of a proof for 25,000*l.* The assignment by Levita to Messrs. Hore and Wontner is dated 20th Dec. 1889, and the letter by McHenry to Levita in which he undertook to pay Levita 6000*l.* "agreed between us as an equitable settlement of disputed accounts," is dated the 17th Jan. 1890, after the assignment. Was it one transaction? If the arrangement between McHenry and Levita that Levita should receive 6000*l.* was not one transaction with the assignment by Levita of his claim to Hore and Wontner there is no consideration to support Levita's claim to the 6000*l.* If there was only one transaction I must consider what the result of that transaction is. The affidavits of Levita make out that the whole matter was one transaction as between him and McHenry. The statement of Levita amounts to this, that McHenry engaged that if he (Levita) would assign to the trustees his proof for 25,000*l.* at the price of 2000*l.* for the purpose of obtaining an annulment of McHenry's bankruptcy, for which the consent of all the creditors was necessary, then McHenry would at a future time pay him 6000*l.* in addition to the 2000*l.* In my opinion that transaction cannot be a good one. The petition to the court for the annulment of McHenry's bankruptcy stated to the effect that Levita's claim had been assigned to Hore and Wontner for 2000*l.*, and that Levita's claim was satisfied; and the result of the petition obviously was that the annulment was made on the footing that all the creditors who had been admitted to proof had assented and were satisfied, and that from that time forward McHenry was to be free from all liability to such creditors. But in the case of Levita the 25,000*l.* admitted to proof had not been satisfied by the purchase for 2000*l.* if the claim now made for the additional 6000*l.* is good. In point of fact, the statement in the petition that the claim had been assigned to Hore and Wontner for 2000*l.* was not true if the claim for 6000*l.* in respect of the same debt was outstanding. Again, if this 6000*l.* was part of the arrangement for the assignment of the debt of 25,000*l.* to Hore and Wontner, why was not the arrangement carried out by the deed of assignment in proper form? The reason appears obvious, for, if it had been stated in the deed, the other creditors would have asked for some information about it. In my opinion the deed was prepared in the form in which it was executed for the purpose of concealing the real facts. The 6000*l.* was an inducement to Levita to execute the assignment of his debt for the purpose of obtaining the annulment of McHenry's bankruptcy. Levita was under no

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obligation to assign his debt for 2000*l.* only. But he ought to have taken care to disclose the whole transaction, and, having chosen to represent that 2000*l.* was the whole purchase money, he cannot be heard to say now that he is entitled to 6000*l.* beyond the 2000*l.* represented to be the purchase money of his debt. He cannot claim a private bribe of 6000*l.* after executing the deed of assignment containing untrue statements. In support of this view there are many authorities: for instance, *Jackman* v. *Mitchell* (13 Ves. 581); *Hall* v. *Dyson* (17 Q. B. 785), and some older cases, viz., *Nerot* v. *Wallace* (3 T. R. 17) and *Murray* v. *Reeves* (3 B. & C. 421). It is said that Levita was not before the court when the application for the annulment of McHenry's bankruptcy was made, but he was a party to the arrangement for obtaining the annulment, and Messrs. Hore and Wontner, the persons he armed with an untrue representation, were before the court. Certain steps were taken to procure an annulment of McHenry's bankruptcy; and the persons who took them, or enabled them to be taken, are not entitled to come forward and set up a transaction totally different to that alleged when the annulment was obtained. The fact that Levita was not before the court in the bankruptcy proceedings is immaterial. It was argued that a distinction existed between a case in which there was a composition or scheme of arrangement between the creditors of a debtor and the present case. I do not think that distinction is well founded on principle. It was also contended that it must be shown that some advantage was gained by Levita over the other creditors of McHenry in order to make the claim for the 6000*l.* invalid. No other creditor has set up such a claim. It was also said that there is no evidence that the arrangement between McHenry and Levita was not disclosed to the other creditors. But it is clear that only half the true story was disclosed, and that the other half was kept secret. It appears from the affidavits of Levita, that his arrangement with McHenry was intended to be kept secret. It was not disclosed to the court when the petition for annulment of the bankruptcy was presented. If the onus of proof be upon the persons impeaching the transaction, it is sufficiently discharged by the facts I have mentioned. Under these circumstances the applicant has sufficiently established his case. It was said also that McHenry was just as bad as Levita in respect to the arrangement between them. I think he was. But even if the creditors of McHenry had not been concerned in resisting the claim for 6000*l.* set up by Levita, the answer to that argument would be found in the maxim *In pari delicto potior est conditio defendentis.* In my opinion the claim by Levita for 6000*l.* against McHenry's estate is not one that can be allowed. I must therefore allow the summons to vary the chief clerk's certificate.

From this decision Mr. Levita appealed.

Finlay, Q.C. and *Clauson* for the appellant.

Cozens-Hardy, Q.C., *Reed*, Q.C., and *Broxholm* for the respondent.

The arguments were similar to those in the court below, and the following further cases were referred to:

Ex parte Duckworth, 16 Ves. 416;
Ex parte Green, 1 Mont. Deas. & De G. 174;
Jackson v. *Davison*, 4 Barn. & Ald. 691;
Ex parte Jones, L. Rep. 3 Ch. App. 144;
Kearley v. *Thomson*, 63 L. T. Rep. 150; 24 Q. B. Div. 742.

The LORD CHANCELLOR.—This is an appeal from a judgment by which the appellant was found not entitled to prove against the estate of Mr. McHenry. The facts appear to be these: There was a debt due, which was accepted as a proof in the bankruptcy of Mr. McHenry, which was a bankruptcy prior to the Act of 1883, of a sum of 25,000*l.* to a brother of Mr. Levita. A larger sum was claimed, but 25,000*l.* was admitted to proof. Mr. McHenry was desirous of obtaining an annulment of his bankruptcy, and one of his creditors, Mr. Bischoffsheim, was also desirous of obtaining that annulment. Mr. Bischoffsheim it appears found a sum of 40,000*l.* and placed it in the hands of two trustees, Mr. Wontner and Mr. Hore, with a view to its being used in settling with Mr. McHenry's creditors so that the bankruptcy might be annulled. Various creditors were settled with. So far as appears the different creditors were settled with on different terms. There was a difficulty about paying Mr. Levita more than a sum of 2000*l.* out of the fund which had been provided, in order to obtain an assignment of his debt to the trustees. Thereupon it was agreed that, if he would sign that instrument, Mr. McHenry would undertake to pay him a sum of 6000*l.* That that agreement was entered into there is no dispute. It is evidenced by documents about which there is no question, and the fact was communicated to the assignees of the debt. Thereupon the assignment was executed and the assignees upon its execution were of course in a position to consent to the bankruptcy being annulled. A petition was then filed in the bankruptcy asking for the annulment, and there was a schedule to that petition showing the names of the creditors who had proved, and what had become of their debts which had been paid or satisfied, who consented, and in the case of an assignment to whom the debt had been assigned. The bankruptcy was annulled; but the question now arises, Can a claim be made against Mr. McHenry's estate for this sum of 6000*l.*? Obviously it is a debt beyond controversy, unless it can be shown that the agreement between Mr. McHenry and Mr. Levita, although made in point of fact, was void in point of law. Of course it can only be void if it was an agreement immoral or against the law as being against public policy. The case was presented in this way: It was said that this payment or promise to pay 6000*l.* was kept back from the knowledge of the other creditors and concealed from the court; that consequently, having been so concealed both from the creditors and from the court, it was an agreement which could not be sustained. Now that depends entirely upon what duty there was to the court on presenting a petition of this description, which depends again upon the functions possessed by the courts, what evidence they would require or ought to require in order to determine whether the bankruptcy should be annulled or not. It appears to me that all that the court had to consider was whether in point of fact all those persons who were creditors, or who represented the creditors by assignment of their debts, consented to the annulment and desired it If they did, then it seems to me that all was

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established which it was necessary for the court to be satisfied of before annulling the bankruptcy. It is laid down in *Ex parte Duckworth* (*ubi sup.*) that the requisite to the annulment is the consent of the creditors who had already proved. The only authority brought before our notice suggesting that in such a case the court might hold its hand was the dictum of Lord Cairns in *Ex parte Jones* (*ubi sup.*), where he was not prepared to say that, although all the creditors present consented, it might not be right to withhold the consent to the annulment in the interest of absent creditors. It is quite unnecessary to express an opinion whether that be a well-founded view or not; it does not arise in the present case. This is not a case of absent creditors at all. All we have to consider is, whether there was any necessity for bringing before the court more than the fact of the consent of the original creditors or their assignees, and I think there was not. But then it was said, though it may not have been necessary to inform the court of the considerations which led all the creditors or their assignees to assent, yet, if you purport to communicate it, you must communicate it truly. But in the present case, first of all I do not see that there was any untruth in the representation made to the court. It was perfectly true to say, as was said on the face of the deed, that it was in consideration of 2000*l.* paid by the assignees that the assignment had been made. It was not the less true because there was a collateral agreement between Mr. McHenry and Mr. Levita which involved a promise to pay in the future another sum. It seems to me to have been no more necessary to communicate that promise by Mr. McHenry to Levita than it would have been to communicate any promise made by the debtor to any one of his creditors, and it was hardly contended by Mr. Reed that there was any such obligation. I do not see therefore that this was in fact concealed in the true sense of that word from the court. But it also seems to me to be clear that not to communicate immaterial facts—facts which would not, or ought not to, have affected the judgment of the court if they had been communicated—can never be a ground for declaring the transaction void, or for saying there had been a breach of duty. All that is material no doubt you are bound to disclose. You are bound not to mislead the court into supposing the material facts to be other than they are; but to say that you are bound to state to the court every immaterial fact appears to me to be a notion of duty very far from exact. Therefore I cannot see in the present case that it can be said in any way that the court was deceived or misled. Then, how about the other creditors? If it were a case in which all the creditors were dealing on a common basis, or understood that they were dealing on a common basis—that is to say, if they were acting together and were agreeing to annul, or consenting to an annulment, in consideration of receiving some proportionate shares or some named sum out of a fund that was to be distributed among them—then I quite agree that any person who was bargaining behind the rest for a private superiority for himself could not maintain the transaction for a moment. Or I would go further and say, if any bargain made by one creditor with the debtor were to his knowledge to be kept back in order that the other creditors might be induced to take the course of agreeing to an annulment upon the supposition that he was receiving less than he really was receiving, that again would be in the nature of a fraud upon the creditors, and the transaction could not be supported. But in the present case nothing of the kind appears, and I am satisfied that there is no foundation for any suggestion of that kind. It is obvious, when one looks at the facts appearing on the affidavits, there was not a pretence for saying that the creditors were being treated on the same basis by any proportionate payments; and with regard to the alleged concealment of this arrangement from the other creditors and from the court, where is the evidence that Mr. Levita was a party to any such concealment? Mr. Levita had nothing to do with the petition for annulment, or the form which it took, or the facts which were disclosed in it. I cannot see a trace of his having given any direction or made any suggestion to the assignees or Mr. McHenry that this was not to appear in any statement or was to be concealed in any way. It was made known to the trustees, it certainly was not kept back from them, and I cannot see a trace of any agreement that it should be kept back from anybody. If so, that seems to me to be conclusive of one part of the case which was put forward by Mr. Reed, because it could only be a contract which was void because concealed, if "concealed" means concealed by arrangement between the debtor and the creditor. If it was an arrangement not intended to be concealed from the court, because Mr. McHenry himself chose to conceal it that of course could not enable him afterwards to set up that fact and treat the transaction as void. I think that the learned judge has first of all, apparently by an oversight, regarded this as a case in which by the transaction the debtor became discharged. He said he was to become freed from his debts on those terms. That is, of course, a mistake: he did not become discharged at all. When the bankruptcy was annulled every right of every creditor came into existence in the same force as it had before his adjudication. Now, as regards the cases, none of them really are authorities for the proposition contended for in *Jackman* v. *Mitchell* (*ubi sup.*), which is the earliest case. A bond was there held bad the giving of which was not communicated to the other creditors, it having been given to secure to one creditor the deficiency of his debt and interest beyond the composition for the purpose of inducing him, he being the largest creditor, to execute the deed and thereby to get the other creditors to follow his example, and so extricate the debtor from his difficulties. This was a clear case of fraud upon the other creditors who were induced to suppose that the largest creditor was consenting on certain terms, and so agreed to the same terms when both parties to the agreement knew that it did not represent the truth. This was a case in which it is obvious the transaction could not stand. Then the next case cited was *Hall* v. *Dyson* (*ubi sup.*), where there was an agreement by the attorney of an insolvent with one of the creditors who had given notice of opposition that for a certain sum of money he would not oppose. Lord Campbell held, that was a fraud on the insolvency laws. He said (17 Q. B. 791): "In the present case the creditor is as it were bought off, and he was under a moral obligation

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to continue his opposition, inasmuch as, by giving notice of it, he had led the other creditors to believe that he really intended to oppose. The consequence of his withdrawing is, that justice is disappointed, because the adjudication is made without the proper investigation having taken place." What bearing that has upon such a case as the present I am at a loss to conceive, because I do not see any moral obligation on Mr. Levita here with regard to the other creditors whose transactions we are considering. Then the third case was *Murray* v. *Reeves* (*ubi sup.*), which is a case of the same description as *Hall* v. *Dyson* (*ubi sup.*). Then in *Nerot* v. *Wallace* (*ubi sup.*) a promise was made by a friend of the bankrupt when he was on his last examination that, in consideration that the assignees and commissioners would forbear to examine him touching certain sums which he was charged with having received and not accounted for, he would pay such sums as the bankrupt had received and not accounted for. That was held void as being against the policy of the bankruptcy laws as tending to hush up malpractices instead of, in the public interest, securing full inquiry into them. None of those cases seem to me to have any bearing at all on the present one. For the reasons I have given I am unable to agree with the learned judge, and I think this appeal must be allowed.

Lindley, L.J.—I am of the same opinion. It appears to me that the key to this case is to be found in the fact that, when the creditors consented to the annulment of adjudication of bankruptcy, each creditor consented upon such terms as he thought proper. They did not work in unison. It is not like a composition deed or anything of that kind. The bankrupt made the best arrangement he could with each creditor, and all the court usually inquires into is whether all the creditors consent. It is very unusual—I do not say it never happens—that anybody should inquire into the terms upon which that consent is given, and here no creditor who consented did in fact represent to the others that he did so upon any particular terms; there was no common basis of consent, and no creditor can say with truth that he consented upon the supposition that the other creditors were consenting upon the same terms. That is not the present arrangement. Each creditor makes his own bargain, and when once you get that clearly before you it is difficult to see what objection there is to this alleged concealment. Now the facts were these: [His Lordship repeated them.] When the authorities are considered, they are clearly distinguishable, not only on the facts, but upon the principles applicable to them. The nearest authority that bears upon this case is *Smith* v. *Salzmann* (9 Ex. 543). There Parke, B. says very pertinently: "Unless it was shown that the agreement"—that is the one there in question—"was entered into upon the understanding that all the creditors were to be upon the same footing, and that the plaintiff was put upon a better footing, or that the plaintiff signed the petition for the purpose of deluding the other creditors to do so, there is no fraud." That decision is very near this, for it happens to be an annulment case, and it is the nearest that I can find. I do not see that there is anything which taints this promise to pay Levita the sum of 6000*l.* I think that the view taken by the chief clerk is right, and that the appeal ought to be allowed.

Davey, L.J.—I am also of opinion that this appeal must be allowed. I am of opinion that the respondent has entirely failed to satisfy the court that there has been any fraud either upon the court or upon the creditors themselves. I should be very sorry that anything which fell from us should in the least degree affect the salutary rule that those who apply to the court for an order are bound at their own risk to state all material facts, and that if they fail to disclose any material facts they are liable to have any order which may be obtained set aside. But that applies only to material facts, and I fail to see now, when this case is understood, that any material facts were withheld from the court. The function of the court seems to me to have been confined to seeing that all the creditors consented, including under the name of creditors those who had become the assignees of debts which had been proved. Of course, for the purpose of proving the title of those assignees, the deeds of assignment had to be produced; but I conceive that the only function of the court was to see that it had the proper parties before it to give consent, and that those parties did give consent. I am therefore of opinion, for the reasons which have already been stated by the Lord Chancellor, that there was no fraud upon the court, nor can I see that there was any fraud whatever upon the creditors. It was utterly unlike a composition, the principle of which is that all the creditors share alike. Each creditor here was entitled to make his own bargain, and unless it can be proved that a creditor was induced to part with his debt for a smaller sum in consideration of this creditor, Levita, having agreed to accept 2000*l.* only, I fail to see how there can be any fraud upon the creditors. The creditors consented before the petition was presented, and each of the creditors gave his consent, not on account of anything which had taken place between Levita and Wontner and Hore, or between Levita and McHenry, but each in consequence of the negotiations which had been conducted with himself and in which each creditor made the best bargain he could in his own interest. The cases which have been referred to seem to me capable of being divided into two classes. The first class includes cases where a secret inducement is offered to one creditor to execute a composition deed, or to accept a composition on the footing that all the creditors fare alike. Of course in that case it would be an obvious fraud on the other creditors who agree to accept a composition payable *pro ratâ* to all, if one creditor was enabled by a secret bargain to obtain a better advantage for himself; and that would be all the more so where, as in modern cases, a specified majority of the creditors have power to bind the minority. The second class of cases is where a creditor has been induced to withdraw his opposition to the insolvent or bankrupt, or to withdraw a bankruptcy petition, in consideration of some pecuniary advantage. There it has been held that the creditor in opposing the insolvent or bankrupt, or in presenting a bankruptcy petition, is acting on behalf of all the creditors generally, and for this reason, that if he did not put himself forward to present a bankruptcy petition or to conduct the opposition to the debtor and have

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him publicly examined, other creditors would do so, and he is in fact putting himself forward to act in the interests of all, and there is the further reason that it is a matter of public interest that the public examination of a debtor should not be stifled. I am of opinion that none of the decided cases are adverse to Mr. Finlay's argument, and I think the case of *Smith* v. *Salzmann* (*ubi sup.*) referred to by Lindley, L.J., supports the view that we are taking of this case. I am therefore of opinion that the appeal ought to be allowed.

Solicitors for the appellant, *Linklater* and *Co.*

Solicitors for the respondent, *Hores* and *Pattisson.*

Thursday, Aug. 2.

(Before LINDLEY, LOPES, and DAVEY, L.JJ.)

NUTTER v. HOLLAND. (a)

APPEAL FROM THE PALATINE COURT OF LANCASTER.

Practice—Payment into court—Money for which trustee liable, but not actually in his hands—Order LV., r. 3 (*d*).

Money cannot be ordered to be paid into court under Order LV., r. 3 (*d*), *unless it is actually in the hands of an executor, administrator, or trustee, and it is not sufficient that he is responsible for it, and that it ought to be in his hands.*

Re Chapman; Fardell *v.* Chapman (54 *L. T. Rep.* 13) *overruled.*

Decision of Robinson, V.C. affirmed.

THE defendant Holland was the executor and trustee of the will of Mrs. A. Nutter, who died on the 1st March 1886, and the plaintiffs were J. P. Nutter, who was the other trustee and a beneficiary under the will, and also some of the other beneficiaries.

On the 8th Sept. 1886 an account was sent to the beneficiaries in the name of the defendant's then firm, showing that the defendant had in hand the sum of 1239*l.* 8*s.* 9*d.* The defendant and the beneficiaries met on the 9th Sept. 1886, and the beneficiaries signed a release to the executor, and the defendant paid to certain persons one-fourth share of the residue, viz., 309*l.* 17*s.* 2*d.*, and he retained the other shares, amounting to 929*l.* 11*s.* 6*d.* for investment in pursuance of the terms of the will.

At this meeting, besides the residuary accounts, the defendant produced an affidavit made by him for the purposes of the Inland Revenue containing the usual paragraph that the aggregate amount of the testatrix's debts was 50*l.* 13*s.* 6*d.*, and that there was no money out on mortgage.

On the 31st May 1892 the defendant, who was a solicitor, was adjudicated a bankrupt, and was subsequently suspended from practice for five years.

The plaintiffs were afterwards unable to obtain any information from the defendant as to the investments representing the sum of 929*l.* 11*s.* 6*d.*

The sum of 120*l.* was, however, paid into a bank, leaving 809*l.* 11*s.* 6*d.* unaccounted for.

The plaintiffs then served the defendant with an originating motion under Order XLVIII., r. 3, sub-sect. (*d*) of the Palatine Court, corresponding to Order LV., r. 3, sub-sect. (*d*) of the Rules of the Supreme Court, asking that he might be ordered to pay into court the sum of 809*l.* 11*s.* 6*d.* with interest at the rate of 4 per cent. from the 8th July 1892, the sum of 809*l.* 11*s.* 6*d.* being part of the estate of the said Alice Nutter and in the hands of the defendant in his character of a trustee under the said will, and that the defendant might be ordered to pay the costs of the application, and for the purposes aforesaid all proper directions might be given, or that such further or other order might be made as the nature of the case might require, and to his Honour might seem fit.

The defendant filed an affidavit which (*inter alia*) stated that, without the assistance of the books and papers of his late firm, he was unable to make out a further or better account of the estate than thereafter appeared. An account was annexed which showed payments to the amount of 811*l.* The plaintiffs disputed this account, and the defendant was cross-examined upon this affidavit, and it appeared that an item in it of 350*l.* was an alleged security purporting to be for money lent by the testatrix in her lifetime, but which the defendant alleged he in fact provided and retained the security, but never mentioned it in the accounts or to the beneficiaries, but he admitted he had repaid himself out of the 929*l.* 11*s.* 6*d.* retained by him for investment.

Before the Vice-Chancellor the plaintiffs admitted investments to the amount of 250*l.*, leaving, as they alleged, a balance in the hands of the defendant uninvested of 559*l.* 11*s.* 6*d.*, and they alleged that the statements of the defendant respecting this sum were false, and that the mortgage above mentioned was a bogus mortgage.

The summons came before the Vice-Chancellor of the Palatine Court of Lancaster on the 14th March 1894, when the defendant did not appear, and the order asked was made, but on the 12th April the defendant moved to discharge it.

Maberly for the defendant.

Mansfield for the plaintiffs.

The VICE-CHANCELLOR.—This is a motion to discharge or vary an order which I made on the 14th March last, which has not yet been drawn up, but that motion was made on the application of Joseph Preston Nutter, Mary Ann Turner, and others, the plaintiffs, against W. T. Holland, that the defendant might be ordered to pay into court a sum of 809*l.* 11*s.* 6*d.*, being part of the estate of Alice Nutter, deceased, and in the hands of the defendant in his character of trustee under the said will, and that the defendant be ordered to pay the costs of this application. When that motion came before me the defendant did not appear, and he had not apparently instructed any counsel to appear for him, nor had he filed any affidavit in answer to the motion. On the 14th March an order was made on the plaintiff's affidavit for the defendant to pay the whole of the 809*l.* subject to certain deductions, into court. At the same time the order went to this effect, that the defendant was to be at liberty to move to discharge or vary the order inasmuch as there had been some little change in the sittings of the court, and I was not quite satisfied that he knew of that change, or that he had an opportunity of being heard. He now applies to alter, or vary, or discharge that order, and the whole matter has now been thrashed out very thoroughly before me, and I have to

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

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decide what is to be done upon the motion. Now first of all, the question of the payment of money into court by a trustee rests upon one of two courses of procedure. The first is where there is an admission in the pleadings, or where there is an admission by the defendant that he holds the money. That is an old practice. It was well established in the Court of Chancery long before the Judicature Act, and in *Hollis* v. *Burton* (67 L. T. Rep. 146, 149; (1892) 3 Ch. 226, 235) Lindley, L.J. says that the practice in that respect is not varied by the Judicature Acts from what it was under the old practice. If you are moving against a trustee or an executor to compel him to pay money into court in an action, you must do so upon a clear and distinct admission by the defendant that he has that money in his hands. I do not know that I need go into the cases upon it, but the admission need not necessarily be in the pleadings. It may be even by letter, or may even be by the account of an accountant. There is no suggested admission here, and if it were put upon admission I think it would be very difficult to find in the papers in this motion such a clear admission by the defendant that I could order him to pay the money in under that practice. The other practice is regulated by the Rules of the Supreme Court, Order LV., r. 3, referring to originating summonses. In this court it is, of course, on originating motion for payment into court of any money in the hands of the executor or administrator, or trustee, and it is under a summons of that description that this application is made, and in considering whether the summons is right or not there are two decisions to which I may refer. One is the decision of the House of Lords in the case of *Dowse* v. *Gorton* (64 L. T. Rep. 809, 813; (1891) A. C. 190, 202), where Lord Macnaghten says: "I apprehend it would not be competent for an applicant on an originating summons to ask for or obtain otherwise than by consent an order founded on breach of trust or inquiries pointing to wilful default." The other is a decision of Kay, J. (now Kay, L.J.) in *Re Chapman*; *Fardell* v. *Chapman* (54 L. T. Rep. 13). There, under an originating summons which asked for administration of the estate as well as payment into court, the learned judge ordered the trustees to pay into court the sum of 7099*l.* 12*s.* 3*d.*, part of the estate improperly used by them. Now I do not know whether it is possible to reconcile these two decisions. If it is not, then of course the decision of the House of Lords is the more binding decision upon me, and what Lord Macnaghten says seems to me to be perfectly good sense, and also to be in accordance with the exact words of the order, which provides that the court may order that payment into court should be made of any money in the hands of the executor or administrator, or trustee. If, therefore, you have a case in which it is distinctly proved that money is in the hands of an executor, administrator, or trustee, there is jurisdiction for the court to order that the money be paid into court for its protection, to be dealt with, of course, according to the rights of the parties to the money when it has been so paid in. But I apprehend that the very foundation of such an order as that must be, that there is money actually in the hands of the trustee who is ordered to pay it in, and it does not seem to me to be enough to prove that there was money once in his hands and to say, "You have received that money, you are not justified in doing that, and we accordingly ask the court to order you to pay that money into court now, and to decide upon this motion that you have not been discharged from the receipt of those moneys by those various investments which you say you have made." I think the order points entirely to a different state of things. It points to a state of things in which the cash which is asked shall be paid into court is actually in the hands of the trustee. Now in this case there can be little or no doubt but that the trustee once had this money in his hands. The residuary accounts which have been proved show that the estate consisted, among other things, of a considerable sum of consolidated stock in the London and North-Western Railway Company. It also appears from the defendant's depositions that those stocks were sold. He says: "Referring to the account furnished by Holland and Callis" (that is his late firm), "I say that 1189*l.* 13*s.* 8*d.* was realised by the sale of the railway shares, and the gross estate is 1342*l.*" And further on he says: "The estate" (that is the 929*l.* 11*s.* 6*d.*) "has never been in my hands. It has been under the control of Holland and Callis for a short time. As the investments were made they came under the control of Nutter and myself as trustees." Now that statement is certainly not accurate. The money I believe did come under his sole control at one time, but I cannot believe, after reading through all these depositions and all the affidavits, that the money is now in his hands in the sense in which it ought to be if I am to make an order for payment of the money into court. He is liable for it, as I have pointed out more than once during the argument, and unless he can discharge himself by proper investment or proper application of the money he will be ordered to pay the amount at the hearing of the action or when the accounts have been properly taken before the district registrar; but to say that he now has this money in his hands as trust money which he is liable to pay into court under that order, is a conclusion at which I cannot arrive after a most careful consideration of all the affidavits. It therefore seems to me that the plaintiffs by bringing this motion have attempted to adopt a procedure which is not really applicable to the present case. I think I shall be doing justice in the case by not giving either party any costs. I make no order on this motion, except to discharge the order made on the 14th March last.

From this decision the plaintiffs appealed.

Hopkinson, Q.C. and *T. E. Mansfield* for the appellants.—The defendant by his account has admitted that he has had this money in his hands. He has not shown that it has been properly invested, and he can be ordered to pay it into court. It is not necessary to show that he has it in his hands now. It would be no answer for a person in his position to say he has spent it:

Re Chapman; *Fardell* v. *Chapman*, 54 L. T. Rep. 13.

The Vice-Chancellor relied on a statement of Lord Macnaghten in *Dowse* v. *Gorton* (64 L. T. Rep. 809, 813; (1891) A. C. 190, 202) where he said that it would not be competent to obtain on an originating summons, otherwise than by consent, an order founded on a breach of trust or inquiries pointing to wilful default. The present summons is correct in form, as the plaintiff only asks that

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the defendant may be ordered to pay into court money which he has admitted is in his hands, and of which he has not discharged himself. The plaintiff does not ask for an account, as the defendant has already rendered one. The first time he set up any investment of the money was after this summons was served on him, and the plaintiff says that the mortgage on which 350*l.* is alleged to have been invested is a bogus one. But, if the defendant wishes it, this application should be treated as a summons under rule 4 of Order LV., and an account ordered to be taken of the trust estate.

Whinney (*Cosens-Hardy*, Q.C. with him) for the defendant.—The residuary account was made out merely to show what was due to the beneficiaries who were entitled to immediate payment. There is now a dispute between the plaintiffs and defendant over items, and therefore no order can be made on this summons, as it is taken out under the wrong rule. The defendant ought not to be ordered to pay any money into court until an account has been taken, as it is not shown that there is now any of the money in his hands. The defendant is content to have an account of the trust estate taken now at his risk as to costs.

Mansfield contended that, on the facts, it was unnecessary to have any fresh account taken.

Lindley, L.J.—This is an appeal from a decision of the Vice-Chancellor on a motion asking that the defendant might be ordered to pay into court the sum of 809*l.* 11*s.* 6*d.* with interest which was in his hands as trustee under a will. That notice of motion proceeds on the assumption that there is money in the hands of the defendant, and is based on the rule of the Palatine Court which corresponds to Order LV., r. 3 (*d*) of the Rules of the Supreme Court. I think that rule means what it says. An order under that rule can only be made when the money is actually in the hands of the executor, administrator, or trustee, and if the money is not in his hands, though he is responsible for it, that rule does not apply. I think Kay, J. went too far in the case of *Re Chapman*; *Fardell* v. *Chapman* (*ubi sup.*), in holding that the rule extended to money improperly applied by a trustee. That rule applies to a case where executors or trustees have money in their hands of which they wish to get rid, or a *cestui que trust* may want money paid into court for its protection. That rule does not apply where the money is not in the hands of the trustee, though he ought to have it. Therefore I think the Vice-Chancellor was right in making no order on this motion. What I think he might have done and what we ought now to do, is this: If an application were made under the rule of the Palatine Court which corresponds to Order LV., r. 4 (*c*) for the administration of the trust, and the plaintiff on taking out the summons waived the taking of the accounts, the accounts having already been sent in by the trustee, the result would be a finding, not that the trustee has money in is hands, but that he is to be charged with money found due from him on his own account. Therefore we propose to treat this as though it was an application for the administration of the trust, and the defendant insisting upon an account being taken, we think that the matter ought to be referred back to the Vice-Chancellor, in order that an account may be taken, and we make an order for the administration of the trust. That order must be at the request and at the risk of the defendant, and the costs of the proceedings, including this appeal, will be reserved to be dealt with by the Vice-Chancellor. If the defendant's allegation as to this mortgage for 350*l.* turns out to be all moonshine, I think the defendant ought to pay the costs. But we leave the costs to the discretion of the Vice-Chancellor.

Lopes, L.J.—I am of the same opinion, and think the order stated by Lindley, L.J. is the proper way to deal with this case. Though I have no great belief in the defendant's story, yet I cannot say there are no facts in dispute in the case. In *Re Powers*; *Lindsell* v. *Phillips* (53 L. T. Rep. 647, 649; 30 Ch. Div. 291, 296) Lindley, L.J. said, referring to Order LV., r. 3 (*d*), that a summons is not the proper way of trying a disputed debt where the dispute turns on questions of fact." The only other matter is as to the proper construction of Order LV., r. 3 (*d*). I entirely agree that the rule means what it says, and that it is confined to cases where the money is actually in the hands of the executors, administrators, or trustees. In *Re Chapman*; *Fardell* v. *Chapman* (*ubi sup.*), Kay, J. seems to have thought that an order might be made under the rule where money had been improperly applied by the trustees of a will. I think that is a construction which the rule will not bear, and that the learned judge went too far in that case.

Davey, L.J.—I agree. The case turns on the true construction of Order LV., r. 3 (*d*), which I understand is identical with the corresponding rule of the Palatine Court on which this motion is based. I agree the rule means what it says, and that before payment into court is ordered under it, it must be shown that the executor, administrator, or trustee has money belonging to the trust actually in his hands. It does not include money which may or may not be ultimately found due from him as the result of an investigation. I also agree that this application is wrong in form. The summons should have asked for the administration of the trust, and then, if an account was waived by the plaintiffs and the defendant did not insist on an account being taken, the court might proceed to do what it would do in an ordinary case after the account had been taken, namely, direct payment of the balance found due on the accounts of the defendant. But I think that the plaintiffs should be put in the same position as if they had proceeded in that way. This summons asks for such further order as may seem just, and the rule enables us to make an order which the circumstances of the case require. I understand that the plaintiffs are not only willing but are desirous of waiving any further account, and are content to charge the defendant on the footing of the account which he has rendered, but that the defendant is not willing to agree to that, but asks that an account may be taken of the trust estate. He is entitled to it if he asks for it. It is said that there is no account to take, but it is clear there is a dispute between the parties. I agree that the account must be taken at the request and at the risk as to costs of the defendant. It must be taken upon the footing of the account rendered in 1886; that is to say, starting with that account, and then the defendant will show, if he can, that the cash

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in hand on that account is now represented by investments.

Solicitor for the plaintiffs, *Chester* and *Co.*, agents for *James Craven*, Preston.

Solicitors for the defendant, *F. A. K. Doyle*, agent for *R. J. N. Parker*, Blackburn.

July 25 *and Aug.* 8.

(Before the LORD CHANCELLOR (Herschell), LINDLEY and DAVEY, L.JJ.)

Re SMITH; SMITH *v.* LANCASTER. (a)

APPEAL FROM THE CHANCERY DIVISION.

Settled land—Sale by tenant for life—Several persons constituting tenant for life—Separate solicitors — Costs — Settled Land Act 1882 (45 & 46 *Vict. c.* 38), *s.* 2, *sub-sect.* 6; *s.* 21, *sub-sect.* 10; *sect.* 53.

On a sale of settled land by several persons constituting the tenant for life under the Settled Land Act 1882, *they are entitled out of the proceeds to the costs of separate solicitors employed by them to peruse the conveyances on their behalf.*

Decision of Kekewich, J. (70 *L. T. Rep.* 871) *reversed.*

A SETTLED estate was sold under the provisions of the Settled Land Act 1882, there being twenty-five persons who together constituted the tenant for life. By arrangement between these parties the conduct of the sale was given to Mr. Fowle, as solicitor for them all, and the conditions of sale stated that he was the vendors' solicitor. The sales were six in number, and realised 2470*l.* Mr. Fowle completed the sale on behalf of twenty-one of the vendors, but the other four employed their own solicitors to peruse, approve, and obtain the execution of the conveyances on their behalf.

The question then arose whether the costs of the solicitors of these four vendors could be allowed out of the proceeds of the sale, and a summons was taken out by the trustees under the Settled Land Act 1882 to have the matter determined.

Kekewich, J. held (70 L. T. Rep. 871) that only one set of costs could be allowed, viz., the costs of Mr. Fowle.

The parties who had employed separate solicitors appealed.

H. Terrell for the appellants.—There is nothing in the Settled Land Acts which compels all the persons who constitute the tenant for life to employ the same solicitor, and the appellants were entitled to employ their own solicitors to peruse on their behalf the conveyances which they were about to execute:

Humphreys v. *Jones*, 53 L. T. Rep. 482; 31 Ch. Div. 30.

Mr. Fowle was employed by them to conduct the sale only, and his authority did not extend to perusing the conveyances on their behalf. These are expenses within sect. 21, sub-sect. 10, of the Settled Land Act 1882.

George Williamson for the other vendors.—The appellants agreed that Mr. Fowle should act as their solicitor in the conduct of the sale, and he signed the contracts on their behalf, and they cannot now say he did not represent them. He is entitled to the scale fee, which includes his costs of perusing these conveyances on behalf of the appellants as well as the other vendors. Therefore, if the appellants are correct, these costs will come out of the proceeds of the sale twice over. These vendors must under sect. 53 of the Settled Land Act 1882 have regard to the interests of all parties, and they are in the position of trustees. All the vendors constitute one tenant for life: (Settled Land Act 1882, s. 2 (6.) Some of the appellants are mortgagees and incumbrancers, and therefore they are not entitled to be allowed any costs:

Cardigan v. *Curzon Howe*, 60 L. T. Rep. 723; 41 Ch. Div. 375.

Fawcus for the trustees.

Terrell in reply.—Mr. Fowle will not be entitled to the scale fee, as he has not perused the conveyances on behalf of all the vendors.

Cur. adv. vult.

Aug. 8.—The LORD CHANCELLOR.—At the time of the sale of this settled estate there were twenty-five persons who under sub-sect. 6 of sect. 2 of the Settled Land Act 1882 together constituted the tenant for life for the purposes of that Act. These twenty-five persons had therefore all the powers which are conferred upon a tenant for life by that Act. By arrangement between these parties, Mr. Fowle, a solicitor, was given the conduct of the sale. He conducted the sale, and the conditions of sale stated that he was the vendors' solicitor. After the sale had taken place Mr. Fowle, on behalf of twenty-one of the vendors, completed the sale, perusing the conveyance on their behalf, and seeing to the completion. The other four vendors employed their own solicitors, not in any way to interfere with the conduct of the sale, but subsequently to the sale to peruse on their behalf the conveyance which they had to execute, and to obtain the completion of the purchase. The question is, whether the costs thus incurred by these four persons who, together with the other twenty-one, constituted the tenant for life, are to be allowed out of the purchase money. The learned judge has allowed only one set of costs, viz., the costs incurred by Mr. Fowle, the solicitor who, as I have said, had the conduct of the sale. It is contended, on behalf of the appellants, the four vendors who employed separate solicitors, that they were entitled to employ their own solicitors if they so pleased, to peruse on their behalf the conveyance which they had to execute; that there was nothing to compel all the tenants for life to employ for this purpose a common solicitor, and that, as a matter of fact, the employment of Mr. Fowle to conduct the sale did not extend so as to authorise him to peruse the conveyance on behalf of the whole of the vendors. By the General Order made under the Solicitors' Remuneration Act, which was relied on by the respondents, a scale fee is fixed for payment to the vendor's solicitor "for conducting a sale of property by public auction, including the conditions of sale," and by the same order a further fee is fixed as a payment to be made to the vendor's solicitor "for deducing title to freehold, copyhold, or leasehold property, and perusing and completing conveyance." It was contended that those fees would cover all that

(a) Reported by W. C. BISS, Esq., Barrister-at-Law.

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was done after the sale in the present case for all the parties. But, if there were any part of the work of perusing the conveyance, &c., which was not performed by Mr. Fowle, and which he had not been authorised by some of the vendors to perform, it is obvious that in respect of that part he could not make the scale charge, because to that extent he would not have perused or completed the conveyance, and therefore would not have brought the case within the words which I have just read. It is clear from the information which we have obtained that these four vendors did not authorise Mr. Fowle to do anything beyond conduct the sale on their behalf, and the question is, whether there is anything to disentitle them from employing their own solicitors to peruse the conveyance on their behalf, and from being allowed out of the proceeds of sale the costs of their so doing. In my opinion there is not. I think there was no more obligation upon them to employ Mr. Fowle than there was an obligation on the part of the other twenty-one vendors to employ the solicitors whom the four selected. Of course it may be a very reasonable and a very desirable thing that all the parties in such a case should agree upon a common solicitor; but, if they do not, how is the matter to be decided? Is the common solicitor to be the solicitor selected by the majority of the vendors? Where is there any power conferred upon a majority to bind the minority in such a matter? Certainly there is no such power to be found in the statute, and therefore it rests with those who impeach the action of the appellants in employing their own solicitor to do this work, to show something which prevents their being entitled so to employ their own solicitors, and to have the costs of that employment. The only clause in the Act, I think, which was relied on as showing that they were not entitled to do this is sect. 53, which says that "a tenant for life shall, in exercising any power under this Act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties." I do not think that that section has any application to such a question as that with which we have now to deal. Of course it was quite right to insist that when such a power as this is given to a person having only a limited estate, he should in the exercise of the power not have regard to his own interests only, but should have regard also to the interests of all the other persons who would be affected by his acts. But that section does not, as it seems to me, affect the right of anyone who takes part in a sale of this description, and whose interests and rights are in a sense independent of those of the other vendors, to protect himself, if he so thinks fit, by having the conveyance which he is to execute perused on his behalf by his own solicitor rather than by a solicitor employed by the other vendors. For these reasons I think the appeal should be allowed.

LINDLEY, L.J.—I am of the same opinion. When the case was argued before us a few days ago I rather gathered from the statement of facts which was laid before the court by the trustees that the appellants might have agreed to employ Mr. Fowle to carry the whole business through on their behalf, and that in afterwards changing their solicitor they were acting contrary to good faith. But, having since read the correspondence, a copy of which has been furnished to us, I am satisfied that there was no foundation for my doubt, and that the appellants never did agree to anything except that Mr. Fowle should conduct the sale for them, and that as to the rest of the business they entered into no agreement at all. Under these circumstances I cannot see any principle or rule of law which says that twenty-five persons who are together exercising the power of a tenant for life must all combine and employ one solicitor. I am not aware of any authority for so holding, there having been no agreement by the appellants that they should do so.

DAVEY, L.J.—I agree.

Solicitors: *Andrew Wood* and *Co.*, agents for *C. Waistell*, Northallerton; *Williamson, Hill*, and *Co.*, agents for *Fowle* and *Horsfall*, Northallerton.

Thursday, Aug. 9.

(Before LINDLEY, LOPES, and DAVEY, L.JJ.)

SOMERSET v. LAND SECURITIES COMPANY LIMITED. (a)

APPEAL FROM THE CHANCERY DIVISION.

Company—Winding-up—Deposit of securities in Land Registry — Debenture-holder's action—Receiver—Order on Registrar to deliver up securities to receiver—Mortgage Debenture Act 1865 (28 *&* 29 *Vict. c.* 78), *ss.* 9, 10, 41, 45, 46—*Mortgage Debenture* (*Amendment*) *Act* 1870 (33 *&* 34 *Vict. c.* 20), *ss.* 8, 9.

The Court has on implied power, under sect. 46 *of the Mortgage Debenture Act* 1865, *to order the Registrar of the Land Registry to hand over en bloc to a receiver in a debenture-holder's action, the securities deposited with him under the Mortgage Debenture Acts* 1865 *and* 1870 *upon which the debentures are charged.*

Decision of Wright, J. reversed.

THE Land Securities Company Limited was incorporated under the Companies Act 1862 on the 22nd Dec. 1863. Its business was (*inter alia*) to make advances of money repayable with interest upon the security of messuages, lands, and hereditaments, and real property of all descriptions and tenures, and all estates and interests therein. The nominal capital of the company was 2,000,000*l.* divided into 40,000 shares of 50*l.* each. In the course of carrying on its business the company had lent money on securities authorised by its memorandum of association, and had issued mortgage debentures to secure money borrowed by it under the authority of the Mortgage Debenture Acts 1865 and 1870, and had deposited the securities upon which such mortgage debentures were founded in the office of the Land Registry as provided by those Acts.

On the 28th March 1894 the plaintiff, who was a debenture-holder, commenced the present action on behalf of himself and all the other debenture-holders for the realisation of their securities, and on the 30th March 1894 Edwin Waterhouse was appointed the receiver in the action.

On the 10th April 1894 the company passed an extraordinary resolution to wind-up voluntarily and appointing Waterhouse liquidator. On the

(a) Reported by W. IVIMEY COOK and W. C. BISS, Esqrs., Barristers-at-Law

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3rd May 1894 an order was made continuing the voluntary winding-up under the supervision of the court.

This was a summons taken out by the plaintiff in the action asking that the Registrar of the Land Registry might be ordered to deliver up to the receiver all deeds and documents in the possession of the registrar by virtue of the Mortgage Debenture Acts 1865 and 1870.

On the hearing it was admitted that a receiver ought to have been appointed under the provisions of the Acts before the application could be properly made, but it was agreed that the matter should be treated as if he had been so appointed.

The Mortgage Debenture Act 1865 (hereinafter referred to as the principal Act), which was subsequently amended by the Mortgage Debenture (Amendment) Act 1870, was passed to enable companies to issue mortgage debentures founded on securities upon, or affecting, land, and to make provision for the registration of such mortgage debentures and securities. The provisions of the Acts, so far as they are material for the purposes of the present report, may be shortly summarised as follows:—The powers conferred by the principal Act may be exercised by all such companies incorporated and carrying on business under the Companies Act 1862, or under any Act of Parliament, as may be entitled to advance money on the security of land (sect. 2). Subject to the provisions and restrictions of the Act a company may from time to time borrow money upon mortgage debentures, to be issued by it under the Act (sect. 4). The securities upon, and in respect of which, such mortgage debentures may be founded and issued under the security of the principal Act are (*inter alia*) lands, messuages, hereditaments; or real property, or some estate therein (sect. 4 of the Act of 1870). The securities on which the company wishes to issue debentures must be produced to the office of Land Registry under 25 & 26 Vict. c. 53 for registration (sect. 6 of the principal Act), for which purpose a register of securities is established (sect. 7). On deposit of the securities with the registrar, the registrar may register the deeds (sect. 8), a schedule of which should be delivered to the registrar at the time of deposit, and the deeds so deposited are to be retained by him "until withdrawn as hereinafter provided" (sect. 10). The debentures issued must not exceed the amount of the registered securities, nor ten times the amount of the uncalled capital of the company (sect. 11). The holders of mortgage debentures are to be entitled to the benefit of the registered securities *pari passu* (sect. 15). A register of mortgage debentures of each company is to be kept at the Land Registry Office (sect. 32), in which the mortgage debentures are to be registered (sect. 33). Any person for the time being entitled to any mortgage debenture is empowered from time to time to enforce the payment of arrears of interest and principal (as the case may be) due on such mortgage debenture, by procuring the appointment of a receiver (sect. 41) on application by petition or summons (sect. 44). The court is empowered to remove a receiver, and to appoint another in his stead, and to make such orders and give such directions as to the powers and duties of the receiver and otherwise as to the moneys received by him as may be thought fit (sect. 45).

The Act of 1870 provides that the registered securities are to be charged with the payment of the principal and interest due on the debentures, and are not to be applicable for any other purpose until discharged, as provided by the Act (sect. 7). The Act contains provisions for the redemption and discharge of the registered securities (sects. 8 and 9), for the inspection of the registers and returns (sect. 11), and as to the form of mortgage debenture. Neither of the Acts, however, contain any express provision as to the manner in which such securities, deeds, and documents are to be dealt with in the case of a company, availing itself of the Acts, being wound-up.

The summons was heard by Wright, J. (sitting as an additional judge of the Chancery Division) on June 28.

Farwell, Q.C. and *Kirby* for the applicant.

Ingle Joyce for the registrar.—I take the preliminary objection that the court has no jurisdiction to make the order asked for. The registrar being an officer of the court, with statutory duties to perform, the application should be by way of *mandamus*, if he fails to discharge those duties.

Farwell, Q.C. and *Kirby*.—The receiver in the action is about to sell the property of the company, and to enable him to do so it is necessary that the deeds should be handed over to him *en bloc*. Sect. 41 of the Act of 1865 enables a debenture-holder to enforce payment of his debentures by the appointment of a receiver. [WRIGHT, J.—I doubt if any receiver other than one appointed under the Act is intended by that section.] We submit that the applicant comes within sect. 46, and that the court has an implied power to make the order. There is nothing in the Act to authorise the registrar to retain the deeds as against the mortgage debenture-holders, and nothing is to be gained by allowing them to remain in his hands. They will be just as safe in the hands of the receiver. They also referred to sects. 7, 9, 10 of the Act of 1870.

Rowden, for the receiver and liquidator, supported the application.

Ingle Joyce.—The registrar merely desires to discharge his duty. Under the Acts the deeds and documents are to remain in his custody until they are withdrawn as therein provided, or until the happening of certain events which have not happened in this case. Further, if the court has jurisdiction to order the registrar to hand over the deeds and documents, it ought not to order them to be handed over *en bloc*, but only as they are from time to time required for the purpose of realising the securities.

Farwell, Q.C. replied.

WRIGHT, J.—I think that there must be power for the court to direct the registrar to hand over the deeds, when such handing over is necessary for carrying out the purposes of the Acts. Sect. 46 of the Act of 1865 certainly contemplates circumstances which would require the handing over of the securities in the hands of the registrar. But, on the other hand, I cannot read into the Act by implication more than is necessary for carrying out the purposes of the Act. The question is, is it necessary for carrying out the purposes of the Act that all the deeds should be handed over *en bloc?* It is said that it is, and for two reasons: first, on account of the debenture-holder's action;

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and, secondly, on account of the liquidation. There is nothing in either of the Acts which gives me any assistance at all, but it seems to me that it is much more convenient and more desirable that, when all the affairs of the company are to be dealt with, one order should be made at once to save expense, rather than that I should wait to see what orders may from time to time be required. I think, therefore, that I ought to make the order asked for; but, if any safeguards can be suggested, such as bringing the documents into court, I am willing that they should be adopted. The registrar will not incur any liability or risk for anything done by him as registrar and in good faith under the order of the court, if the court has jurisdiction to make the order, or even if it has not jurisdiction. In either case the registrar will will be protected.

From this decision the Registrar of the Land Registry appealed.

Lindley, L.J.—I do not see how we can affirm the order made by Wright, J. The real difficulty arises from this, that the Land Registry is a public office, and the registrar of the Land Registry is a public officer, and sect. 10 of the Act of 1865, which has not been repealed, provides: "There shall also be delivered with the beforementioned deeds or instruments a schedule, under the hand of the secretary or one of the directors of the company, of the deeds and documents which were delivered to the company at the time when the security was executed to them, which deeds or documents shall be deposited with the registrar, to be retained by him until withdrawn as hereinafter provided." Then what power has this court, or any other court, to direct the registrar to deliver up these deeds unless they are "withdrawn as hereinafter provided." I think it would probably be right in principle, that, after referring to the purposes of the Act and finding that all the purposes for which these securities are deposited have been satisfied, and that there is no purpose for which they can be retained, a necessary implication may arise that they ought to go back to those who own them. That is possible, but we are far short of that here; we have not arrived at any such stage, and nothing like it. We are asked, because there is a debenture-holder's action and a winding-up, and a gentleman has been appointed receiver in the debenture-holder's action and liquidator in the winding-up, to say that he is the proper person to have all these deeds and documents, and not the public official appointed by statute. It may be convenient, or it may not, but there is no necessary implication, nor anything like a necessary implication, to the effect that this deposit has answered all the purposes contemplated by the Act. I think the order must be discharged.

Lopes, L.J.—I am of the same opinion. I see no way of getting over the words of sect. 10 of the Act of 1865, which provides for the documents being retained "until withdrawn as hereinafter provided;" and I see in sect. 8 of the Act of 1870, which refers to proceedings on redemption of securities, it is provided how, in the case of redemption, the deeds are to be redelivered. It provides that, if the company shall be desirous of freeing and discharging any registered security, the company "may at any time make application to the registrar for the purpose of having such respective security freed and discharged from the charge of the mortgage debentures issued by the company, and upon its being made to appear to his satisfaction that the aggregate of the principal sums secured by all the mortgage debentures of the company then outstanding does not exceed the total amount (to be ascertained in the manner provided by the principal Act) of the registered securities of the company at the time being, exclusive of that proposed to be discharged, he shall allow the same to be so freed and discharged and shall cause an entry to be made in the register of securities of the said security being discharged, and shall on request redeliver to the company the several deeds or instruments to which such security relates, and which were delivered to the registrar for registration under the provisions in that behalf contained in the principal Act, and such entry shall be conclusive evidence of such discharge." Therefore the Legislature seems clearly to have indicated there the case in which the deeds are to be redelivered. I can see no way of getting over the latter part of sect. 10 of the Act of 1865.

Davey, L.J.—I am of the same opinion. Mr. Joyce, in opening this case, very properly said that he raised no question of form, and if in any form of proceeding the order now under appeal could be made his clients did not object to the order. But I am of opinion that there is no form of proceeding under which this order could be made. The registrar is a public officer and has public duties, and the only jurisdiction the court would have over him would be to enforce either by *mandamus* or otherwise the performance by him of that which it was his duty to do. Now, I ask, reading this Act, where is the duty in the registrar to hand over these securities to the receiver? I do not understand that, either in the receiver's affidavit or in Mr. Farwell's argument it was put forward that there was any such duty by the registrar. At the highest I think what is said in the affidavit, or what Mr. Farwell said in argument, comes to this: that it would be extremely convenient, and that it is usual in cases like this, where there is not such an Act of Parliament, and the documents are not intrusted to a public officer, to hand over such public documents to the receiver. Now, the Act is very peculiarly framed, because those who framed it had never contemplated the possibility of the company being wound-up. They had not even, I gather, contemplated the possibility of a mortgagee desiring or finding it necessary to realise his security by exercising his power of sale, and accordingly there are no express provisions in the Act relating to such a state of circumstances. I think that, inasmuch as the existence of that very ordinary and well-known state of circumstances must conceivably have been within the contemplation of the Legislature, whatever can be found by necessary implication (and I use the words deliberately) to apply to such a case ought to be applied to it, although it is not expressed in the Act. In sect. 46 of the Act of 1865, for example, although it does not in terms contemplate the realisation of the security by sale, I think it must be taken that the receiver might realise his security by the exercise of the power of sale, and in that event, I think, although there is no express provision for it, it necessarily follows from the provisions of the Act that deeds which would no longer be the deeds of the com-

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pany or of the mortgagor, but have become by exercise of the power of sale the property of the purchaser, ought to be delivered up to the purchaser, and I should have no difficulty in making an order on the registrar to deliver up the deeds relating to a property which has been sold under the exercise of a power of sale to the purchaser from the company. But I am not at all disposed to imply any powers or any directions in the Act for delivery up of the deeds where the implication of such powers or directions is not necessary for effecting the purpose of the Act; and Mr. Farwell wholly failed to satisfy me that the delivery of these deeds was necessary for the purpose of enabling the receiver or liquidator, or whoever the officer may be, to realise these securities which are held by the company. On the contrary, I can see a great convenience in securities of this nature remaining in the custody of a public officer in a safe place, and in my opinion the security of the debenture-holders—which was the primary cause and must be conceived to be the principal object of the Legislature in directing these deeds to be deposited with the registrar—the protection of the debenture-holders is still required, and just as much required, after the winding-up as before the winding-up until the securities are realised or the debenture-holders are paid off. It may, as Mr. Farwell suggests, occasion some additional expense, but I am quite satisfied we ought not to make this order unless we can find something in the Act which authorises and makes it the duty of the registrar to hand over the deeds in the way asked for.

Solicitors: *Ashurst, Morris,* and *Co.*; *R. C. Ponsonby*; *Solicitor to the Treasury.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

July 14 *and* 20.

(Before KEKEWICH, J.)

Re SHAW; BRIDGES *v.* SHAW. (*a*)

Practice—Probate action—Costs—Real estate—Insufficient personal estate—Administration—Jurisdiction.

An action was brought in the Probate Division propounding the will of H. Shaw, who died in 1893, the defendant—who disputed the will—being G. Shaw, his heir-at-law, and one of his next of kin. At the trial the President gave judgment establishing the will, and, upon the application of the defendant G. Shaw, directed his costs to be paid "out of the estate," but no order was made as to the plaintiffs' costs. The testator's estate consisted of real estate, of which part was specifically devised by his will, and part was undisposed of, and so devolved upon the defendant G. Shaw as heir-at-law. The personal estate was of small value. In an action for the administration of the testator's estate:

Held, that the President of the Probate Division, in directing costs to be paid out of "the estate," meant personal estate over which the court had control, and that under the circumstances a judge of the Chancery Division had no jurisdiction, and ought not to order the costs of the probate action to be paid out of the real estate either descended or specifically devised.

(*a*) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

ON the 7th Jan. 1893 Henry Shaw died, leaving his brother George Shaw his heir-at-law and one of his next of kin.

George Shaw, believing that Henry Shaw had died intestate, applied for letters of administration to his estate, which were granted to him on the 21st Feb. 1893.

On the 27th Feb. 1893 the action of *Purser* v. *Shaw* was brought in the Probate Division by the executor and beneficiaries for the purpose of having probate of a will, alleged to have been made by Henry Shaw in 1881, granted to Purser, the executor of the will, and to have the administration granted to George Shaw revoked. By this will Henry Shaw specifically devised two freehold houses, and bequeathed certain furniture and other personal estate, but made no residuary gift. A plot of freehold building land was also undisposed of by the will, and passed to George Shaw as heir-at-law.

George Shaw was cited in the probate action as heir-at-law, and as defendant disputed the validity of the will.

On the 30th Oct. 1893 judgment was given in the probate action establishing the will and revoking the administration granted to George Shaw. The President, on the application of George Shaw, directed his costs to be paid "out of the estate," but gave no direction as to the plaintiffs' costs.

On the 5th Dec. 1893 probate of the will was granted to Purser; and on the 23rd Dec. 1893 this action was brought by a Mrs. Bridges, one of the specific devisees and other beneficiaries, against George Shaw and the executor, Purser, for administration of the testator's real and personal estate. A receiver had been appointed in the probate action. The testator's personal estate was found to be insufficient for the payment of the costs of the several parties to the probate and administration action, or of the remuneration of the receiver, and this summons was taken out in the administration action by Mrs. Bridges against George Shaw and the mortgagee of his share in the testator's estate, and also against certain infants interested as specific devisees under the will, asking, among other things, that the costs of all parties in the probate action, and also the costs of all parties in the administration action, might be declared to be payable, and might be directed to be paid, out of the testator's real estate which had descended to George Shaw in priority to the real estate specifically devised.

Marten, Q.C. and *Bardswell* for the summons.—An executor can get costs out of real estate:

Smith v. *Hopkinson*, 39 L. T. Rep. 124; 4 P. Div. 84;
Re Price; Williams v. *Jenkins*, 54 L. T. Rep. 416; 31 Ch. Div. 485;
Charter v. *Charter*, 34 L. T. Rep. 412; 3 Ch. Div. 218;
Young v. *Dendy*, 1 P. & D. 344;
Re Pearce; *McLean* v. *Smith*, 56 L. T. Rep. 228; 35 W. R. 358;
Maddison v. *Pye*, 32 Beav. 658;
Scott v. *Cumberland*, 31 L. T. Rep. 26; 18 Eq. 578;
Gowan v. *Broughton*, 31 L. T. Rep. 533; 19 Eq. 77.

Although the Probate Court has no power to order costs out of real estate, we have a right to

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come to the Chancery Division, as the decision was for the benefit of the real as well as of the personal estate: (Coote & Tristram's Prob. Practice, 10th edit., p. 501.) The personal estate is quite insufficient:

Rowsell v. *Morris*, 29 L. T. Rep. 446; 17 Eq. 20; *Re Morgan; Hill* v. *Williams*, W. N. 1890, p. 125.

Tanner for the executor.

Warmington, Q.C. and *S. B. L. Druce*, for the heir-at-law, and for W. S. Cottrell, his mortgagee, were not called on.

Renshaw, Q.C. and *Charles Browne* for infants interested as specific devisees under the will.

KEKEWICH, J.—In this case there is a variety of real estate, namely, specifically devised real estate and descended real estate. The will of the testator was only admitted to probate after the hearing of an action in the Probate Division, to which the executor was a party. Nothing was said in the order about his costs, but it did contain a direction that the defendant, who had been cited to appear as heir-at-law, should be paid his costs out of the estate, leaving the other costs to be provided for in the due course of administration. I suppose this course was adopted because, unless the Probate Division has done that, the unsuccessful party would not have been allowed costs at all. Although it is not absolutely necessary to say what that direction means, it seems to me clearly beyond dispute that "the estate" means personal estate over which the court has control. Without going back to ancient history, we know that the Probate Division, like the court from which it sprang, cannot deal with real estate, but can deal with personal estate only. In granting probate of a will or letters of administration the Probate Division gives authority touching personal estate only; although I do not forget that a will is useful as regards real estate. It was always admitted by conveyancers as a document of title. It always had considerable effect given to it in the Court of Chancery unless disputed or challenged. But when it came to a question of a legal devise, the probate was not evidence until the Probate Act 1857, which by sect. 64 provided that the probate or an office copy should be admitted as evidence unless contested. Subject to that and to some like legislation, as the extension of power to appoint a receiver, the Probate Division, like the court from which it sprang, had no jurisdiction over real estate. It has been held by Lord Penzance, in *Young* v. *Dendy* (1 Prob. Div. 344), that the Court of Probate had no jurisdiction to order payment of costs out of the real estate. That has been settled and acted on in several cases, and has never been departed from. In opposition to this the counsel for the executor asked me to accept their reading of the words of the judgment of the Court of Appeal in *Re Morgan* (W. N. 1890, p. 125). I cannot think the Lords Justices intended to leave it open. I have ascertained from Sir Francis Jeune that no change has taken place in the practice of the Probate Court. The result is, that when the Probate Division directs costs to be paid out of the estate, it means out of the personal estate. Then, having failed so far, the counsel for the executor say, that in an administration action it is right to order the costs of the probate action to be paid out of the estate generally, with a view to having them thrown upon the real estate eventually. I can conceive cases in which it would be quite right to pay the costs of contesting a will out of the real estate in an administration action, as when, subsequently to the period when the Chancery Division had full seisin of the administration, either the executor acting under the authority of the court, or without the authority of the court, but with proper advice and proper circumspection, took proceedings for the benefit of the whole estate. I think the matter is one of discretion in every particular case, and I am not willing to exercise it here. It would be extremely wrong to lay down the rule that, where a will has been contested, the costs which the personal estate is insufficient to pay should come out of the real estate. A will is perfectly good if it devises real estate, and the contest need not have been what it was in the Probate Division. Very likely the costs of the contest were increased by referring to the real estate. I daresay the contest was *bonâ fide*, but I cannot say whether the executor incurred all these costs beneficially, or whether advisedly or otherwise. I am unwilling now to shut him out from obtaining them. I say that, under the circumstances, the court has no jurisdiction, and ought not to order the costs of the probate action to be paid out of the real estate, whether descended or specifically devised. There are no such special circumstances here to justify such an order, and the costs of the executor in the probate action must fall on the personal estate alone.

Solicitors: *Letts Brothers*, for *Philip Baker*, Birmingham; *Gamlen* and *Burdett*, for *Baker, Lee*, and *Co.*, and for *W. S. Cottrell*, Birmingham.

Wednesday, Aug. 8.

(Before KEKEWICH, J.)

Re SHEPHERD; CHURCHILL *v.* ST. GEORGE'S HOSPITAL. (*a*)

Will—Gift of New Three per Cent. Annuities—Codicil—Gift of 2¾ per Cent. New Consols—Specific gift—National Debt (Conversion) Act 1888 (51 *Vict. c.* 2), *s.* 25, *sub-sect.* 2.

A testator, by his will dated the 3rd *Oct.* 1887, *gave to trustees* 10,000*l. New Three per Cent. Bank Annuities upon trust to apply the dividends in certain payments to his wife, and after her death he directed the stock to be sold, and the proceeds to be divided between forty-six charities therein named, and he gave his residuary estate to his sister and her son equally. By a codicil, dated the* 28*th Feb.* 1891, *the testator, after reciting the above gift and that the said Bank Annuities had been converted into* 2¾ *per Cent. Consols, bequeathed to his trustees* 15,000*l.* 2¾ *per Cent. Consols then standing in his name, upon trust to apply the dividends in making the payments to his wife directed by his will, and he further directed that, in addition to those payments, his trustees should, out of such dividends, during the life of his wife, make further annual payments to the charities therein mentioned, and in all other respects confirmed his will. The testator's wife died in Jan.* 1892, *and the testator in March* 1894.

(*a*) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

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on summons:

Held, that the bequest to the charities by the will had not been revoked by the codicil; the gift was demonstrative, not specific, and therefore the latter part of sect. 25, sub-sect. 2 of the National Debt (Conversion) Act 1888 had no application; the case fell within the first branch of the sub-section, and there was a valid gift of 10,000l. 2¾ per Cent. New Consols in trust for the charities.

SUMMONS by the residuary legatees under the will of A. H. Shepherd against St. George's Hospital (as representing the several charities named by the testator) and the trustees and executors, to have it determined (1) whether a legacy of 10,000*l.* New Three per Cents. given by the will had failed by reason of the conversion; and (2) whether the charities had any and what interest in the 15,000*l.* 2¾ per Cent. New Consols bequeathed by a codicil.

Warmington, Q.C. and *Methold* for the plaintiffs.—There is no specific gift in the will, therefore there is no sum upon which sub-sect. 2 of sect. 25 of the National Debt (Conversion) Act 1888 could operate. There is no mention in the codicil of what is to happen to the 15,000*l.* 2¾ per Cent. Consols after the death of the wife. We submit, first, that the charities get nothing; in the alternative, that they get no more than 10,000*l.* 2¾ per Cent. Consols:

Duke of Northumberland v. *Percy*, 68 L. T. Rep. 45; (1893) 1 Ch. 298;

Lord Lovat v. *Duchess of Leeds*, 2 Dr. & Sm. 62.

Renshaw, Q.C. and *Vaughan Hawkins* for St. George's Hospital.—Our proposition is, that the charities are entitled to the 15,000*l.* 2¾ per Cent. Consols, which the testator has substituted for the 10,000*l.* Three per Cent. Bank Annuities. In any case we are entitled by force of the National Debt (Conversion) Act 1888 to 10,000*l.* 2¾ per Cent. Consols: see first part of sub-sect. 2 of sect. 25. The case of the *Duke of Northumberland* v. *Percy* is in our favour.

Henry Tindal Methold for the trustees.

KEKEWICH, J.—It is a rule of practical wisdom that a judge is not allowed to guess, and this codicil is an apt illustration of the wisdom of that rule. One might, without much difficulty, and with some confidence, guess in reading the codicil that the testator intended to increase his generosity, that he thought 10,000*l.* Three per Cents. were not very fairly represented by 10,000*l.* 2¾ per Cent., and it would be better to increase the amount. But then, if you read a little further, as Mr. Renshaw has pointed out, the amount may have been increased simply in order to provide for the increased payments thereout during the life of the wife; that may have been, not only the governing motive, but the only motive, and there may have been an intention on the testator's part not to give 15,000*l.*, but only still to give 10,000*l.* The answer is, one must not guess at all, and he has not said what is to happen to the 15,000*l* in words which I can in any way construe as a gift; that is to say, there is no gift at all. That being so, the question is, what happens to the gift under the will? I find no revocation of the gift under the will, certainly not as regards the charities, and it is immaterial to consider whether there is any revocation during the life of the wife. There is none as regards the charities, the ultimate gift. He recites it, and it looks very much as if he were leading up to something like revocation; but it is certainly not expressed, and I do not see that it is necessarily implied. Then the legacy standing, what is the meaning of it? It is a demonstrative legacy. A legacy of that character is not specific, though a very little change in the language would have made it a specific legacy, as probably it was intended to be. There again I must not guess. I must take the words as they are. He gave 10,000*l.* New Three per Cents., and there is no such thing now either standing in his name or in any other person's name, and the second branch of sub-sect. 2 of sect. 25 of the National Debt (Conversion) Act 1888 has no application because there is no specific bequest. I adopt North, J.'s explanation of that sub-section, which is to be found at page 303 of (1893) 1 Ch. I have no doubt that the provision in that branch of the sub-section was inserted to meet that particular case, but does not what I have here fall within the first branch of the same sub-section? "In any Act passed or instrument executed before the passing of this Act references to any stock," and so on; and why should not that refer to the will? The only possible argument against it is, that you have a testamentary disposition mentioned below, and that therefore the instrument mentioned in the first part cannot possibly refer to what is specifically dealt with in the second part. That would be a strong argument if all dispositions by will were mentioned in the second part, but they are not. What is dealt with there for the reasons mentioned by North, J. is a specific disposition by will; anything else must be presumed to have been intended to fall, as it does in language fall, under the general description of "any instrument" in the earlier part of the sub-section. The result is, that there is a good gift of 10,000*l.* 2¾ per Cent. Stock in trust for the charities. The costs of the application to come out of the residue.

Solicitors: *Pyke* and *Parrott*; *Palmer, Eland*, and *Nettleship*.

QUEEN'S BENCH DIVISION.

Monday, Aug. 3.

(Before MATHEW and KENNEDY, JJ.)

HUFFAM (app.) v. NORTH STAFFORDSHIRE RAILWAY COMPANY (resps.). (a)

Railway company—Bye-law—Invalidity of bye-law—Passenger travelling with a ticket on the day on which ticket was not available—No intention to defraud—Penalty provided by bye-law—Railways Clauses Consolidation Act 1845 (8 & 9 *Vict. c.* 20), *ss.* 103, 104, 108, *and* 109—*Regulation of Railways Act* 1889—*Statute Law Revision Act* 1892.

The bye-law of a railway company provided that, "any passenger using, or attempting to use, a ticket on any day for which such ticket is not available, or using a ticket which has been already used on a previous journey, is hereby subjected to a penalty not exceeding forty shillings."

No fraud, or attempt to commit fraud, was alleged or suggested against the appellant. The

(a) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

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justices convicted the appellant under the above bye-law.

Held, that the above bye-law, being repugnant to sect. 5 of the Regulation of Railways Act 1886, is an invalid one, and the conviction therefore must be quashed.

CASE stated by justices.

At a court of summary jurisdiction held at Hanley, the appellant was charged, on an information preferred by the North Staffordshire Railway Company (hereinafter called the respondents), for that he on the 15th March 1894, at Stoke-upon-Trent, did unlawfully use a certain railway ticket on a day for which such ticket was not available, contrary to the bye-laws of the said company made in pursuance of the provisions of the statute in such case made and provided.

The bye-law relied upon was in the following words:

Any passenger using or attempting to use a ticket on any day for which such ticket is not available, or using a ticket which has been already used on a previous journey, is hereby subjected to a penalty not exceeding forty shillings.

The appellant travelled on the respondents' railway by the train which departed at 5.30 p.m. on Thursday, the 15th March 1894, from Stoke-upon-Trent to Macclesfield.

The tickets of the passengers by that train were examined at Congleton, an intermediate station between Stoke-upon-Trent and Macclesfield, and the appellant there tendered the return half of a first-class return ticket, which bore the date of the 28th Feb. 1894 as the date of issue, and which was proved and admitted to have been purchased by him on the 28th Feb. 1894.

The following is a copy of the ticket tendered by the appellant, and of the conditions indorsed:

Issued by the N. S. R. Co., subject to the company's regulations, and to the conditions in their time tables, not transferable, first-class, available on the day of issue for one journey only; Stoke-upon-Trent to Macclesfield. H.R. *Viâ* main line. Fare, 5*s*. 9*d*.

The number of the ticket was upon it. Half of the ticket was produced. There was nothing on the back of it except the date of issue.

One of the regulations and conditions contained in the respondents' time tables at the date of the issue of the said ticket was as follows:

Return tickets between North Staffordshire Railway stations are available for the day of issue only except those issued on Saturday or Sunday, which are available up to Monday evening following. Return tickets issued between North Staffordshire stations and Derby, Burton, Crewe, Stafford, or Market Drayton, are avaiable for seven days.

The full first-class fare from Stoke-upon-Trent to Macclesfield was demanded from the appellant by the respondents' ticket examiner, at Congleton, but the amount was not specified. The appellant refused to pay such fare, but gave his correct name and address.

It was admitted that the appellant had a first-class annual contract ticket by which he was entitled to travel between Macclesfield and Manchester, on the line of the London and North-Western Railway Company, on the 15th March 1894.

The justices were of opinion that the bye-law applied, and was not *ultra vires*, and convicted the appellant.

The Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20).

Sect. 103 enacts that:

If any person travel or attempt to travel in any carriage of the company, or of any other company, or party using the railway without having previously paid his fare, and with intent to avoid payment thereof, or if any person having paid his fare for a certain distance, knowingly and wilfully proceed in any such carriage beyond such distance, without previously paying the additional fare for the additional distance, and with intent to avoid payment thereof, or if any person knowingly and wilfully refuse or neglect on arriving at the point to which he paid his fare to quit such carriage, every such person shall for every such offence forfeit to the company a sum not exceeding forty shillings.

Sect. 104 enacts that

If any person be discovered either in or after committing or attempting to commit any such offence as in the preceding enactment mentioned, all officers and servants, and other persons on behalf of the company, or such other company or party as aforesaid, and all constables, gaolers, and peace officers, may lawfully apprehend and detain such person until he can conveniently be taken before some justice, or until he be otherwise discharged by due course of law.

Sect. 108 gives power to the railway company to make regulations for the travelling upon and the using and working of the railway.

Sect. 109 gives power to make regulations by bye-laws, and to repeal or alter such bye-laws, and make others:

Provided that such bye-laws be not repugnant to the laws of that part of the United Kingdom where the same are to have effect, or to the provisions of this or the special Act, &c.

Sub-sect. 3 of sect. 5 of the Act to amend the Regulation of Railways Acts 1889 (52 & 53 Vict. c. 57) enacts that:

If any person travels or attempts to travel on a railway without having previously paid his fare, and with intent to avoid payment thereof, &c., on summary conviction, he shall be liable to a fine not exceeding forty shillings, and in the case of a second or subsequent offence to a fine not exceeding twenty pounds, &c.

The Statute Law Revision Act 1892 (55 & 56 Vict. c. 19) repeals the Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20) as follows:

In part, namely: Sect. 103 to "thereof, or" where those words last occur.

A. T. Lawrence for the appellant.—This conviction ought to be quashed. The bye-law is *ultra vires*. No fraud is alleged, and no fraud can be said to have been committed. Railway companies under sect. 109 of the Railways Clauses Consolidation Act 1845 have power to make bye-laws, but they have no power to impose penalties under their bye-laws except where fraud has been committed, or attempted to be committed. He cited

Dyson v. *London and North-Western Railway Company*, 44 L. T. Rep. 609; 50 L. J. 78, M. C.; 7 Q. B. Div. 32;

London, Brighton, and South Coast Railway Company v. *Watson*, 40 L. T. Rep. 183; 4 C. P. Div. 118; 48 L. J. 316, C. P.

W. F. Craies for the respondent company.—The bye-law in this case is different to the bye-law in *Dyson* v. *London and North-Western Railway*

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Company (44 L. T. Rep. 609; 50 L. J. 78, M. C.; 7 Q. B. Div. 32). The Statute Law Revision Act of 1892 (55 & 56 Vict. c. 19) has repealed the first part of sect. 103 of the Railways Clauses Consolidation Act 1845; it got rid of what was obviously a hardship, making passengers pay for a ticket from where the train started. This case is not like a case where the passenger is travelling without a ticket, or has bought one from another person. This bye-law is quite distinct from such bye-laws. This is merely a civil penalty recoverable before justices. The passenger has three alternatives—to pay the fare, to produce the proper ticket, or to give his name and address. He cited

Saunders (app.) v. *South-Eastern Railway Company* (resp.), 43 L. T. Rep. 281; 5 Q. B. Div. 456; 49 L. J. 761, Q. B.

MATHEW, J.—I am of opinion that this conviction by the justices ought to be quashed, the penalty ought not to have been inflicted. It is agreed that the traveller, the appellant in this case, was innocent of any fraudulent intent. Having regard to sect. 103 and 104 of the Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20), the bye-law of the respondent company is bad under those sections. For fraud is the gist of the offence under those sections, and here there was no fraud. The bye-law is also bad according to the decision in the case of *Dyson* v. *The London and North-Western Railway Company* (44 L. T. Rep. 609; 50 L. J. 78, M. C.; 7 Q. B. Div. 32), and no reasons have been given to show that that case was wrongly decided. But it is argued on behalf of the respondent company that the bye-law, though it may be void under the sections cited, has nevertheless been made valid by the repeal of sect. 103 of the Railways Clauses Consolidation Act 1845, by the Statute Law Revision Act 1892 (55 & 56 Vict. c. 19). But before the Statute Law Revision Act of 1892, there came the Regulation of Railways Act 1889, in sect. 5, sub-sect. 3, of which Act there is an elaborate code dealing with this description of offence, and it is there enacted that, "if any person travels on a railway without having previously paid his fare, and with intent to avoid payment," he shall be liable to a penalty, using, therefore, the same words, "with intent to avoid payment," as were used in the repealed section 103 of the Railways Clauses Consolidation Act 1845. If the appellant could have been brought within the terms of that section he might have been rightly convicted; but the appellant had previously paid his fare, and there was also no intention to defraud, therefore he could not have been convicted. The conviction by the justices was therefore wrong, and must be quashed.

KENNEDY, J.—I am of the same opinion.

Conviction quashed.

Solicitors for the appellant, *Purkis* and *Co.*; *Sword*, Hanley.

Solicitors for the respondent company, *Chester*, *Mayhew*, *Broome*, and *Griffithes*, for *E. A. Paine*, Hanley.

Friday, Oct. 26

(Before MATHEW and CHARLES, JJ.)

SAUNDERS v. THE HOLBORN DISTRICT BOARD OF WORKS. (a)

Public health — Sanitary authority — Non-performance of statutory duty—Penalty—Liability of sanitary authority to action for damages—Public Health (London) Act 1891 (54 & 55 *Vict. c.* 76), *ss.* 29, 119, 141.

By sect. 29 (1) *of the Public Health (London) Act* 1891 *the duty of sweeping and cleansing the streets, and removing all street refuse, so far as is reasonable and practicable, is imposed upon the sanitary authority; by sect.* 29 (2) *the sanitary authority is liable to a penalty for non-performance of this duty.*

The plaintiff sued the defendants to recover damages for injuries sustained by her through the non-removal of snow within the defendant's district.

Held (*following* Municipality of Picton v. Geldert, 69 *L. T. Rep.* 510; (1893) *A. C.* 524) *and* Cowley v. Newmarket Local Board, 67 *L. T. Rep.* 486; (1892) *A. C.* 345), *that the duty imposed upon the defendants was created solely by the statute, and that there was nothing in the statute to show that the defendants were intended to be liable otherwise than in a penalty for the non-performance of the duty, and that the action therefore was not maintainable.*

APPEAL of the plaintiff from the judgment of the judge of the Clerkenwell County Court entering a nonsuit.

The action was brought by the plaintiff against the defendants, who were the sanitary authority of the Holborn district, to recover damages for injuries sustained by reason, as was alleged, of the defendants having neglected the duty of removing snow from the streets in the district imposed on them by sect. 29, sub-sect. 1, of the Public Health (London) Act 1891.

The evidence called in support of the plaintiff's case was to the effect that, on the 8th Jan. 1894 the plaintiff was passing along a street within the defendants' district. There had been a heavy fall of snow a few days previously, which had not been removed from the street; the accumulation of snow had frozen on the foot pavement, rendering it very slippery, and in consequence the plaintiff slipped and fell, and sprained her wrist. The plaintiff alleged that by reason of the accident she had suffered special damage in her business of a nurse.

The learned County Court judge was of opinion that there was evidence for the jury that the duty imposed on the defendants had been neglected, and that they had not so far as was reasonably practicable in the circumstances properly swept and cleansed the streets, and that they had failed so far as was reasonably practicable to remove the street refuse; but the learned County Court judge was of opinion that it was the intention of the Legislature that the penalty imposed by the statute should be the only remedy for the failure by the sanitary authority perform their statutory duty, and that no action would lie against the sanitary authority at the suit of persons who had been injured by the neglect, even though they might have sus-

(a) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

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tained some special damage. He therefore directed a nonsuit to be entered.

The plaintiff appealed.

The Public Health (London) Act 1891:

Sect. 29.—(1.) It shall be the duty of every sanitary authority to keep the streets of their district, which are repairable by the inhabitants at large, including the footways, properly swept and cleansed, so far as is reasonably practicable, and to collect and remove from the said streets, so far as is reasonably practicable, all street refuse.

(2.) If any such street in the district of any sanitary authority, including the footway, is not properly swept or cleansed, or the street refuse is not collected and removed from any such street so far as is reasonably practicable, as required by this section, the sanitary authority shall be liable to a fine not exceeding twenty pounds.

Sect. 119.—(1.) All fines recovered by this Act shall, notwithstanding anything in any other Act, be paid to the sanitary authority and applied by them in aid of their expenses in the execution of this Act, except that any fine imposed on the sanitary authority shall be paid to the county council.

Sect. 141. In this Act, unless the context otherwise requires: The expression "street refuse" means dust, dirt, rubbish, mud, road scrapings, ice, snow, and filth.

Hawtin for the plaintiff.—The nonsuit was wrong. The general principle, in cases such as this, is that a breach of a statutory duty makes the person chargeable with that duty liable to an action at the suit of any person who may sustain special damage by reason of that breach:

Couch v. *Steel*, 3 E. & B. 402;
Hartnell v. *Ryde Commissioners*, 8 L. T. Rep. 574; 4 B. & S. 361;
Reg. v. *Hall*, 64 L. T. Rep. 394; (1891) 1 Q. B. 747.

In *Guardians of Holborn Union* v. *Vestry of St. Leonard's, Shoreditch* (35 L. T. Rep. 400; 2 Q. B. Div. 145) it was held that an action could be maintained against a vestry in circumstances somewhat similar to the present case. It is true that this Act imposes a penalty for non-performance of the duty, but that does not preclude the bringing of an action by an individual who has suffered special damage. The object of the penalty is to enforce the performance of the Act, and the Act provides (sect. 119) that the penalty when recovered shall go to the county council. The only remedy, therefore, for damage to an individual is by action:

Borough of Bathurst v. *Macpherson*, 41 L. T. Rep. 778; 4 App. Cas. 256;
Wilson v. *Merry*, 19 L. T. Rep. 30; L. Rep. 1 H. of L. (Sc.) 326.

Courthope-Munroe for the defendants.—The action is not maintainable. Where a penalty is imposed for the non-performance of a statutory duty, the penalty is the only remedy for a breach of the duty, unless it clearly appears from the statute that it was intended to give a right of action to a person who has suffered special damage from the breach of duty. No such intention can be gathered from this statute. The cases of *Couch* v. *Steel* (*ubi sup.*) and *Hartnall* v. *Commissioners of Ryde* (*ubi sup.*) have both been adversely commented on in the House of Lords and the Judicial Committee of the Privy Council, and the principles enunciated by them are no longer accepted as good law:

Municipality of Pictou v. *Geldert*, 69 L. T. Rep. 510; (1893) A. C. 524;
Cowley v. *Newmarket Local Board*, 67 L. T. Rep. 486; (1892) A. C. 345;
Atkinson v. *Newcastle and Gateshead Waterworks Company*, 36 L. T. Rep. 761; 2 Ex. Div. 441.

The case of *The Holborn Union* v. *Vestry of St. Leonard's, Shoreditch* (*ubi sup.*) is distinguishable from the present case, because there the statute imposed no penalty, and the only means of compelling the vestry to perform its duties was by an action for damages. *Cowley* v. *Newmarket Local Board* (*ubi sup.*) is directly in point, and is decisive of this case in the defendant's favour. [He was stopped by the Court.]

Hawtin in reply.—In *Cowley's* case the local board were held not to be liable to an action because the board had succeeded to the duties of the surveyor of highways, and the surveyor, being only a servant, would not have been liable to an action.

MATHEW, J.—I am of opinion that this appeal must be dismissed. We have had before us the very able and learned judgment of the County Court judge, and I entirely agree with the conclusion at which he arrived with so much labour and ability. The action was brought to recover damages for injuries alleged to have been sustained by the plaintiff through the failure of the defendants to discharge their statutory duty of removing snow and ice from the footways over which the plaintiff was passing. It was said that under the Act of 1891 the duty which had been previously imposed upon each householder to clear away the snow and ice in front of the house had been imposed upon the defendants, and that therefore they were liable. Now the terms of the section are these: [His Lordship read sect. 29.] Those are the obligations created by the statute in this public body, and it is said upon the authority of *Couch* v. *Steel* (*ubi sup.*) and *Hartnell* v. *The Ryde Commissioners* (*ubi sup.*), which are still treated by the learned counsel for the plaintiff as having some vitality in them, that his client is entitled to maintain this action. Relying upon those cases little credit is given by him to the subsequent decisions beginning with the well-known case of *Atkinson* v. *The Newcastle Local Board* (*ubi sup.*). That case has been followed by the case in the House of Lords of *Cowley* v. *The Newmarket Board* (*ubi sup.*), and by the more recent decision of the Judicial Committee of the Privy Council in the *Municipality of Pictou* v. *Geldert* (*ubi sup.*). Those cases condemn in terms the cases of *Couch* v. *Steel* (*ubi sup.*) and *Hartnell* v. *The Ryde Commissioners* (*ubi sup.*) It is quite plain that the result of those decisions with reference to the obligations imposed upon bodies of this kind by Act of Parliament is that unless the intention of the Legislature is clearly expressed that there shall be a liability to an action for default in the performance of a statutory duty no action shall lie. Upon looking at this statute it is clear there is no intention that any such liability shall be imposed upon the defendants. I have read the section, and in the case of non-performance of the duties created by the section, there is imposed a penalty not to exceed 20*l.*, to be recovered in the manner pointed out by the Act. That is the sole liability imposed by the statute upon the defendants, and why should we infer that there is in addition a liability to an action for damages? By the old statute before

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it was repealed there was no liability upon the local authority to clear away snow or ice, and no such action would lie against the inhabitants of the district in reference to such a matter. Why then should it be said that this statute creates the liability? It seems to me that the intention of the Legislature must have effect given to it according to the language used, namely, that the local authority shall be bound to do what the statute says it shall be bound to do, and that the consequence of not doing it shall be the liability pointed out by the Act, and no further liability. If we adopted any other construction, we should be putting upon the locality an obligation which does not exist at common law; and for which there is no statutory provision. The learned County Court judge has referred to the authorities at great length upon which he bases his decision, and I entirely agree with that decision.

CHARLES, J.—I am of the same opinion. I entirely agree with the observations which my learned brother has made in reference to the judgment of the learned judge of the County Court. I agree with that judgment and with the reasons given by the learned County Court judge. I will, however, state, in my own words, the reason why I do agree with the judgment in the court below. It is beyond dispute that the duty imposed upon the sanitary authority is created by the 29th section of the Public Health Act 1891, and that until that section was passed there was no duty cast upon the sanitary authority in reference to the removal of snow or ice from the streets. It seems, therefore, clear to me that, in order to make out a liability on the part of the sanitary authority to an action for failure to perform that duty, we must find in the statute itself some intimation that the sanitary authority is intended to be so liable. That is the principle which is laid down in *Cowley* v. *The Newmarket Local Board* (*ubi sup.*), where it was said that the giving to a public authority a duty of repair does not of itself make that public authority liable to an action in respect of a failure to perform that duty, that is, in respect of a non-feasance. In order to establish such liability it must be shown that the Legislature intended that such a liability should be imposed. Looking at this section I fail to see any indications that the Legislature intended to impose this extraordinary liability upon the sanitary authority. On the contrary, it seems to me that the section contains not only in its first clause the imposition of the duty upon the sanitary authority, but in its second clause it contains the only remedy which anyone can have if the sanitary authority fails to perform this duty, namely, that, "if any such street within the district of any sanitary authority is not properly swept and cleansed, or the street refuse is not collected and removed from any such street so far as is reasonably practicable, the sanitary authority shall be liable to a fine not exceeding 20*l.*" Now, inasmuch as that penalty is imposed by the same section which creates the duty, I think there can be no doubt at all that upon the same principle that I acted upon in the case of *Reg.* v. *Hall* (*ubi sup.*), when I quashed an indictment against an overseer of the poor for failure to perform some duty in connection with a Parliamentary election, the sanitary authority could not be indicted. Indeed, it is not contended that they could be. As they could not be indicted, has anything been done by the Legislature beyond imposing upon them the liability of this penalty for the non-performance of their statutory duty? I fail to see that anything beyond a liability to a penalty has been imposed. There is nothing in the Act which gives a right of action against them. We have been referred in the course of the argument to the somewhat old cases of *Couch* v. *Steel* (*ubi sup.*) and *Hartnell* v. *The Ryde Commissioners* (*ubi sup.*), and although it is perfectly true that those cases have never been formally overruled either by the Exchequer Chamber or the Court of Appeal or the House of Lords, they have been spoken of in the House of Lords and in the Court of Appeal and in the Judicial Committee of the Privy Council in terms which preclude their being treated as binding authorities. The first case in which the authority of *Couch* v. *Steel* (*ubi sup.*) was seriously shaken was a case in the Court of Appeal—the case of *Atkinson* v. *The Newcastle Waterworks* (*ubi sup.*). In delivering the judgment of the Court of Appeal Lord Cairns (the other learned judges agreeing with him) indicates plainly enough that he does not approve of the reading of the statute upon which the decision in *Couch* v. *Steel* (*ubi sup.*) was based, and that it is no longer a question of whether a penalty is imposed, or whether it goes to the party aggrieved or to a common informer. That is no longer a material or cardinal consideration. What is to be looked at is the purview of the statute itself, and the court must consider whether the statute itself indicates that liability to an action for damages shall exist as well as a liability to a penalty. That case was followed in time by the two cases which we have been referred to, the one of *Cowley* v. *The Newmarket Board* (*ubi sup.*) in the House of Lords, and the other *The Municipality of Pictou* v. *Geldert* (*ubi sup.*) in the Judicial Committee of the Privy Council, and it is quite plain, looking at those two cases, that the older cases cannot now be regarded as binding. Now then, what was the state of things before this statute passed? The inhabitants of a parish, or an individual, would not have been liable to an action for such a non-feasance as this. There was no duty on the inhabitants of a parish to remove snow and ice, no indictment could have been brought against them, and no action could have been brought against them. The surveyor of highways could not have been proceeded against in such a case of non-feasance, as is pointed out by the learned County Court judge in his judgment from the time of *Young* v. *Davis* (2 H. & C. 197) onwards no action lay against the surveyor of highways. Whether that is based upon the ground that he is a servant and the doctrine of *respondeat superior* applies, or whether it is based upon the ground that he is subject to penalties for the non-performance of his duty, is immaterial. The fact remains that a surveyor of highways could not be indicted. So, again, when his duties were transferred to the sanitary authority, and they became surveyors of highways, it was held that they were not liable to any indictment. That was the state of things with regard to a sanitary authority before the passing of this Act of Parliament. It appears to me, therefore, clear that when this Act of Parliament was passed the Legislature was placing a duty upon the sanitary authority which had never been placed

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upon them before, and for the non-performance of which they could never have been proceeded against by indictment or action. The statute states the penalty, and, I think, the only penalty, which can be imposed for the non-performance of their duty. I need not point out the serious consequences that might result from a contrary construction of the statute. We are bound to look at the purview of the statute, and it would be an extraordinary thing if we were constrained to hold that anyone who was injured by the failure of a local authority to cleanse thoroughly the streets in their district was able to bring an action and recover damages against the authority. I think the appeal must be dismissed with costs.

Appeal dismissed.

Solicitor for the plaintiff, *E. W. Essell.*

Solicitor for the defendants, *Matthew A. Hale.*

House of Lords.

July 23 and 30.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, ASHBOURNE, MACNAGHTEN, and MORRIS.)

ROUSE *v.* BRADFORD BANKING COMPANY LIMITED. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Debtor and creditor—Principal and surety—Discharge of surety—Giving time—Covenant to indemnify retiring partner—Overdraft at bank.

The general principle of equity, that where there is a contract with a principal and a surety, and time is given to the principal without the assent of the surety, and without reserving the rights of the creditor against him, the surety is released, applies to a case where the parties who, as between themselves, have become principal and surety, were originally both principal debtors to the creditor.

Oakeley *v.* Pasheller (4 *Cl. & F.* 207; 10 *Bli. N. S.* 248) *discussed.*

Oriental Financial Corporation *v.* Overend, Gurney, and Co. (31 *L. T. Rep.* 322; L. Rep. 7 H. L. 348) *followed.*

Semble (*differing from the court below on this point*), *that a proviso added to a covenant of indemnity given by the principal to the surety to the effect that the surety should not be entitled to require the payment of the debt by the principal so long as the covenant of indemnity remained in force, would not prevent the ordinary doctrine from applying.*

Where a person had become surety to a bank for an overdraft to an agreed amount, the fact that the bank agreed with the principal to allow him to increase his overdraft beyond the agreed amount for a limited time:

Held, not to be such a giving of time to the principal as would discharge the surety, the bank's rights in respect of the original overdraft not being affected.

Judgment of the court below affirmed for different reasons.

A bank which has agreed to give an overdraft cannot refuse to honour cheques, within the limit of that overdraft, which have been drawn and put into circulation before any notice has been given to the drawer that the limit is to be withdrawn.

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

THIS was an appeal from a judgment of the Court of Appeal (Lindley, Kay, and Smith, L.JJ.), reported in 70 L. T. Rep. 427, and (1894) 2 Ch. 32, reversing a judgment of Kekewich, J., reported in 69 L. T. Rep. 828.

The appellant, who was a shareholder in the respondent bank, brought this action claiming a declaration that he was entitled to the shares, and to the dividends which had accrued upon them, free from any lien of the bank, and for an injunction restraining the bank from dealing with the shares.

The respondents by their counter-claim claimed a declaration that they were entitled to a lien on the shares in respect of a debt exceeding the value of the shares, due to them from a firm of W. Rouse and Co.

The appellant had formerly been a partner in the firm, but had retired from it at the end of 1884. At that time the firm was largely indebted to the bank, and the appellant remained liable to the bank for the old debt, but had received a covenant of indemnity from the continuing partners.

The new firm stopped payment in Sept. 1892. The bank were aware of the fact that the appellant had retired from the firm, and was only liable to them as a surety.

The case set up by the appellant was that the dealings between the bank and the new firm amounted to a giving of time which discharged him from his liability as surety. Kekewich, J. decided in his favour, and in the Court of Appeal Lindley and Kay, L.JJ. (Smith, L.J. dissenting) agreed with the view of the law taken by Kekewich, J., but Lindley and Smith, L.JJ. (Kay, L.J. dissenting) took a different view of the dealings between the parties, and the decision was consequently reversed.

The facts appear fully in the reports in the courts below, and in the judgment of the Lord Chancellor,

Cozens-Hardy, Q.C., *Renshaw*, Q.C., and *F. Thompson*, for the appellant, argued first that there was a novation. The bank agreed to accept the liability of the continuing partners as their sole debtors. This is shown by the fact that compound interest was charged on the account, for though a bank may charge compound interest against a customer, it cannot do so against a person in the position of the appellant with whom the relation of customer had ended. Secondly, the appellant was released by time being given to the new firm. Originally all the parties were principals; then, by a transaction of which the bank was informed, one became a surety, and on time being given to the others he was discharged on the principle of *Oakeley* v. *Pasheller* (4 Cl. & F. 207; 10 Bli. N. S. 248), which was commented on and discussed in

Oakford v. *European and American Steamship Company*, 1 H. & M. 182;

Maingay v. *Lewis*, Ir. Rep. 3 C. L. 495; on appeal, Ir. Rep. 5 C. L. 229;

Oriental Financial Corporation v. *Overend, Gurney, and Co.*, 25 L. T. Rep. 813; L. Rep. 7 Ch. 142; on appeal, 31 L. T. Rep. 322; L. Rep. 7 H. L. 348;

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Wilson v. *Lloyd*, 28 L. T. Rep. 331; L. Rep. 16 Eq. 60;

Bailey v. *Edwards* (4 B. & S. 761), in which case Blackburn, J. expressed a view differing from that which he afterwards took in *Swire* v. *Redman* (35 L. T. Rep. 470; 1 Q. B. Div. 536.

he dealings between the parties show that by nplication time was given to the principals, and he surety was thereby released. The proviso in he deed of dissolution of partnership had not the ffect which was given to it in the court below, ut was only intended to relate to proceedings on he covenant for indemnity. See

Carr v. *Roberts*, 2 B. & Ad. 905; 5 B. & Ad. 78; Davidson's Precedents, vol. II., pt. 1, 2nd edit., p. 475, and the cases there cited.

Finlay, Q.C., *Vernon Smith*, and *B. C. Gardiner*, or the respondents, argued that the court below as right in saying that there was no novation. Ve also say that there was no giving of time such s to release the surety; to do so there must have een a binding contract for a good consideration ot to sue, and there was nothing of the kind ere. At most there was only an indulgence, not binding agreement, and the foundation of the ppellant's case fails. If we are right in this, *Oakeley* v. *Pasheller* is not in point. In that case here was in fact a novation. A retiring partner s not necessarily only in the position of a surety. See

Baynton v. *Morgan*, 59 L. T. Rep. 478; on appeal, 22 Q. B. Div. 74.

The relation of principal and surety does not rise out of the covenant to indemnify. The ecision in *Swire* v. *Redman* (*ubi sup.*), in which *Oakeley* v. *Pasheller* was distinguished, has been llowed in *Birkett* v. *McGuire* (7 Ontario App. as. 53). Smith, L.J. took the correct view of the ecision in *Oakeley* v. *Pasheller*. The outgoing artner is not, under the circumstances, released rom his liability. See

Oakford v. *European Steamship Company* (*ubi sup.*).

The principle upon which a surety is discharged y giving time to the principal is, that it intereres with his right to pay off the debt and sue he principal debtor; but under the proviso the ppellant never had such a right.

Cozens-Hardy, Q.C. in reply.—The proviso is nerely appendant to the covenant. It is not an uthority to give time to the principal. *Oakford* v. *European Steamship Company* was a continuing ontract to build a ship, and was quite different rom this case. The principle of *Oakeley* v. *Pasheller* puts the outgoing partner in the position of urety. See also

Moule v. *Garrett*, 22 L. T. Rep. 343; L. Rep. 5 Ex. 132) and the cases cited by Channell, B., on appeal, 26 L. T. Rep. 367; L. Rep. 7 Ex. 101.

Here there was a good consideration for giving me, and a giving of time, in fact, which releases he surety.

At the conclusion of the arguments their Lordhips gave judgment as follows:—

The LORD CHANCELLOR (Herschell).—My ords: The appellant, who was the defendant in he action, was formerly in partnership with ertain other persons carrying on business as orsted spinners under the firm of Rouse and Co. The partnership between them was dissolved by a eed of the 17th April 1885. By that deed William Rouse was to cease to carry on the business, and the other members of the firm, John Frederick Rouse, Frank Rouse, and Herbert Rouse, were to continue to do so. By that deed the debts of the firm were to be paid by the new partnership, who were to take over its assets, and they covenanted with William Rouse, the retiring partner, to indemnify him against those debts. That covenant contained a proviso to which I will call attention presently. At the time of the dissolution, amongst the debts owing was a debt of upwards of 50,000*l.* to the Bradford Banking Company. At the time when the new firm failed, some years afterwards, the debt had been reduced below 50,000*l.*, but a considerable amount was still owing to the bank, and this action was brought to recover it, or rather to enforce their right to hold certain shares belonging to William Rouse as security for it. (*a*) The answer to the action was that William Rouse had been discharged from all his liability to the bank by reason of transactions between the bank and the new firm. The case was put in this way; that upon the dissolution of the firm under the deed which I have mentioned as between themselves, the continuing partners became the principal debtors, and William Rouse merely a surety for them; and that inasmuch as the bank had notice of the deed of dissolution and its terms, it was brought to the knowledge of the bank that such was the relation of the parties after that date. Then it was said that the bank, thus knowing that William Rouse had become surety only as between him and his former copartners, gave time to the continuing members of the firm for the payment of the debt in question, and so discharged William Rouse. It was contended, indeed alternatively, that there had been novation, and that the bank had accepted the new firm as their debtors in place of the co-debtors who had previously been liable to them, and that, by this novation, William Rouse was discharged. That argument has not found favour with any of the learned judges before whom the case has come, and your Lordships have already intimated that in your opinion it cannot be supported. With regard to the question whether time was given so as to discharge the surety, the general principle of equity that where there is a contract with two persons, one as principal and the other as surety, and time is given to the principal without the assent of the surety, and without the rights against the surety being reserved, the right against the surety has gone, was not contested; but it was said to be inapplicable to such a case as the present, when those who as between themselves became principal and surety had been originally both of them principal debtors to the creditor. On the other hand, it was contended that that made no difference, and that the rule of equity was as applicable to a case where two having both been principal debtors, one afterwards became with notice to the creditor a surety, as it was to a case where the contract between him and the creditor was one of principal debtor and surety. Reliance was placed for this proposition upon the case of *Oakeley* v. *Pasheller* (10 Bli. N. S. 248), decided in this House. The

(*a*) As above mentioned the action was brought by the appellant as plaintiff against the bank, and the question on which the appeal was brought arose on the counterclaim of the bank.

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case has been very much discussed, and inasmuch as I believe that all your Lordships have formed a clear opinion upon the argument which has been addressed to you on that point, it is probably well to express it, even although a view may be taken which would not make the decision in this case turn upon the conclusion arrived at with regard to *Oakeley* v. *Pasheller*. In *Oakeley* v. *Pasheller* Lord Lyndhurst, in delivering judgment, said this: "Now, in consequence of an arrangement which took place between the representatives" (that is the representatives of the retiring partner) "and the new partnership" (in that case an additional partner was taken in when one of the partners went out), "they stood in the character of sureties, and the principle of law is this: that where a creditor gives time to the principal, there being a surety, without any communication with the surety, and without the consent of the surety, it discharges him from liability, because it places him in a new position and exposes him to risks or contingencies which he would not otherwise be liable to." The proposition is there laid down in terms quite unequivocal by Lord Lyndhurst, affirming Lord Brougham as Lord Chancellor, and the Master of the Rolls. It has been suggested, in a case to which I will call attention in a moment, that that case turned upon the fact that the creditor had been a party to an arrangement by which the representatives of the deceased and retiring partner were, as between him and them, to be sureties only. I cannot myself find any trace of such an arrangement as being the foundation, in any respect, of the judgment of Lord Lyndhurst. In the case of the *Oriental Financial Corporation* v. *Overend, Gurney, and Co.* (25 L. T. Rep. 813; L. Rep. 7 Ch. 142), before Lord Hatherley when Lord Chancellor, he referred somewhat elaborately to the facts in *Oakeley* v. *Pasheller*, and he said: "There is really in substance no hardship, and that is one reason why I dwelt on it at some little length to show that it was not a doctrine which was at all shaken by the right of the creditor to preserve his remedies against the surety; and if there was any small hardship they could have freed themselves from that hardship and all difficulty whatever. A person comes and tells them that since the debt was contracted circumstances have arisen by which he is, in fact, surety, and the other debtor is the principal debtor. Thereupon all that they have to do is to give the principal debtor time and reserve their rights against the surety." It is quite clear, from the language used in the earlier part of the judgment, that Lord Hatherley considered he was really following the principle laid down in *Oakeley* v. *Pasheller*. The case of the *Oriental Financial Corporation* v. *Overend, Gurney, and Co.* was this: that two persons had appeared to the creditor, at the time the contract was entered into, to be both principal debtors, and he afterwards obtained notice of the fact that one of them was a surety only. It was held that when once he had received that notice, he could not give time to the one who, as between themselves, was the principal debtor, without discharging the surety. That case came before this House on appeal from the decision of Lord Hatherley as Chancellor, and the judgment was affirmed. Lord Cairns said (31 L. T. Rep. 322; L. Rep. 7 H. of L. 368): "My Lords, it appears to me that after the case which was referred to at the Bar, decided by your Lordships' House in *Oakley* v. *Pasheller*, it is impossible to contend if after a right of action accrues to a creditor against two or more persons he is informed that one of them is a surety only, and after that he gives time to the principal debtor without the consent and knowledge of the surety, that under those circumstances the rule as to the discharge of the surety does not apply." That is a distinct and clear expression of opinion as to the limits and the grounds of decision in *Oakeley* v. *Pasheller*, and it is in accordance with the view which I have myself formed of that case. And in this House, as I have said, the decision of Lord Hatherley was affirmed, and therefore the proposition was actually applied in a case where the two debtors had both been believed to be principal debtors by the creditor at the time the contract was entered into. I own that I am quite unable to see any distinction, even if *Oakeley* v. *Pasheller* did not exist, between that case in the House of Lords and the present. If notwithstanding that both the debtors appeared to be principal debtors, the knowledge afterwards that one of them is a surety only disentitles you to deal with the other in the way of giving time without discharging that debtor, then it seems to me it must equally be the case—for otherwise there would be a distinction, resting on no intelligible or solid basis—that where, although both were principal debtors at the time, one of them afterwards, as between himself and his co-debtor, becomes a surety, a dealing with the one who remains the principal debtor discharges the surety. So far I have expressed the opinion that on the point of law relied on, namely, that if it can be shown that there was a giving of time to the new firm this would release the debtor, the defendant, I think the case is made out unless the proviso to the covenant of indemnity in the deed of partnership alters the rights of the parties. The proviso is, that William Rouse "shall not be entitled to require payment of any of the said debts or sums of money hereinbefore covenanted to be paid by the said John Frederick Rouse, Frank Rouse, and Herbert Rouse" (the continuing partners) "so long as the said William Rouse, his heirs, executors, and administrators, shall be indemnified according to the covenant last hereinbefore contained." In the view taken by two of the learned judges in the court below, the fact that this proviso was added to the covenant of indemnity prevented the ordinary doctrine applying to which I have been referring, inasmuch as, in the opinion of those learned judges, the fact of giving time would not have prejudiced any rights of which William Rouse was possessed, the proviso having by agreement between him and his copartners limited those rights to an extent which would prevent his being prejudiced. That is certainly a question of some gravity. I do not intend, because in the view that I take it is unnecessary, to express a decided opinion upon it, but I own that I should entertain great doubts, and I should have to give further consideration to the question before I could give my assent to the proposition which has been the foundation of the view of two of the learned judges in the court below. I come now to the question, which, of course, lies at the root of the defence, whether it has been made out that the bank gave time to those who had become principal debtors. There are two transactions

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relied on for the purpose of establishing this. It was upon one of these that the learned judges in the courts below pronounced judgment. It became unnecessary to consider the other, because they came to the conclusion that the first of these did amount to a transaction by which there was an agreement to give time. I cannot but think that some of the considerations which have been dwelt upon in your Lordships' House were not fully present to the minds of the learned judges in the court below in dealing with this part of the case. Very little is said upon this question. It is somewhat summarily dismissed as being clear and free from difficulty and as being a case in which there was a binding agreement to give time. Now we have no evidence as to what actually passed between the parties on the occasion when the suggested agreement was come to. It is, of course, obvious that time is only given within the meaning of the rule to which I have been referring if there is a binding agreement arrived at for good consideration. There was here no written agreement, and we are left to find out what the agreement was from a perusal of certain minutes of the bank with reference to the transaction; but, of course, those minutes can only be construed, and will only assist us to arrive at what the real bargain between the parties was, if we consider them in the light of the relation between the parties at the time when those minutes were made. We must look at their position before and after, in order to understand the minutes, and to arrive at any just conclusion as to what the parties intended to agree to, and did agree to. Now the minute is in these terms: "Mr. John F. Rouse attended and submitted the balance-sheet of his firm up to the 31st Dec. last, and made application for an overdraft of 53,046*l.* until the 14th March." Before saying anything upon those words, I think it is essential to see what arrangement for overdraft had existed, if any, prior to that date. A minute is put in of the 31st Dec. 1886, which is in these terms: "Resolved that the account of W. Rouse and Co. may be for a short time in excess of the normal limit of 50,000*l.* by 2000*l.*" That is the earliest of the minutes before us; but at the time of the dissolution there was an overdraft to an extent a little exceeding 50,000*l.*, that is to say, in the time of the old firm. I have no hesitation in drawing the inference, under these circumstances, that there had been an agreed overdraft with the old firm, which was continued afterwards, for a limit of 50,000*l.*, and that that agreed overdraft with that normal limit was in existence on the 16th Feb. 1889, when this minute was made. What then is the meaning of "making application for an overdraft of 53,046*l.* until the 14th March?" It seems to me to be no more than this—an application that the agreed overdraft of 50,000*l.*, which had existed for many years, should for a limited period of time be increased to 53,000*l.* But I do not think it was intended that the rights of the parties, whatever they were, as regards the 50,000*l.* overdraft, should be in any respect altered, or that the 53,000*l.* overdraft so long as it existed should be an overdraft meaning anything else or on any other terms than those which had been applicable to the agreed overdraft of 50,000*l.* Certainly I should be very much surprised if it was ever intended by the parties that supposing (which is the assumption of the appellants and one which I will make for the purposes of this case) that prior to this agreement at any time a writ had been issued or a claim made for the 50,000*l.*, the right to claim or to sue for the 50,000*l.* was to cease during this term until the 14th March, because there was for that time to be an increase of the overdraft. I think it is manifest from the subsequent minutes that this 50,000*l.* overdraft was regarded by both parties as continuing after the 14th March. This is not a separate application for a single transaction of an overdraft of 53,000*l.* for a certain time, because there was an overdraft before, and there was an overdraft afterwards. It is obvious, therefore, that all that this transaction had relation to was an increase of that overdraft which began before and was continued, and was understood by both parties to be so. If that be the true view, it seems to me to be conclusive that there was here no agreement to give time or to alter in any respect the relation between the parties, because, in my judgment, whatever could have been done in the way of enforcing any right to this 50,000*l.* before the 16th Feb. continued just as much within the power of the bank after the 16th Feb. and down to the 14th March, and indeed thenceforward. It is not necessary to consider what the rights of the bank were with regard to their debtors when they had agreed to an overdraft. The transaction is, of course, of the commonest. It may be that an overdraft does not prevent the bank who have agreed to give it, from at any time giving notice that it is no longer to continue, and that they must be paid their money. This, I think, at least it does: if they have agreed to give an overdraft they cannot refuse to honour cheques or drafts, within the limit of that overdraft, which have been drawn and put in circulation before any notice to the person to whom they have agreed to give the overdraft that the limit is to be withdrawn. That effect, I think, it has in point of law; whether it has more than that in point of law it is unnecessary to consider. Even if it has no greater effect in point of law it is obvious that neither party would have it in contemplation that when the bank had granted an overdraft it would immediately, without notice, proceed to sue for the money; and the truth is that whether there were any legal obligation to abstain from so doing or not, it is obvious that, having regard to the course of business, if a bank which had agreed to give an overdraft were to act in such a fashion, the results to its business would be of the most serious nature. It may be, therefore, that the parties simply contracted upon the basis of that state of things that there is a legal right throughout for the bank at any time to sue for the money. But whatever the right was, it seems to me that that right was in no way diminished, but continued in full force and effect notwithstanding the arrangement of the 16th Feb. That, of course, is sufficient to dispose of that part of the case. It was asked by Mr. Renshaw what was the meaning then, if the bank might have thus sued, of saying that there was to be an overdraft until the 14th March. It had the effect which I have just described—precisely the same effect as the previous overdraft had—that just as before they could not have refused to honour drafts, within the limit, drawn and put in circulation before they had given notice; so it appears to me

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that between that date and the 14th March they could not refuse to honour drafts drawn within the greater limit, namely, up to 53,000*l.*, unless they had given notice that the overdraft would be withdrawn. It is not necessary to say whether this agreement was entered into for valuable consideration or not. If it was not, of course, it must wholly fail; but inasmuch as I think there was no agreement to give time in the sense required, it is not necessary to inquire whether the minutes disclose a contract for valuable consideration or not. So much for the first transaction. The second transaction arose in this way: At that time the limit had been reduced from 50,000*l.* to 45,000*l.* That took place on the 9th April 1889, when there was a resolution—"That the limit of the account of William Rouse and Co. for the future be 45,000*l.*" They had reached that limit, and were anxious that certain bills should be met. The bills amounted to the sum of 18,000*l.*, and they were maturing at various dates from the 13th Aug. till the 18th Nov. 1890. The firm were very anxious that the bank should undertake to meet those bills. The bank were unwilling to do this without further security, inasmuch as it was beyond the 45,000*l.* limit. Upon that an agreement was entered into by which two persons each became surety to the extent of 2500*l.* to the bank, and in consideration of that the bank undertook that if Messrs. William Rouse and Co. paid into the bank before the 30th Sept. sums amounting to not less than 10,000*l.* they would meet those bills. The security makes it clear that no part of it was given for the 45,000*l.*; it was only for such excess as there should be in the amount due from the firm to the bank over 45,000*l.* The last clause is in these terms: "It is hereby agreed and declared that this guarantee and the liability of the surety thereunder shall absolutely cease and determine when and as soon as the balance owing by the said principals to the said company shall after the 18th Nov. next be reduced to the sum of 45,000*l.*" No doubt it was in the contemplation of the parties that it would not be until the 18th Nov. that it would be reduced to the sum of 45,000*l.* 45,000*l.* was the limit; with that limit the bank were content, and this was an advance beyond that limit, and it was because they were advancing beyond that limit that they required this fresh security. Now, it seems to me that the entire agreement had relation only to this new advance, to this undertaking to meet those bills which were in excess of the limit, and that it was not intended by any of the parties to it that it should affect any of the rights which the bank possessed in relation to the sum within the limit, namely, 45,000*l.* No security was given for that; the bank got nothing in respect of it, and it would be strange indeed if the bank, getting nothing in respect of it because they entered upon greater liabilities, which greater liabilities alone were secured to them by any fresh security, it should be held that they gave up, or that the debtor supposed that they gave up, any rights which they possessed in respect of the 45,000*l.* For these reasons I think, on the construction of the document, the true conclusion as to the intention of the parties is, that upon that occasion also there was no binding agreement to give time as to this 45,000*l.*, which alone could establish the defence that the defendant sets up. For these reasons I move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.

Lord WATSON.—My Lords: When two or more persons bound as full debtors arrange, either at the time when the debt was contracted, or subsequently, that *inter se* one of them shall only be liable as a surety, the creditor after he has notice of the arrangement must do nothing to prejudice the interests of the surety in any question with his co-debtors. That appears to me to be the law as settled by the judgments of this House in *Oakeley* v. *Pasheller* and *Overend, Gurney, and Co.* v. *Oriental Financial Corporation*. I am not prepared to affirm, upon the evidence before me, that the bank twice gave time to their debtors. In my opinion, all that they did on the first occasion was to substitute a wider for a narrower limit of overdraft during a specified period. But, save as to its amount, the overdraft was to remain in all respects the same as before. The terms upon which the balance due was recoverable underwent no alteration. On the second occasion there is still less ground for suggesting that time was given. I think it right to state that, as at present advised, I am not prepared to assent to the view taken by two of the learned judges of the Appeal Court with regard to the effect of the proviso. Seeing that it has become unnecessary to decide the point, I shall not waste time in discussing it. I therefore concur in the judgment which has been proposed by the Lord Chancellor.

The other learned Lords concurred.

Solicitors for the appellant, *Field, Roscoe,* and *Co.*, for *Taylor, Jeffery,* and *Jessop*, Bradford.

Solicitors for the respondents, *Patersons, Snow, Bloxam,* and *Kinder*, for *Gardiner* and *Jeffery*, Bradford.

Supreme Court of Judicature.

COURT OF APPEAL.

July 27, *Aug.* 1, 7, *and* 10.

(Before the LORD CHANCELLOR (Herschell), LINDLEY and DAVEY, L.JJ.)

MINTER *v.* CARR. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Mortgage—Redemption—Consolidation—Union of mortgages—Equity of redemption in one of the properties previously assigned.

An owner of several properties mortgaged property A. to S., and other properties to different mortgagees, who, in respect of such properties, were the predecessors in title of the defendants. After this, but before these mortgages came into the hands of the same mortgagees, the mortgagor mortgaged property A. (subject to the mortgage to S.) to W., and this security (the mortgage to W.) was on the 14th July 1890 *transferred to P., who on the 8th Oct.* 1890, *in exercise of his power of sale, sold and conveyed property A. to M., subject only to the mortgage to S., which in the meantime, after the mortgage to W., but before*

(*a*) Reported by W. C. Biss, Esq., Barrister-at-Law.

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the commencement of this action, had become vested in the defendants, together with the mortgages on the other properties made as above-mentioned to the defendants' predecessors in title. At the time that the mortgage on property A. was transferred to P. he was already a puisne mortgagee of all the properties; and at the time P. sold property A. to M. the latter was also already a puisne mortgagee of all the properties. An action having been brought by M. to redeem property A.:

Held (affirming the decision of Romer, J., 70 L. T. Rep. 583), that the defendants were not entitled as against M. to consolidate with their mortgage on A. their securities on the other properties.

Vint v. Padget (32 *L. T. Rep. O. S.* 66; 2 *De G. & J.* 611) *considered.*

THIS was an appeal from a decision of Romer, J. (reported 70 L. T. Rep. 583).

The facts (which are fully stated in the report in the court below) were shortly these:—

One James Banks mortgaged 1 and 2, Shakespeare-terrace, to Charles Sedgwick, and other properties to different mortgagees the predecessors in title of the defendants.

After these mortgages were executed, but before they got into the hands of the same mortgagees, the mortgagor mortgaged 1 and 2, Shakespeare-terrace (subject to the mortgage to Sedgwick) and other properties in which the defendants were not interested, to Stunt, and this security, on the 14th July 1890, was transferred to one James Pledge, who, on the 8th Oct. 1890, in exercise of his power of sale, sold and conveyed 1 and 2, Shakespeare-terrace, to the plaintiff, subject to the mortgage to Sedgwick, but otherwise free from incumbrances. In the meantime, after the mortgage to Stunt, and before the commencement of this action, Sedgwick's mortgage on 1 and 2, Shakespeare-terrace, and the mortgages on the other properties to the defendants' predecessors in title, mentioned above, became vested in the defendants. Then this action was brought to redeem 1 and 2, Shakespeare-terrace, and the defendants claimed as against the plaintiff to consolidate with their mortgage of those two houses their securities on the other properties.

Romer, J. held that the defendants were not entitled so to consolidate the mortgages, and they appealed.

Neville, Q.C. and *Edwin Ward* for the appellants.—Where the first mortgages of several properties are vested in the same person, and the equities of redemption in another person, if the owner of the equities desires to redeem he must redeem all the properties:

Vint v. *Padget*, 32 L. T. Rep. O. S. 66; 2 De G. & J. 611;
Tweedale v. *Tweedale*, 23 Beav. 341;
Titley v. *Davies*, 2 Y. & C. C. C. 399;
Bugden v. *Bignold*, 2 Y. & C. C. C. 377, 383;
Bovey v. *Skipwith*, 1 Ch. Cas. 201;
Beevor v. *Luck*, L. Rep. 4 Eq. 537.

In *Harter* v. *Colman* (46 L. T. Rep. 154; 19 Ch. Div. 630), Fry J. explained *Vint* v. *Padget*, and his explanation does not prevent it applying to this case. Besides the facts of those two cases make them distinguishable. Stunt took the mortgage subject to the defendants' right of consolidation. Minter cannot be in a better position than Banks, the mortgagor. The right to consolidate arose when the mortgages became vested in Ralph Brockman in 1873, and Minter had no interest in the properties until 1884. In *Jennings* v. *Jordan* (45 L. T. Rep. 593, 594; 6 App. Cas. 698, 700) Lord Selborne said that the doctrine of consolidation was well established, and could not now be altered except by the Legislature.

Bramwell Davis for the plaintiff.—The assignee of an equity of redemption takes subject to all equities against the assignor existing at the date of the assignment, but not to any arising subsequently to which he is not a party. The defendants cannot consolidate as against the plaintiff anything acquired by them since he acquired the equity of redemption:

Harter v. *Colman* (*ubi sup.*);
Baker v. *Gray*, 33 L. T. Rep. 721; 1 Ch. Div. 491;
Miln v. *Walton*, 2 Y. & C. C. C. 354.

The case of *Vint* v. *Padget* (*ubi sup.*) has been virtually overruled by *Jennings* v. *Jordan* (*ubi sup.*) and *Harter* v. *Colman* (*ubi sup.*). In the latter case Fry, J. disapproved of *Beevor* v. *Luck* (*ubi sup.*); and in *Jennings* v. *Jordan* the House of Lords commented on that case, and approved of *White* v. *Hillacre* (3 Y. & C. (Ex.) 597), which is distinctly in favour of the plaintiff. The court will have regard to the intention of the parties:

Re Pride; *Shackell* v. *Colnett*, 64 L. T. Rep. 768; (1891) 2 Ch. 135;
Bird v. *Wenn*, 54 L. T. Rep. 933; 33 Ch. Div. 215;
Adams v. *Angell*, 36 L. T. Rep. 334; 5 Ch. Div. 634;
Smithett v. *Hesketh*, 62 L. T. Rep. 802; 44 Ch. Div. 161.

Ward in reply.

Cur. adv. vult.

Aug. 10.—The judgment of the court was delivered by

LINDLEY, L.J.—The facts of this case are complicated, but the question raised by the appeal is simple. The defendants are first mortgagees of several properties. The plaintiff is entitled to redeem all those properties. He derives his title through Pledge, who was himself entitled to redeem them all. The plaintiff seeks to redeem only one of those properties, viz., 1 and 2 Shakespeare-terrace, on payment of the sum for which alone it was originally mortgaged. The defendants contend that they are entitled to consolidate all their mortgages as against the plaintiff, and rely on *Vint* v. *Padget* (*ubi sup.*). The plaintiff's answer to this is twofold. First, he says *Vint* v. *Padget* has been virtually overruled by *Jennings* v. *Jordan* (*ubi sup.*) and *Harter* v. *Colman* (*ubi sup.*). Secondly, he says that before Pledge sold to him, he (Pledge) paid off and obtained a transfer of a second mortgage (Stunt's) on the property which the plaintiff desires to redeem, viz., 1 and 2, Shakespeare-terrace, and that, although Pledge had a right to redeem all the properties when he got in Stunt's second mortgage, Pledge had, and the plaintiff still has, the same right to redeem that property as Stunt himself originally had. Romer, J. has held that the plaintiff has this right, and that the defendants are not entitled to resist redemption of this property unless all their mortgages are paid off. The equitable rule which allows a mortgagee of several properties belonging to the same mortgagor to consolidate them against him is founded in good sense. It is fair and just that a secured creditor should say to his

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debtor who is in default and has not paid his debts as agreed, "You shall not deprive me of any of my securities without paying me all that is due to me on them." To extend this doctrine to persons claiming under the mortgagor after a right to consolidate has arisen against him is also intelligible, if they have notice of the right to consolidate, but it is not so obvious where they have not. The assignee of an equitable right stands, however, in no better position than the assignor, and this accounts for a still further extension of the original doctrine. But to extend the doctrine still further to a case like *Vint* v. *Padget* (*ubi sup.*), where the purchaser of two properties knew they were subject to mortgages created by the vendor, but which mortgages were not in the hands of the same mortgagee when the purchase was made, was, I think, to make an extension very difficult to justify, and I certainly am not prepared to carry the decision in that case further than I am compelled. The defendants clearly had no right to consolidate against Stunt, and his mortgage was not extinguished when he was paid off, but was assigned as a subsisting security to Pledge, who afterwards sold 1 and 2, Shakespeare-terrace, to the plaintiff. Pledge was at that time entitled to redeem all the properties mortgaged to the defendants. Now if Pledge could not keep Stunt's mortgage active as against other incumbrancers so as to avail himself of Stunt's right to redeem, it would follow that the defendants would be entitled to consolidate their mortgages against the plaintiff. But the case of *Adams* v. *Angell* (*ubi sup.*) shows that there is no rule of law which compels the court to hold that Pledge could not keep Stunt's mortgage alive as against the incumbrancers, and, if so, and if the case turns on the intention of Pledge, I have no doubt that he intended to keep Stunt's mortgage alive, and that he, in fact, did so. Consequently, I think he might have availed himself of Stunt's right to redeem 1 and 2, Shakespeare-terrace, alone. If Pledge could do this, so can the plaintiff. The defendants suffer no more loss by being so redeemed by Pledge or by the plaintiff than if they had been redeemed by Stunt. To deny Pledge's or the plaintiff's right to redeem as Stunt would have redeemed would, in my opinion, be extending the doctrine of consolidation beyond what is reasonable, and beyond even *Vint* v. *Padget* (*ubi sup.*), and this ought not to be done. Even if, therefore, *Vint* v. *Padget* is still to be regarded as a binding authority, I am of opinion that the judgment appealed from should be affirmed, and the appeal be dismissed with costs.

DAVEY, L.J.—I agree with the judgment of the court which has been delivered by the Lord Justice. I am not prepared to extend the doctrine of consolidation beyond the extent to which it has been already carried, and I think that to accede to the appellants' argument in the present case would be an extension of that doctrine. It is clear that the appellants are in no respect prejudiced by Pledge having taken a transfer of Stunt's interest in the property, and having sold to the plaintiff under Stunt's power of sale. Pledge was only doing what Stunt might have done, and if the appellants derived any advantage it would have only been by an accident, and to the benefit of which they have no claim. I only desire to say that I do not quite share the Lord Justice's doubts as to *Vint* v. *Padget* *ubi sup.*). As at present advised, I think that case may be supported on sound principles, but it is unnecessary for us to deal with *Vint* v. *Padget* in this case, as, even assuming that case to have been rightly decided, we have come to the unanimous conclusion that the appeal fails.

Solicitors for the plaintiff, *A. R.* and *H. Steele*, agents for *G. W. Haines*, Folkestone.

Solicitors for the defendants, *Talbot* and *Tasker*.

Thursday, Aug. 9.

(Before LINDLEY, LOPES, and DAVEY, LJJ.)

Re GLORY PAPER MILLS COMPANY LIMITED: DUNSTER'S CASE. (a)

APPEAL FROM THE CHANCERY DIVISION.

Company—Winding-up—Memorandum of association—Signature by member of firm—Subsequent application by and allotment to firm of same number of shares—Satisfaction—Companies Act 1862 (25 & 26 *Vict. c.* 89), *s.* 23.

The liability under sect. 23 *of the Companies Act* 1862 *of a subscriber of the memorandum of association of a limited company for the shares subscribed for is satisfied by an allotment of a similar number of shares to his firm, made in pursuance of an agreement with the company that only the number of shares mentioned in the memorandum shall be taken by the firm or any member thereof.*

Decision of Williams, J. reversed.

THIS was an application by T. M. Dunster that his name might be struck off the list of contributories of the Glory Paper Mills Limited, as a contributory in respect of 100 shares.

The company was incorporated on the 2nd May 1887, with the object of carrying on the business of manufacturers and dealers in paper. The nominal capital was 50,000*l.*, divided into 4000 preference shares of 10*l.* each, with a cumulative and preferential dividend of 8*l.* per cent. and 1000 deferred shares of 10*l.* each.

Dunster, who was a member of the firm of Dunster and Wakefield, signed the memorandum of association for 100 preference shares. He was also one of the first directors of the company, and acted in that capacity down to the date of winding-up of the company.

Dunster and Wakefield acted as agents for the company from the time of its commencement at a commission of 2½ per cent.

On the 17th May 1887 Dunster signed in the name of his firm and sent to the company an application in the ordinary form for 100 preference shares, and on the 24th May these shares were duly allotted to the firm and were fully paid up.

On the 27th June Dunster and Wakefield wrote and sent to the directors of the company a letter in the following terms:

> We will undertake the agency of the Glory Paper Mills Limited for 2½ per cent. commission on the gross account, and all papers to come through us, and we invoice the papers in our names, and we will, if wanted, make advances on papers sent up to 5 per cent. per annum.

On the 8th March 1893 the company was ordered to be wound-up, and the official receiver

(a) Reported by W. IVIMEY COOK and W. C. BISS, Esqrs., Barristers-at-Law.

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and liquidator placed Dunster's name on the list of contributories in respect of the 100 shares for which he had signed the memorandum of association.

Dunster's name was never entered on the register of members, nor was he ever called upon by the company to take or pay for a separate 100 shares in his own name.

It appeared from the evidence filed on behalf of Dunster that Dunster and Wakefield agreed to become the agents of the company in May 1887, and that it was then agreed that their firm should take and pay for in full 100 shares of 10*l.* each in consideration of the firm having the agency of the company with a commission of 2½ per cent. on the gross accounts; that the firm was to be entitled to the shares and to pay for the same in full on allotment; that, in pursuance of such agreement, Dunster signed the memorandum in his own name for such 100 shares, it being understood that the memorandum should be signed by individuals and not by firms; that, in order to carry out such arrangement, it was considered necessary for Dunster to fill up an application form, and that he should do so in the name of his firm, so that the shares might be allotted in the name of his firm; that the sole reason why the form of application of the 17th May was signed by him in the name of his firm was for the purpose of getting the shares so allotted to his firm and to himself individually, and for no other purpose whatever; that the signing of the memorandum and the application of the 17th May formed one transaction only, and did not constitute two applications, one by Dunster for 100 shares, and another by his firm for a further 100 shares; and that these facts were fully known to all the directors and officials of the company, and had always been acquiesced in by the company.

The summons was heard by Williams, J. (sitting as an additional judge of the Chancery Division) on the 18th July.

Buckley, Q.C. and *Methold* for the applicant.—Under sect. 23 of the Companies Act 1862 a person, by signing the memorandum of association of a company, becomes bound to take the number of shares for which he signs. It has, however, been held that, if he subsequently applies for and is allotted a similar or larger number of shares, his contract to take the number of shares for which he signed is satisfied:

Re Freen and Co. Limited; Elliot's case, 15 L. T. Rep. 406;
Re Crooke's Mining and Smelting Company; Gilman's case, 54 L. T. Rep. 205; 31 Ch. Div. 420.

Here we say that the contract by Dunster to take 100 shares was satisfied by the allotment to Dunster and Wakefield of a similar number. The shares were applied for in order to secure to the firm the agency of the company, and the memorandum was signed by Dunster merely because the Registrar of Joint Stock Companies refused to accept a firm as one of the signatories to the memorandum of association. The shares allotted to the firm were, in fact, the same shares as those for which Dunster subscribed the memorandum. [WILLIAMS, J.—Under sect. 23 of the Companies Act 1862 the contract to take shares is statutory. If, therefore, A. signs the memorandum of association for a certain number of shares, is his statutory contract satisfied by the shares being taken by A., B., and C.?] We submit so. A., B., and C. would be jointly and severally liable to pay the amounts due upon the shares, A.'s liability would not be diminished, and the company would get the benefit of having three persons to look to for payment instead of one. The present case, we submit, comes within the decision in *Re Mason's Hall Company Limited; Nokes' case* (16 W. R. 1135). There a member of a firm, which consisted of three persons, subscribed the memorandum of association of a company for 100 shares in pursuance of a previous arrangement with his firm that the shares should be alloted to the members in certain proportions, which was accordingly done, and it was held that the members subscribing must be on the list of contributories for the 100 shares, but that the shares must be satisfied by means of the shares allotted to the other members of his firm and those retained by him.

Farwell, Q.C. and *E. S. Ford* for the official receiver and liquidator.—*Nokes' case* (*ubi sup.*) is really an authority in our favour. There was only one application for shares in that case, whereas here there were two. *Gilman's case* (*ubi sup.*) has little bearing on the present case, as there it was held that there was practically only one transaction. Dunster having signed the memorandum for shares, his name ought to remain on the list of contributories in respect of such shares, notwithstanding that no shares were ever allotted to him, and that his name was never on the register:

Re London, Hamburgh, and Continental Exchange Bank; Evans's case, 16 L. T. Rep. 252; L. Rep. 2 Ch. 427;
Re South Blackpool Hotel Company; Migotti's case, 16 L. T. Rep. 271; L. Rep. 4 Eq. 238.

The application by and the allotment to the firm constituted, we submit, a distinct transaction from that entered into by Dunster, and there never was any real intention that the second application should be connected with the first.

Buckley, Q.C. in reply.—Under article 29 of the articles of association the company has the same right of lien upon shares, whether they stand in the names of one or more persons. If a person agrees to take shares in a company, and the company does not allot them within a reasonable time, he is not bound to accept them:

Ramsgate Victoria Hotel Company v. *Montefiore*, 13 L. T. Rep. 715; L. Rep. 1 Ex. 109.

Here an interval of seven years has elapsed.

WILLIAMS, J.—I do not think I ought to accede to this application to remove Dunster's name from the list of contributories of this company. I should be very sorry if I thought that any injustice was done and that the court had no means of setting that injustice right. I do not, however, think, under the circumstances of this case, that there is any injustice. This company was being promoted, and it seemed good either to Dunster, or to his firm of Dunster and Wakefield, to give their support to the proposed company by signing the memorandum of association for 100 shares. I daresay that the Registrar of Joint Stock Companies will not accept the signature of the firm as a proper signing of the memorandum of association as required by the statute. I am very far from saying that he is right; but under those

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circumstances Dunster alone signed the memorandum of association, and, having so signed, sect. 23 of the Companies Act 1862 provides what his liability is to be. The section says that "the subscribers of the memorandum of association of any company under this Act shall be deemed to have agreed to become members of the company whose memorandum they have subscribed, and upon the registration of the company shall be entered on the register of members hereinafter mentioned." It seems to me, therefore, beyond a doubt that Dunster individually the moment he signed the memorandum of association must be deemed to have agreed to become a member of the company, and his name ought forthwith to have been entered on the register of members. Dunster was a director, and it seems to me that he failed in his duty in not immediately putting himself on the register in respect of those 100 shares for which he signed the memorandum of association. It is said that when Dunster signed the memorandum he was acting on behalf of his firm. It seems to me that, however much that may have been arranged between Dunster and the other member of his firm, and however much that arrangement may have been communicated to the directors subsequently, it cannot possibly affect the liability of Dunster, who forthwith became a member of the company, and ought to have had his name entered on the register of members. In this state of things the directors of the company and Dunster and Wakefield were minded apparently, if they could, to transfer the liability of Dunster to his firm. It is quite true that Dunster as a member of his firm would be jointly and severally liable in respect of membership; still, it does not seem to me that that is the same thing as his being individually liable. One has only to point out one instance in which the liabilities and advantages would be different to show that it is not the same thing to put the name of an individual and that of his firm on the register, and that is this: that the rights of set-off would obviously be different. It therefore seems to me that, although in fact in the present case it may have made no difference, it is impossible for me to say as a matter of law that the statutory obligation of Dunster under sect. 23 was satisfied by the name of his firm being placed on the register. The directors seem to have thought that it could be so satisfied, but to have had some misgivings in the matter, and therefore, instead of doing what, if they were right logically, they ought to be able to do—simply to put the name of the firm upon the register without any further application than the signing of the memorandum—they received and entertained an application upon the 17th May from Dunster and Wakefield to allot them 100 shares. That application was unconditional, and not only so, but the resolution for allotment was also unconditional. It includes this 100 shares among some 1800 shares which at the same time were allotted to other persons. Having regard to certain dates which were mentioned to me as appearing in the minute-book, I cannot help thinking that what really made Dunster and Wakefield think it desirable that they should make this application upon the 17th May was that at that time they had not been, at all events formally, appointed agents of the company, and they were very anxious to obtain the appointment. But be that as it may, there was a complete contract; there was an unconditional application and an unconditional allotment—an allotment which in my opinion did not satisfy, and could not satisfy, the obligation which Dunster individually had already incurred. I am asked now, after the company has gone into liquidation, to say that that contract is not binding on Dunster and Wakefield because of the unexpressed understanding that existed between the directors and this gentleman. It seems to me that I ought not to attend to that at all. Here is an unconditional application and an unconditional allotment. It may very well be that on both sides it was thought that this would be a satisfaction of the individual obligation of Dunster; but they were wrong in so thinking, and if they desired to make their application conditional upon their view being right they should have said so in their application. With regard to the authorities that have been cited to me, the only one to which I need refer is *Nokes' case* (*ubi sup.*). That, as has been already pointed out, was a wholly different case. There was no separate application at all; all that happened was that Nokes applied for 100 shares on behalf of his firm, and got the allotment made partly to himself and partly to the other two members of his firm, and it was held that the allotment ought really to have been wholly to Nokes, and he was accordingly placed upon the register in respect of the whole of the 100 shares, and it was further held with regard to fifty-eight shares which had been allotted to the other members of his firm that there had been no application by them, and consequently that there was no contract by them to take the shares, and that being so, the mere fact of their names being on the register did not make them members of the firm; because, although sect. 23 imposed immediately upon the subscribers of the memorandum the position and liabilities of members, the section goes on to provide that, "every other person who has agreed to become a member of the company under this Act, and whose name is entered on the register of members," and the other persons in that case had not agreed to become members here. In my opinion the firm had clearly agreed to become members. The application must therefore be refused with costs.

From this decision Dunster appealed.

Lindley, L.J.—I think that the learned judge has not come to a right conclusion in this case. The real question is, whether there was one agreement to take shares or two. At the first blush it looked as if there were two agreements; but it is plain from the evidence that the signing of the memorandum by Dunster was in performance of the arrangement that his firm should be the agents of the company, and that his subsequent application on behalf of the firm for 100 shares was part of the same arrangement. The documents might have supported two agreements, but the evidence was all in favour of there being only one. How then does it stand in point of law? Dunster was bound to take 100 shares, and he asked that they should be had in the name of himself and his partner. Why should he be fixed with 200 shares? None of the parties understood that there were to be two agreements; and that is the true solution of this case. Then with respect to the qualification, I do not feel any difficulty on this

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point. The 73rd article says that the qualification of a director shall be the holding of 100 shares, and a director may act before he gets them. Dunster did hold the 100 shares, and I cannot understand the evidence which seeks to compel him to hold them in his own name. The agreement was, that he was to hold 100 shares. If the company choose to take the extra responsibility of his partner, that does not matter. The real question is reduced to one of fact. What is the inference? Was there one agreement to take 100 shares, or were there agreements to take 200 shares? My opinion is, that there was only one agreement, and consequently that Dunster's name must be removed from the list in respect of those shares.

LOPES, L.J.—I am of the same opinion. The question really is, What was in point of fact the true state of the case? What is the proper inference to be drawn from the facts? Dunster and Wakefield were paper manufacturers, and it appears that Dunster, one of the partners, had signed the memorandum of association for 100 shares. I think there is no doubt about that; but under what circumstances did he do that? He wished and he intended only to sign in the name of the firm, he was told that it was not right to sign the memorandum of association in the name of the firm, and thereupon he signed it in his own name, meaning thereby, "I sign this in my own name, but I sign it as a member of the firm." Subsequently the company was formed, and then that is done which seems to me to be a work of supererogation—an application was sent in in the name of the firm for 100 shares. It is said that this was a separate and independent agreement from the former, and that Dunster ought to be on the register for 100 shares, and the firm on the register for another 100 shares. In my opinion that is wrong. There were only 100 shares taken. What is afterwards done is simply the performance of the original contract. There was no intention from first to last to take 200 shares. The true meaning of the transaction was that 100 shares were to be taken, and no more. With regard to the qualification, there also I think there is no difficulty. Dunster held 100 shares, and Dunster was qualified to be a director. I think, therefore, this appeal must be allowed.

DAVEY, L.J.—In my opinion, we should be doing a piece of injustice if we affirmed this order. We should be imposing a liability on this gentleman which neither he nor any other party to the transaction ever intended or dreamt of his entering into. If we are to believe the statements made on oath, not only by Dunster himself, but by several other witnesses, not one of whom have been cross-examined, there can be no manner of question that there was one contract, and one contract alone; and that when Dunster signed the memorandum of association he did so with the intention of carrying out that informal arrangement—informal, because it was not binding at that time on the company—that his firm was to take 100 shares in this company, and that thereby became a contract with the company. The company, for aught I know to the contrary, might have insisted on Dunster himself being put on the register, but they did not. The application that was made in the name of the firm of Dunster and Wakefield is proved to my mind most clearly to have been made for the mere purpose of carrying into effect a piece of machinery which would formally get the shares into the name of Dunster and Wakefield; and, in my opinion, it would be an outrage to hold that there were two sets of 100 shares in this case, and we should be acting contrary to the intention of everybody connected with the transaction. Nor do I think that the documents which are relied on by the respondent, when properly understood, are in the least degree inconsistent with this. In June they appear to have put into writing the terms on which these gentlemen were to act, and to have settled the terms which were not for aught I know fixed at that time. But that is not in the least inconsistent with Dunster having signed the memorandum, or with his firm having taken these shares in pursuance of an arrangement with the promoters before the incorporation that they should be agents of the company, and the company, we are told in fact, employed them as agents from the time when the company was incorporated. I am therefore of opinion that there was only one contract in this case, and that was a contract by Dunster to take 100 shares. It is proved that he entered into that contract on behalf of his firm just as if he had signed the memorandum on behalf of himself and Wakefield, and it is to my mind proved that the application in the name of Dunster and Wakefield for 100 shares was only made in pursuance of and for the purpose of carrying out that obligation. Then Mr. Farwell has raised another point which is not mentioned in the judgment of the learned judge, that Dunster was one of the first directors of the company, and was under an obligation therefore to be the holder of 100 shares. I do not think it necessary to go into that, because this is not an application to put Dunster on the register on the ground of his obligation to take shares, but on the ground of his having contracted by the memorandum. I entirely agree with Lindley, L.J. that a man is none the less a holder of 100 shares because the company has the additional advantage of having another person joined with him, both of those joint holders being jointly and severally liable to the company. I am of opinion, therefore, that this order ought to be discharged, and that Dunster's name ought to be removed from the register with costs both here and below.

Solicitors: *Blachford, Riches,* and *Co.; Goldring* and *Bell.*

Oct. 24 and 25.

(Before LINDLEY and SMITH, L.JJ.)

BOYD v. BISCHOFFSHEIM. (a)

ORIGINAL MOTIONS.

Practice—Vacation business—Appeal—Interlocutory proceeding—Order of single judge of Court of Appeal—Motion to discharge or vary—Supreme Court of Judicature Act 1873 (36 & 37 *Vict. c.* 66), *s.* 52—*Supreme Court of Judicature (Procedure) Act* 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-sect.* 1 (*b*).

An application to the Court of Appeal to discharge or vary an order made under sect. 52 *of the Supreme Court of Judicature Act* 1873 *is not an*

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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appeal within the meaning of sect. 1 of the Supreme Court of Judicature (Procedure) Act 1894, and consequently leave to appeal is not required.

IN July 1894 this action against three defendants for fraudulent conspiracy was dismissed by North, J., as frivolous and vexatious.

The plaintiff having given notice of appeal, the several defendants applied in the long vacation, viz., on the 16th Oct. 1894, to the Lord Chief Justice (Lord Russell), for an order that the plaintiff might give security for the costs of the appeal, and that the appeal might be postponed till the security was given.

Lord Russell, acting as a judge of the Court of Appeal, made an order under sect. 52 of the Supreme Court of Judicature Act 1873, directing the plaintiff to find security to the amount of 100*l.* against each defendant; but his Lordship declined to order that the appeal should not be proceeded with till the security was given.

The plaintiff now moved to discharge the order of the Lord Chief Justice, and the defendants also moved to vary the order in point of form.

The question was now raised before the Court of Appeal as to the jurisdiction of this court to entertain these applications, having regard to sect. 1 of the Supreme Court of Judicature (Procedure) Act 1894, no leave to appeal having been obtained from Lord Russell, C.J.

Sect. 52 of the Supreme Court of Judicature Act 1873 enacts that, in any cause or matter pending before the Court of Appeal, any direction incidental thereto, not involving the decision of the appeal, may be given by a single judge of the Court of Appeal; and a single judge of the Court of Appeal may at any time during vacation make any interim order to prevent prejudice to the claims of any parties pending an appeal as he may think fit; but every such order made by a single judge may be discharged or varied by the Court of Appeal or a divisional court thereof.

Sect. 1, sub-sect. 1 (*b*) of the Supreme Court of Judicature (Procedure) Act 1894 enacts that, except in certain specified cases (none of which were applicable to the order made in the present case), no appeal shall lie, without the leave of the judge or of the Court of Appeal, from any interlocutory order, or interlocutory judgment, made or given by a judge.

Turrell for the plaintiff.

Cozens-Hardy, Q.C. and *Gregson* for the defendant E. R. McDermott.

Alexander Young for the defendant E. McDermott.

Pollard for the defendant Bischoffsheim.

The LORDS JUSTICES held that an application to the Court of Appeal to discharge or vary an order made under sect. 52 of the Judicature Act 1873 was not an appeal within the meaning of sect. 1 of the Supreme Court of Judicature (Procedure) Act 1894, and that consequently leave to appeal was not required. Their Lordships disallowed the plaintiff's motion, declining to interfere with the discretion of Lord Russell, C.J., as to the amount of the security; but they varied the order in point of form by declaring that the appeal should not be in the paper until a week after security had been given.

Solicitor for the plaintiff, *W. C. Goulding.*

Solicitors for the defendants, *Hores* and *Pattisson*; *John Holmes* and *Son*; *Freshfields* and *Williams.*

Monday, Nov. 5.

(Before the LORD CHANCELLOR (Herschell), LINDLEY and SMITH, L.JJ.)

Re EMMA JANE HINCHLIFFE. (a)

ORIGINAL APPLICATION TO THE COURT SITTING IN LUNACY.

Lunacy — Practice — Exhibits to affidavit — Inspection.

Documents appearing as exhibits to an affidavit made in lunacy form as much a part of the affidavit as if they were actually annexed to and filed with the affidavit; and consequently anyone entitled to see the affidavit has the right to inspection of the exhibits likewise.

THIS was an application for an order to inspect exhibits to an affidavit.

The facts appear in the judgment of the Lord Chancellor.

H. Terrell for the applicant.

Willis Bund for the respondent.

The LORD CHANCELLOR.—This is an application in the lunacy of Emma Jane Hinchliffe, who is now dead, for an order that her executor should be permitted to have inspection of certain cases and opinions referred to in terms which I will allude to presently, and made exhibits to an affidavit of her committee dated the 16th Jan. 1891. It appears that the committee was the sister of the lunatic, and there was a third sister who was sane. The committee and the sane sister entertained the view that the trustees of certain property in which they were interested with the lunatic had dealt improperly therewith, and they contemplated taking proceedings against them. They desired to join the lunatic as plaintiff in those proceedings, and applied to the master in lunacy for an order permitting them to do so. Of course the joinder obviously so far affected the lunatic's rights as possibly to subject her to the payment of costs. In order to obtain the consent of the master to this joinder, the committee made an affidavit in which she said that she had taken the opinions of counsel, as she and her sisters were interested in the question of the liability of the trustees. Then her affidavit states that the instructions to counsel and opinions are annexed to the affidavit, and marked C. The next paragraph refers to certain other instructions which are annexed, and marked D. On that affidavit the master granted leave to join the lunatic, and by so doing, as I have previously said, necessarily affected her rights. The lunatic is now dead, and this affidavit which was made in lunacy is handed over by the committee to the executor. He being in possession of it sees that the master was induced to act by the production of the documents which I have before referred to. Thereupon the executor says that he is entitled to see those documents. Mr. Willis Bund, on behalf of the committee, denies that right, and persuaded Kay, L.J. to hold the same view on the ground that those documents are not the property of the lunatic, but of the committee. Mr. Willis Bund

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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suggests that these were documents of the committee which were privileged, and which she was not compellable to produce. But I think the questions of property and privilege have nothing to do with the application now made. The opinions of counsel may be the property of the committee taken for her own protection, and being so, she might not be compelled to produce them. But the committee chooses herself to put them before the master as part of an affidavit, in order to induce the master to act in a manner which may possibly prejudice the lunatic's rights. I am at a loss, in the absence of authority, to see the ground on which the lunatic if she became sane, or her executor if she died, could be refused inspection of documents made in lunacy. Though they are not filed they form as much a part of the affidavit as if they were actually annexed and filed. For these reasons it seems impossible to hold that the committee can refuse inspection of these documents.

Lindley and Smith, L.JJ. concurred.

Solicitor for the applicant, *Frith Needham.*

Solicitors for the respondent, *Kennedy, Hughes,* and *Kennedy*, agents for *Colmore* and *Monckton,* Birmingham.

June 9 *and* 11.

(Before Lord Esher, M.R., Kay and Smith, L.JJ.)

The Bexley Heath Railway Company (apps.) v. North (resp.). (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Lands Clauses Acts—Compensation—Tenancy for less than a year—Injury to adjoining property held on thirty years' lease—Jurisdiction of magistrate — Lands Clauses Act 1845 (8 *Vict. c.* 18), *s.* 68 *and* 121.

The respondent was tenant of a piece of land held upon a lease from the Crown for the term of thirty years from 1889, *subject to a right reserved to the Crown to give him a three months' notice to quit as to any part of the land comprised in the lease. The appellants, a railway company, gave him notice to treat in respect of a strip of this land required by them for their railway. Afterwards the Crown gave him a three months' notice to quit this strip of land. The metropolitan police magistrate, before whom a summons was afterwards taken out by the appellants, refused to assess, under sect.* 121 *of the Lands Clauses Act, the compensation to be paid to the respondent. Upon a motion by the appellants for a* mandamus *to the magistrate, the Divisional Court held* (Reg. *v.* Kennedy, 68 *L. T. Rep.* 454; (1893) 1 *Q. B.* 533) *that the respondent had no claim except for the loss of the strip of land and damage for its severance during the remainder of his three months' interest in it, and granted a* mandamus *to the magistrate to assess, under sect.* 121, *the amount of compensation due. Upon a special case subsequently stated by the magistrate:*

Held (*affirming the decision of the Queen's Bench Division,* 70 *L. T. Rep.* 903), *that the magistrate had no jurisdiction under sect.* 121 *to assess compensation for the injuriously affecting of the remainder of the respondent's land upon the basis of a thirty years' tenancy, and that the only compensation he had jurisdiction to assess was, for the loss of the strip of land and damage for its severance for three months.*

This was an appeal from a judgment of the Queen's Bench Division (Mathew and Collins, JJ.), reported 70 L. T. Rep. 903, upon a special case stated by a metropolitan police magistrate.

The special case is set out in the report of the case in the Queen's Bench Division, and the facts are also stated in the judgment of Kay, L.J.

Sect. 68 of the Lands Clauses Act 1848 (8 Vict. c. 18) provides for the assessment of compensation, where the claim is above 50*l.*, by a jury or by arbitration.

Sect. 121 provides as follows:

If any such lands shall be in the possession of any person having no greater interest therein than as a tenant for a year or from year to year; and if such person be required to give up possession of any land so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain, or if a part only of such lands be required, compensation for the damage done to him in his tenancy by severing the lands held by him or otherwise injuriously affecting the same; and the amount of such compensation shall be determined by two justices. . . .

Upon the argument of the special case before the Queen's Bench Division (70 L. T. Rep. 903) the Court held that the question was practically concluded by a judgment of the Queen's Bench Division (Lord Coleridge, C.J, and Cave, J.), reported 68 L. T. Rep. 454; (1893) 1 Q. B. 533), in which the court, upon a former application by the appellants, granted a *mandamus* to the metropolitan police magistrate to assess under sect. 121 of the Lands Clauses Act 1845 the amount of compensation to be paid to the respondent.

The respondent, Colonel North, appealed from the judgment of the Queen's Bench Division.

Crackanthorpe, Q.C. (*Forman, Ernest Spencer,* and *F. O. Robinson* with him) for the respondent.

Farwell Q.C. (*Edward Boyle* with him) for the appellants.

June 11.—Lord Esher, M.R.—It seems to me that Colonel North's claim as regards this piece of land itself and compensation for severance could be only in respect of a three months' tenancy. But he makes a larger claim than that in respect of adjoining land which was valuable as a shooting property, and he says that the taking of this strip of woodland by the railway company injuriously affected the land on each side of it. That is his argument in this court; but when the matter came before the Divisional Court on the motion for a *mandamus*, and he was asked whether he had any claim except as to the strip of land itself, his counsel failed to formulate any other claim, and the court therefore held that he had no colourable right to any other compensation. Upon the question whether he had any such further colourable right depended the question whether the case should be tried by a jury under sect. 68, or whether the compensation should be assessed by a magistrate under sect. 121. As no further colourable right

(a) Reported by E. Manley Smith, Esq., Barrister-at-Law.

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was made out, the Divisional Court issued a *mandamus* to the magistrate to act under sect. 121. The magistrate proceeded to act under the *mandamus*, but he seems to have doubted whether the decision of the Divisional Court was right or wrong, and he therefore, after deciding the amount of compensation as regards the land itself, settled on an alternative amount including the further claim now made; and stated a case for the opinion of the court as to which of these two sums was the right amount to be paid. Upon that special case the Divisional Court gave judgment against Colonel North, who has now appealed to this court. It seems to me that, in this position of things, Colonel North could not insist on compensation for any greater right than what could be assessed under sect. 121. His claim was ordered to be tried before the magistrate under sect. 121, and he could not claim compensation for anything which the magistrate had no jurisdiction, under that section, to deal with. It was said that this was hard upon Colonel North, because he had tried to get his compensation assessed under sect. 68, and had failed. But, if he had any right to compensation greater than that which could be assessed by the magistrate under sect. 121, then the order for a *mandamus*, granted by the Divisional Court, was wrong and Colonel North should have appealed against it. It is too late now to appeal against the *mandamus*, and if he had the right to the greater compensation which he now claims, it is too late to maintain his claim. The learned counsel for Colonel North said that he should like an opinion from the court whether, if the magistrate was confined to give the smaller sum assessed under sect. 121, a further claim could be made for compensation to be assessed by a jury under sect. 68. In my opinion Colonel North cannot make this claim; he cannot have part of his claim assessed under sect. 121 and afterwards have a further claim assessed under sect. 68. His compensation must be assessed either under sect. 121 or under sect. 68; it cannot be assessed under both. If Colonel North ever had a right to compensation on a larger basis than that which we think he is entitled to for injuriously affecting the shooting land on either side of the strip taken by the railway company, I think he has lost it. But I do not express any opinion whether in fact he ever had such a right, because it is unnecessary that I should do so. I think that the judgment of the Divisional Court was right, and this appeal must be dismissed.

Kay, L.J. read the following written judgment:—Colonel North, the respondent, under a lease from the Crown dated the 5th Feb. 1889, was entitled to certain land for a term of thirty years. The lease contained power for the Crown to determine the tenancy as to all or any part of the land upon three months' notice. The land included a good deal of covert used by Colonel North for preserving pheasants. In May and June 1891 the Bexley Heath Railway Company gave to Colonel North notices to treat for a strip of land running through this property for the purpose of making a railway which would be in a deep cutting. Part of this strip went through and divided some of the pheasant coverts. On the 30th June 1892, before anything had been done under the notices to treat, the Crown gave notice to Colonel North to determine his lease as to the strip of land included in the notices to treat only. Then on the 20th July 1892 the railway company proceeded to take possession under sect. 85 of the Lands Clauses Act, and gave security for the estimated value of the land. Next, they took proceedings to have the purchase money and compensation assessed, and treating Colonel North's interest as being for three months only by reason of the notice determining his tenancy as to the strip, they took proceedings before a magistrate under sect 121, which gives the magistrate jurisdiction only when the person's interest is as tenant for a year or from year to year. The position of Colonel North at that time was that he was a tenant of the lands adjoining on both sides for the residue of the term of thirty years, subject to the contingency of having that tenancy determined by a three months' notice. Colonel North objected to the jurisdiction of the magistrate. He said, in effect, "I have three claims:—(1) the value of my interest in the land taken; (2) damages for severance of the land on either side; (3) the injuriously affecting the land on either side by the execution of the works or otherwise." Moreover he contended, as I understand, that each of these three claims should be valued as at the date of the notice to treat, not the actual date of the valuation; and at the date of the notice to treat his interest in the land actually taken was for the residue of the term of thirty years, subject to the contingency of its being determined by a notice which had not then been given. The magistrate decided that he had no jurisdiction. Thereupon the company applied for a *mandamus* to the magistrate to assess the price of the land or other compensation. On the 8th Feb. 1893 the Divisional Court granted the *mandamus*. As I understand they held, first, that the time to be regarded was the date when the magistrate had to make the assessment. The contingency of having the tenancy determined by three months' notice had then become, as to the strip taken, a certainty which it was impossible to disregard. The price therefore must be the price of a three months' tenancy of the strip, and the damage by severance must be damage for a three months' severance. The severance beyond the three months was not by the railway company but by the Crown, who by determining the tenancy resumed possession of the strip after the three months, and I suppose have sold their reversion in it to the railway company. There remained the third claim for injuriously affecting the adjoining land on either side of the strip which was held for more than one year or from year to year. The Divisional Court evidently doubted whether the magistrate had jurisdiction to assess the compensation for this; but they doubted still more whether there was any such injury, and they invited counsel to formulate their claim on this account. Counsel would not, or could not, or at all events did not, do this to the satisfaction of the court; and therefore, on the ground that there was no tangible claim in this respect, the court granted the *mandamus*. The effect of that was, that the Divisional Court considered that the only valid claims were, first, for the price of the three months' tenancy of the land taken, and secondly, for the severance for three months of the adjacent lands on either side; and they held that these two claims were within the jurisdiction of the magis-

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trate. The case went back to him and he awarded 31*l.* 10*s.* for these two claims; but, if he had jurisdiction to deal with the other claim for injuriously affecting otherwise than by severance, he awarded 368*l.* 10*s.*, and he stated a special case as to which sum should be allowed for the opinion of a divisional court. That court, upon argument of the special case, held that the matter had been decided upon the application for a *mandamus*, and that the larger sum therefore could not be given. This appeal is from that decision. It seems quite clear that sect. 121 applies only when the land taken and the adjoining land are all held for not more than a year or from year to year, and that the magistrate had no jurisdiction to assess the larger compensation in this case. In truth the proper course for Colonel North, if he insisted on this larger claim, was to have appealed against the order for a *mandamus* in order to have had his claims assessed, not by a magistrate under sect. 121, but by arbitration or by a jury in the ordinary way under sect. 68. On this appeal we are bound to treat the *mandamus* as rightly granted. The only claims which the magistrate could deal with under it were those which he has valued at 31*l.* 10*s.* The decision of the Divisional Court must therefore be affirmed, and the appeal dismissed.

SMITH, L.J.—The only question which arises in this appeal is, whether Colonel North is entitled to the larger or the smaller of the two sums awarded by the magistrate for compensation for the injury alleged to have been caused by the execution of this railway. The facts of the case have been already stated, and I will only mention one or two further dates. In June 1891 the company had given Colonel North notice to treat in respect of two pieces of land held by him upon a lease from the Crown for a term of thirty years, under which the Crown had the right to give a three months' notice to quit as to any piece of the land. Neither the company nor Colonel North took any proceedings on these notices. On the 30th June 1892 the Crown gave Colonel North a notice to quit, in respect of the strip of land which the company wished to take, and in July the company gave him notice under sect. 85 that they were about to enter into possession of the land. In October following a summons to appear before the magistrate was taken out on behalf of the company for the assessment of the compensation to be paid. Upon the hearing of the summons Colonel North argued that the magistrate had no jurisdiction in the matter because, though his tenancy of the strip to be taken was for less than a year, the rest of the land, which was injuriously affected, was held upon a thirty years' lease. The magistrate declined jurisdiction, and the company thereupon applied to the Divisional Court and obtained a *mandamus* ordering the magistrate to hear and determine the summons. The *ratio decidendi* of that decision of the Divisional Court was that Colonel North had not made out any real claim for compensation for the injurious affecting of his land other than the strip taken. Colonel North did not appeal against this order for a *mandamus*. The magistrate then heard the summons and stated this special case. The sole point is, whether Colonel North is entitled to the larger or the smaller of the two sums assessed by the magistrate; that is, whether or not he is to have compensation based upon the thirty years tenancy of the land injuriously affected. It is manifest to me that the magistrate had no jurisdiction under sect. 121 to assess compensation on the larger basis, and this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Dollman* and *Pritchard.*

Solicitor for the respondent, *George Whale.*

May 22, 23, 24, *and July* 9.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

THE CHAMBER COLLIERY COMPANY LIMITED *v.* THE COMPANY OF PROPRIETORS OF THE ROCHDALE CANAL. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Canal company—Mines under canal—Compensation for minerals left for support of canal—Undertaking by canal company not to sue for damage caused by not leaving the minerals—Right of action—34 Geo. 3, c. 78, ss. 39 and 40.

Under the provisions of a special Act of Parliament for the building of a canal, the owners of minerals near and under the canal brought an action for a declaration that a certain amount of the minerals should be left unworked so as to avoid injury to the canal, and that the canal company should pay to the mine-owners the value of the minerals to be left unworked. It was proved that, if these minerals were worked and taken away, no such injury would be caused to the canal as would involve any damage to the interests of the public in its navigation. After the action had been commenced the canal company offered an undertaking not to sue the mine-owners for any injury that might be caused to the canal by the working and taking away of the minerals which the mine-owners proposed to leave unworked, and in respect of which they asked compensation.

Held, that since the mine-owners, by reason of the undertaking of the canal company, would incur no danger of an action for injuring the canal by working the minerals proposed to be left unworked, they were not entitled to the benefit of the Act, and their action should be dismissed.

THIS was an appeal from a judgment of the Queen's Bench Division (Cave and Wills, JJ.) refusing to set aside the judgment of a special referee. The action, which had been subsequently referred to Mr. Gully, Q.C., was brought by the owners of a colliery situated near and under the canal of the defendants for a declaration of their rights under 34 Geo. 3, c. 78, ss. 39 and 40, which was an Act for the making of the Rochdale Canal. By that Act it was provided as follows:

Sect. 39. Nothing herein contained shall extend to defeat, prejudice, or affect the right of the lord or lords, lady or ladies of any manor or manors, or the owner of any lands in, upon, or through which the said canal, cuts, and reservoirs, or any of them, or any towing paths, wharfs, quays, trenches, sluices, passages, watercourses, or conveniences aforesaid, shall be made, to the mines or minerals lying and being within or under the lands to be set out or made use of as aforesaid, but all such mines and minerals are hereby reserved to the lord or lords,

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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lady or ladies, of such manor or manors, and the owner of such lands respectively, and it shall be lawful for the lord or lords, lady or ladies, of such manor or manors, and the owner of such lands respectively (subject to the conditions and restrictions herein contained), to work, get, claim, take, and carry away, to his or her own use, such mines and minerals, not thereby injuring, prejudicing, or obstructing the said canal, cuts, and reservoirs, towing paths, wharfs, quays, trenches, sluices, watercourses, or other the conveniences aforesaid or any of them.

Sect. 40. If the owner or worker, or owners or workers, of any coal or other mine or mines shall, in pursuing or working such mine, work near to or under the said canal, cuts, and reservoirs, or any of them, so as in the opinion of the said company of proprietors to endanger or damage the same, or in the opinion of the owner or worker, owners or workers, of the said mine or mines, to endanger or damage the further working thereof, then it shall be lawful for the said company of proprietors to treat and agree with such owner or worker, or owners or workers, for all such coals or other minerals as may be near or under the said canal, cuts, and reservoirs, or any of them, as shall be thought proper to be left for the security or preservation of the said canal, cuts, and reservoirs, or any of them; and in case the said company of proprietors and such owner or worker, or owners or workers, of such mine or mines shall disagree touching the satisfaction to be made for such coal or other minerals, then it shall be lawful for the said commissioners, at the request of the said company of proprietors, or of such owner or worker, or owners or workers, of such mine or mines, to cause a jury to be summoned and impanelled in the manner herein directed, who shall, and they are hereby authorised and required, by such ways and means as aforesaid, to assess and determine what satisfaction such owner or worker, or owners or workers, of such mine or mines ought to have and receive from the said company of proprietors, on being restrained from working such mine or mines; and upon payment or satisfaction made to such owner or worker, owners or workers, of such mine or mines by the said company of proprietors, according to the verdict or judgment of such jury, such owner or worker, owners or workers, of such mine or mines, shall be, and he, she, or they, is or are hereby perpetually restrained from working such mine or mines within the limits for which satisfaction shall be by the said jury adjudged and declared to extend.

The action was commenced by the plaintiffs on the 18th March 1891, for a declaration of their right to have it ascertained what portion of their coal they ought to leave unworked, and how much compensation they should be paid by the defendants.

On the 24th Jan. 1893 the defendants offered the plaintiffs an undertaking that they would not sue the plaintiffs for any injury that might be done to the canal by the plaintiffs' working and taking away all their coal near and under the canal.

Mr. Gully found (1) that there was no reasonable ground for apprehending that working the mines under the canal would cause them to be damaged by percolation of water from the canal; (2) that working the mines within certain limits marked by him on a plan would cause a subsidence in the canal; (3) that such subsidence would not interfere with the navigation of the canal; (4) that such subsidence would require repairs to be done during a period of eight or ten years to the towing-path and perhaps certain bridges; (5) that the cost of such repairs would not exceed 1200*l.*; and (6) that if the coal was left unworked within certain limits marked out by him on a plan the defendants ought to pay the plaintiffs 12,688*l.*; and he gave judgment that this amount of coal should be left unworked, and that the defendants should pay to the plaintiffs 12,688*l.*

This judgment was affirmed by the Queen's Bench Division.

The defendants appealed.

Sir *Henry James*, Q.C. and *Joseph Walton*, Q.C. (*McSwinney* with them), for the defendants, repeated the undertaking offered on the 24th Jan. 1893. There is now no fear of the mine-owners having any action for damages brought against them, and judgment ought to be for the defendants. It has been found that there is no fear of any subsidence which would interfere with the navigation of the canal, or would give any right of action to the Attorney-General on behalf of the public. The question is one solely between the two parties to this action.

Sir *Richard Webster*, Q.C. and *O. Leigh Clare* (*J. A. Tweedale* with them) for the plaintiffs.—The plaintiffs are entitled to leave unworked any coal which for the safety of the canal ought to be left unworked and to be compensated for it:

Knowles v. *The Lancashire and Yorkshire Railway Company*, 61 L. T. Rep. 91; 14 App. Cas. 243.

Sir *Henry James*, Q.C. replied. *Cur. adv. vult.*

July 9.—Lord Esher, M.R. (after stating the proceedings): Now, a similar Act of Parliament to that which we have now to consider was construed by the House of Lords in *Knowles* v. *The Lancashire and Yorkshire Railway Company* (*ubi sup.*), and it was held that, if the canal is injured by the working of the mines, the canal owner can complain under the Act, and if the mines are injured the mine-owner can also complain, and also if the mine-owner become liable to an action by the canal owner by reason of the canal being injured by the working of the mines, in such a case also he can bring his complaint under the Act. But in the latter case it is not enough that the mine-owner has a fear of injuring the canal and becoming liable to an action; the court must decide whether the fear is well founded. Taking the findings of the arbitrator in the present case, there seems to be no reasonable ground for apprehending that the working of the mines will cause damage to them. But it is said that working within certain marked limits will cause a subsidence of the canal in certain places, and so far the mine-owners have maintained a complaint upon which they are entitled to protection. They have been ordered to leave unworked coal of the value of 12,688*l.* and the canal company has been ordered to pay them 12,688*l.* in respect of this. Now, what would be the injury to the canal by reason of which this heavy obligation is put upon the canal company? It is so slight as to be a subsidence which would not interfere with the navigation of the canal. In such a case the Attorney-General could not interfere on behalf of the public. Moreover the subsidence would only necessitate repairs from time to time during a period of eight or ten years to the towing paths and bridges, and 1200*l.* would cover the whole of the expense of these repairs. If no offer had been made by the canal company such as they have in fact made, perhaps the mine-owners would be entitled to leave this coal unworked and to be paid 12,688*l.* in respect of

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it. But it is now said by the canal company that the mine-owners have no ground for fearing an action being brought against them; if any damage is caused, the canal company will repair it themselves and not sue the mine-owners. Therefore, it seems to me contrary to justice and the Act that the mine-owners should insist on leaving this coal unworked, and on being paid for it such a large sum as 12,688*l*. I think that the judgment of the Divisional Court was wrong, and that this appeal should be allowed.

KAY, L.J.—The appeal of the canal company raises several questions. Adopting the findings that the working of the mines would not cause damage to the mines by percolation of water and would not interfere with the navigation of the canal, although such working would cause a subsidence of the canal, the canal company offer to release the colliery company from all claims and liability in respect of such subsidence, and ask for judgment in their favour. According to the decision of the House of Lords in *Knowles* v. *The Lancashire and Yorkshire Railway Company* (*ubi sup.*), the liability on the part of the colliery company to compensate for any subsidence justifies their bringing the present action, although their mines will not be directly damaged, because they had reached a point at which they found that, having regard to the proximity of the canal and their statutory liability, they could not work further without some danger, or could not work further to the same advantage as if the canal were not there. We are bound, therefore, to hold that the action was properly instituted. But, having regard to this offer of the canal company, is it necessary to compel the mine-owners to leave this large barrier of coal, and is it proper to compel the canal company to pay 12,688*l*.? If it be the case, as we must assume upon these findings, that the navigation of the canal will not be interfered with, the interest of the public is not involved whether the mines are worked or not. Counsel for the colliery company are instructed to say that the workings in the particular locality having been stopped so long have filled up, and that the coal near or under the canal cannot now be worked, or cannot be worked without additional expense. But the offer now made was made by letter on the 24th Jan. 1893, and there is no reason to suppose that, if accepted then, the works could not have been carried on in the usual way without any extraordinary expense to the colliery company. If the canal company give an undertaking to the court that they will not object to the working of the coal under or near the canal between the points marked, and will at their own expense repair any damage that may be done to the canal, or to the banks or towing paths thereof, by reason of such working, and will not make any claim upon the colliery company in respect of such damage, I think that upon such undertaking no order should be made upon the colliery company to leave any coal, or upon the canal company to pay to them any compensation.

SMITH, L.J.—This is an action by mine-owners founded upon sects. 39 and 40 of the Act 34 Geo. 3, c. 78, wherein they ask for a declaration that they are entitled to have ascertained what portions of their minerals are to be left by them unworked lying near and under the canal of the defendant company, and what compensation is to be paid to them by the canal company in respect thereof. The position of a mine-owner towards a canal proprietor under sections similar to the present, was dealt with by the House of Lords in the case of *Knowles* v. *The Lancashire and Yorkshire Railway Company* (*ubi sup.*), and it was therein held that a canal proprietor was in a position to set in motion the machinery of the commissioners and jury mentioned in sect. 40, in one set of circumstances, and the mine-owners could do the like in the other. It was decided that a canal proprietor could take action if injury was likely to occur to his canal by the further working by the mine-owner of his minerals adjacent to or underneath the canal, in which case proceedings could be had under sect. 40 in order to ascertain what minerals "should be thought proper to be left for the security or preservation of the canal," and that satisfaction should be given by the canal company to the mine-owner for such minerals. It was also decided that a mine-owner might set this machinery in motion if injury was likely to occur to his mine, as, for instance, by being flooded by percolation of water from the canal if the mine-owner proceeded further with his working, and in this case also it was to be ascertained what minerals should be thought proper to be left for the preservation and security of his mine and paid for by the canal company. It was further decided that a mine-owner could also set this machinery in motion to have ascertained what minerals were thought proper to be left and paid for by the canal company where, having regard to the proximity of his workings to the canal and his obligation under the statute to the canal proprietors not to injure, prejudice, or obstruct their canal, he could not venture to continue the further working of his mine because of anticipated injury to the canal, which might render him liable to an injunction, and, if injury did thereby occur, to an action for damages by the canal company. The first question in this case is, whether, when a mine-owner is taking proceedings under sect. 40 and all he can establish is a gradual surface damage to the banks and towpaths and possibly to the bridges of a canal, but no injury to the canal itself or its navigation, or to the mine, he is entitled as of right to have it declared that coal shall be left and paid for by the canal company, neither the safety of the mine nor the safety of the canal requiring it, and when the canal company is willing to covenant, if the coals are won and the anticipated surface damage does occur, that no action shall be brought against the mine-owner. It was said by the plaintiffs' counsel that the case in the House of Lords had decided that even in such a case minerals must be left and paid for. The case of *Knowles* v. *The Lancashire and Yorkshire Railway Company* (*ubi sup.*) was a case in which a canal company had been actually injured by the workings of a mine-owner, and the canal company sought to recover damages from the mine-owner for such injuries. It was argued by the mine-owner in opposition to this claim that, inasmuch as before some of the workings had taken place the mine-owner had given notice to the canal company that he was about to work his minerals, and that as the canal company had never offered to pay for them, the mine-owner was entitled to do what he pleased with his own (working in due course) irrespective of results;

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but it was held that, if a mine-owner proceeds with his workings, which in fact do damage to a canal, he does so at his peril, for he might have instituted proceedings under the section to have had ascertained what minerals should have been thought proper to be left for the security of the canal; in which case the mine-owner would be paid by the canal company for what minerals were ascertained to be proper to be left, and that as he had not done so, the canal company was entitled to recover damages as claimed. This does not show that, in proceedings under the section by the mine-owner against a canal company on account of an apprehended action, he is entitled as of right under any set of circumstances to have minerals left and paid for. All it shows is, that the mine-owner may proceed under the section, and thus make himself in all ways safe. If in a particular case he can be made safe without leaving his coal, why should it be thought proper for the security of the mine-owner that it should be left where it is not necessary that it should be? What is to be determined must, in my judgment, depend upon the circumstances of each case as it arises, though, if actual injury to the mine-owner or canal proprietor is apprehended, the leaving of coal is the *primâ facie* way to bring about this safety. The plaintiffs in this action launched their claim upon the two grounds which *Knowles'* case (*ubi sup.*) has decided were open to them, the first and main ground being that injury would be done to their mine by reason of the canal cracking and the water in that part of the canal situated between the two locks getting out and into the mine if they continued their workings; the second being that such injury would be done to the canal as would render them liable to an injunction and damages at the suit of the canal company, and they asked that, upon each ground, minerals might be directed to be left by them to be paid for by the canal company. Mr. Gully, the arbitrator, has found, as to the first claim, that no injury would be occasioned to the plaintiffs' mine or the further working thereof by the abstraction of the minerals near to and underneath the canal. This claim, therefore, of the plaintiffs fails, and they are not entitled upon this ground to have it adjudged that any minerals should be left unworked, or that they should be compensated therefor. As to their other claim, viz., the apprehended action, Mr. Gully found that, although the continued working of the minerals would cause some surface damage to the banks, towpaths, and possibly to some bridges of the canal, such damage would not interfere with the navigation of the canal, and that all that would be necessitated would be some repairs from time to time during a period of from eight to ten years to make good this surface damage, at a cost not exceeding in all 1200*l.* He has, however, awarded, and the Divisional Court has upheld his holding, that, although this comparatively small amount of damage and outlay will be sustained and incurred, yet the mine-owners (the plaintiffs) were entitled under the Act to have it declared that they were to have their coal left unworked, and he has defined the extent, and awarded that the canal company are to pay the plaintiffs for their coal the sum of 12,688*l.* The result is singular, for the canal company does not ask that the coal should be left, and they are willing that every ton of it should be worked and taken away by the plaintiffs in the same way as if no canal existed, and yet this coal is for ever to be made useless to mankind, although neither the canal company nor the mine-owners require it for the safety of their respective undertakings. The question therefore is, do these two sections coupled with the decision in *Knowles* v. *Lancashire and Yorkshire Railway Company* (*ubi sup.*) necessitate under the circumstances of this case that it should be held that coal at the instance of the mine-owner shall be left and be paid for amounting, as it happens to do in this case, to the money value of 12,688*l.*, when 1200*l.* spread over eight to ten years is the utmost money necessary to be expended to keep things as they are? It will be seen that the only injury which can befall the plaintiffs is the before-mentioned surface damage which might give rise to an action by the canal company, and which action the canal company, who are the only persons who could bring it, are willing to covenant never shall be brought against the mine-owner. What then in these circumstances is left to the plaintiffs as regards their two rights under the sections? It appears to me nothing. If they had been liable to have had their mine injured, or been liable to an action by the canal company, that case would not have been this case; but, as they are liable to neither and will not sustain one shilling's worth of injury, I do not see that a declaration can properly be made, as has been made, that 12,688*l.* worth of coal should be left and paid for by the canal company to the mine-owner. Lord Cottenham, in his judgment in *Cromford Canal Company* v. *Cutts* (5 Rail. Cas. 442), which judgment was stated by Lord Macnaghten in the House of Lords to be clearly right, in dealing with these claims under similar sections, said: "There might be a case where no damage to the owner (*i.e.*, coal owner) would accrue. If the coal owner's power and control over his mine be not interfered with by the rights vested in the company (*i.e.*, canal company), then it will not be necessary to put in operation the machinery of the Act if the damages be merely imaginary." In this I entirely agree; and what difference is there between imaginary damages and those as to which the canal proprietor undertakes and binds himself never to put forward a claim? But it was argued for the plaintiffs that, besides the canal proprietor and the mine-owner, the public have rights, and that the mine-owner under the section owed a statutory duty to them in addition to the canal proprietor which the Attorney-General could enforce by information, and consequently that this court could not sanction an undertaking which might render it unnecessary to leave unworked the 12,688*l.* worth of minerals as directed by the arbitrator. It appears to me, however, that Mr. Gully's finding has rendered this point, which is taken by the plaintiffs on the exigencies of their position, untenable. He finds that, although there will be the surface damage mentioned caused by a subsidence, "such subsidence would not interfere with the navigation of the canal;" so the Attorney-General on behalf of the public would have no cause of complaint. Had the canal owners offered the undertaking which they did on the 24th Jan. 1893 before action brought, I should have said, for the reasons above, that the plaintiffs' action had failed, and should

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have been dismissed with costs. But, upon the facts which existed according to Mr. Gully's finding as to the subsidence, when the action was brought on the 24th March 1891, the plaintiffs were within their rights in bringing it, and in my opinion continued so until the 24th Jan. 1893, when the undertaking was offered by the defendants, and which, upon the facts as found, should have been accepted by the plaintiffs. Sir Henry James before us, for the canal company, repeated this offer, and if required consented to bring the 1200*l.* into court, so that it might be there when required from time to time for the surface repairs. In my judgment the court may well sanction this consent being given, and we think that this undertaking should be given. In these circumstances the plaintiffs being under no fear of an action, the second point also fails the plaintiffs, and this appeal must be allowed, and the award of Mr. Gully and the judgment of the Divisional Court ordering the coal to be left and the 12,688*l.* to be paid must be set aside. The case, however, must go back to Mr. Gully to determine pursuant to the undertaking what, if any, expense or loss the plaintiffs have been put to by the cesser of the working of their mines for two years prior to the 24th Jan. 1893, and what is reasonable compensation, if any, for such expense and loss.

Appeal allowed.

Solicitors for the plaintiffs, *Woodcock, Ryland,* and *Parker,* for *Tweedale, Son,* and *Lees,* Oldham.

Solicitors for the defendants, *Norris, Allens,* and *Chapman,* for *George Jackson,* Rochdale.

Wednesday, July 11.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

CHAPMAN *v.* THE FYLDE WATERWORKS COMPANY. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Waterworks — Stopcock in pavement of public street out of repair—Power in water company to repair stopcock and break up street for that purpose—Duty in company to keep stopcock in repair — Negligence — Waterworks Clauses Act 1847 (10 *&* 11 *Vict. c.* 17), *ss.* 28, 48, 51, *and* 52 *—Waterworks Clauses Act* 1863 (26 *&* 27 *Vict. c.* 93), *ss.* 17, 19.

The plaintiff suffered personal injury from a fall caused by tripping up over the cover of a stopcock which was fixed in the pavement of a street over the service pipe which supplied water from the main of a water company to a house in the street. This cover was out of repair, and, in order to repair it, it would have been necessary to break up the surface of the street. In an action for damages against the water company, the jury found that the cover had been negligently left out of repair by the person whose duty it was to repair it.

Held, that, as the company was the only person having a statutory authority to break up the street for the purpose of repairing the cover to the stopcock, a duty was imposed on them to keep it in repair so as not to be dangerous to the public.

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

THIS was an appeal from a judgment of Day, J. at the trial of the action with a jury.

The action was brought to recover damages for personal injuries caused to the plaintiff by stumbling over the iron cover of a stopcock fixed in the pavement of a street which was alleged to have been negligently allowed by the defendant company to be out of repair, and to project above the pavement.

The iron cover or lid was made for the purpose of getting at the stopcock, which was fixed about two feet six below the surface of the pavement upon the service pipe by which one of the houses in the street was supplied with water from the defendant company's main. The service pipe had been laid down by the company at the request and expense of the owner of the house. The stopcock was for the purpose of regulating the supply of water through the service pipe.

It was not possible to repair the iron cover of the stopcock without breaking up the surface of the street.

The defendant company was incorporated by the Fylde Waterworks Act 1861 (24 & 25 Vict. c. cliv.), and by sect. 21 of that Act it is provided as follows:

> The works which the company are by this Act authorised to execute comprise the following waterworks with all requisite works and conveniences connected therewith . . . eighthly, the laying down, repairing, and maintaining of all embankments, drains, sluices, cuts, channels, pipes, wells, and all other works necessary for supplying water within the limits of this Act.

By the Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17) it is provided by sect. 28 that the undertakers may open and break up the soil and pavement of the streets within the limits of their special Act, and lay down service pipes and other works, and from time to time repair, alter, or remove the same.

By sect. 44, in the case of houses whose annual value shall not exceed 10*l.*, the undertakers are made liable to lay down communication pipes and other necessary works for the supply of such houses with water and to keep the same in repair.

Sects. 48 to 52 give power to owners or occupiers of dwelling-houses upon certain conditions to lay down service pipes for the supply of water to their houses from the undertakers' mains, and to remove such pipes after they have been laid down, and for such purposes to open and break up the pavement of the street between their houses and the main.

At the trial of the action before Day, J., with a jury, the jury found that the cover to the stopcock was out of repair, and that the accident was caused by the negligence of the person who was bound to keep it in repair, and they assessed the damages at 40*l.*

Day, J. held that the defendants were bound to keep the cover in repair, and gave judgment accordingly for the plaintiff.

The defendants appealed.

Shiress Will, Q.C. and *Harper* for the defendants.—The householder, and not the defendant company, is the person who is liable for the repair of the stopcock and its cover. They were laid down by the defendants, but it was at the householder's expense, and for the householder's benefit. No duty, statutory or otherwise, is cast upon the

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defendant company to repair. Sect. 28 of the Waterworks Clauses Act 1847 gives them power to do so, but the word "may" is there used, and no obligation is placed upon them. When the company does any repairs to the service pipe and its fittings it does them as agents of the householder. The fact that sect. 44 imposes an obligation to lay down and repair service pipes in the case of certain small houses shows by implication that in other cases there is no obligation upon the company to repair. Sect. 17 of the Waterworks Clauses Act 1863 (26 & 27 Vict. c. 93), which imposes a penalty on any person supplied with water by the undertakers who negligently allows any pipe, valve, cock, or other apparatus to be out of repair, shows that the householder, and not the water company, is liable in the present case.

C. A. Russell for the plaintiff.—The company is the only person who has any power to do repairs to the stopcock and its cover, and by inference a duty is thereby imposed on them to keep the stopcock and cover in repair. A stopcock is a "work necessary for supplying water" within sect. 21 of the special Act:

East London Waterworks Company v. *Vestry of St. Matthew, Bethnal Green*, 17 Q.B. Div. 475.

The company put down the stopcock as much for their own benefit as for the benefit of the householder. The scheme of the Waterworks Acts is that, so long as water is being supplied by the company through a service pipe, the company is the only person who is allowed to control the service pipe. The cover to the stopcock cannot be repaired without breaking up the surface of the street. The company has a statutory power to do this, but the householder has no such power whatever. Sect. 17 of the Waterworks Clauses Act 1863 refers only to pipes, &c., inside the house which is supplied with water, and it deals only with negligence of the householder by which the water is wasted or contaminated.

Shiress Will, Q.C. replied.

Lord ESHER, M.R.—I think that Day, J. was right in holding that the defendants are liable to the plaintiff. The fact that the cover to the stopcock was on the surface of a path which the plaintiff had the right of walking along, imposed on the person who had the control of it the duty of keeping it in repair, so that no one rightfully using the pavement should be injured through any want of its repair. It is not necessary for us to decide whether the service pipe on which the stopcock was fixed was the property of the householder whom it supplied with water. I will assume for the purposes of this case that the service pipe and the stopcock, and the cover which rested on brickwork were all the property of the householder. But that is not enough to determine the case. The question is, who had the control of the cover so as to be able and be bound to repair it? By sect. 21 of the special Act, the Fylde Waterworks Act 1861, the company is authorised to execute certain things, including, in paragraph 8, "the laying down, repairing, and maintaining of all . . . pipes, wells, and other works necessary for supplying water within the limits of this Act." The decision in *The East London Waterworks Company* v. *The Vestry of St. Matthew, Bethnal Green* (*ubi sup.*) seems to me to show that these words "works necessary for supplying water" include works necessary for preventing waste of water; so that sect. 21 authorises the water company to lay down, repair, and maintain the stopcock on the service pipe. By sect 28 of the Waterworks Clauses Act 1847 the undertakers are authorised, under the superintendence of the local authority, to break up the soil and pavement of streets within the limit of their special Act for the purpose of laying down and repairing service pipes and doing other works necessary for the supply of water. Now, when once a service pipe has been laid down under a street, and the surface of the street has been made good, who has authority to interfere again with the surface and break it up? The fact of owning property underneath a street does not of itself justify anyone in breaking up the surface. Assuming, therefore, that this service pipe is the property of the householder whom it supplies, he has no authority to break up the street in order to get at it, unless he is authorised to do so by an Act of Parliament. The Waterworks Clauses Act 1847 gives the occupier of a dwelling-house power, under sects. 48, 51, and 52, to break up the pavement of a street for the purpose of laying down and removing a service pipe to his house. But that is the only power given to him: he has no power to break up the pavement for the purpose of examining or of repairing the service pipe. It is clear, therefore, that he is unable to repair it, and that being so it is impossible to contend that he is liable for not repairing it. On the other hand, the company is authorised to repair a service pipe, and, for that purpose, to break up the surface of a street. In my opinion the stopcock is fixed on to the service pipe primarily for the benefit of the water company, the benefit of the householder is only a subsidiary purpose. But at least it cannot be denied that it is put there for the advantage of both parties, and that the company has the sole right of keeping it in repair, and of breaking up the street for that purpose. Therefore, in my opinion a duty as regards the public is thereby imposed on the defendant company of keeping the stopcock and its cover in good repair, so that the public may not suffer injury through its non-repair, and they are liable in this action to pay damages to the plaintiff. The result of the judgment of Day, J. is, I think, right, and this appeal must be dismissed.

KAY, L.J.—In this case the plaintiff tripped up over the lid of the stopcock on a service pipe leading from the main of a water company to a private house. The lid projected above the pavement, and the plaintiff stumbled and injured himself by falling. At the trial of the action for damages for his injuries, before Day, J., the jury found that the lid was out of repair, and that was the cause of its not being properly shut and of the plaintiff's fall. Now, it is plain that it is impossible to do anything in the nature of repairs to the lid or cover without breaking up the surface of the street by moving the flagstones in the pavement where it is fixed. The defendants laid down the service pipe at the request of the householder, and of their own accord put on the stopcock, which is fixed about 2ft. 6in. below the surface of the ground, and built round it some brickwork, on which rests the iron cover which caused the accident. The defendants resist the claim made against them, and say that there was no duty incumbent on them to repair the

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stopcock. It is enough to say that by sect. 21 of their special Act, and by sect. 28 of the Waterworks Clauses Act 1847, with the explanation that has been put upon the words "necessary for supplying water" in the case of the *East London Waterworks Company* v. *Vestry of St. Matthew, Bethnal Green* (*ubi sup.*), the placing of this guard and its repair were in the power of the defendants. There is nothing in either Act giving express power to the householder to repair the service pipe at all, and he certainly has no power to break up the street for that purpose. Power is only given him to lay down and to remove a service pipe, and for those two purposes to break up the surface of the street. Therefore it seems to me that, under the special and the general Act, the only persons who have express power to repair this iron casing and express power to break up the street for that purpose, are the defendants. But we were referred on behalf of the defendants to the Waterworks Clauses Act 1863, sect. 17 of which imposes a penalty on a person supplied with water who negligently causes or suffers any pipe or other apparatus or receptacle to be out of repair so as to waste the water. It is said that that section shows that the householder was liable to repair the stopcock in this case. But the pipe, valve-cock, and other things mentioned in that section are all things upon the premises of the householder; none of them are things under the pavement of a public street. It is clear that that is so, because otherwise there would be this absurdity: that under sect. 17 he would be liable to repair this stopcock, but at the same time he has no authority under any previous Act enabling him to break up the street, which must be done if the stopcock is to be repaired. Therefore, it seems to me that sect. 17 does not help the defendants. Then they relied on sect. 19 of the same Act. That section only provides that a householder shall not do certain things with regard to the service pipe except with the consent of the water company, but it does not enable him to break up the street for the purpose of doing any of the things mentioned. The result of all the sections that have been referred to seems to me to be this: that the only persons who have power to repair this stopcock and its cover are the defendants. The defendants are therefore persons who are liable to the plaintiff for negligence in not keeping the cover in repair. The result of the judgment of Day J. is right, and this appeal fails.

SMITH, L.J.—This is an action for damages for personal injuries caused to the plaintiff by falling through tripping over the lid of a stopcock in the pavement, which was out of repair and had been negligently left out of repair by the person who was responsible for keeping it in proper condition. The question is, who was liable to keep it in repair? I have no doubt that, under the Fylde Waterworks Act 1861, and under the Waterworks Clauses Act 1847, a duty to repair the stopcock was imposed on the defendants. A point was taken that sect. 28 of the Waterworks Clauses Act 1847 uses the word "may," not "shall," and therefore imposes no obligation. It is true that there was no obligation on anyone to lay down this service pipe; but when once it was laid down, I think a duty was imposed to maintain it in good repair so as not to injure any one of the public using the path. The effect of the sections of the Acts seems to me clear and explicit. It was said that the service pipe and the stopcock belonged to the householder who had had them laid down at his own expense; but that would not free the company from liability to keep them in repair after they had once been laid down. It was argued that it was the householder's duty to repair, but I can find no such duty imposed by any Act of Parliament. Sect. 17 of the Waterworks Clauses Act 1863 is one of a group of sections headed "and with respect to the waste or misuse of the water supplied by the undertakers, be it enacted as follows:" Those sections all refer, not to the pipes in public streets, but to the proper management of the pipes, &c., inside the house to prevent the householder from wasting the water. But, in my opinion, it is not necessary to decide whether the householder in this case was under any duty to repair the stopcock, because, even if he were liable, the defendants are also liable, so that the question of his liability is immaterial. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the plaintiff, *Woodcock, Ryland,* and *Parker*, for *Markland*, Manchester.

Solicitors for the defendants, *Arkcoll, Cockell,* and *Co.*, for *W. J. Dickson*, Kirkham.

Thursday, Oct. 25.

(Before Lord ESHER, M.R., LOPES and RIGBY, L.JJ.)

REG. *v.* CHEW AND OTHERS. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Income tax—Appeal against assessment—Unsatisfactory schedule—Right of appellant to be put on oath—Income Tax Act 1842 (5 *&* 6 *Vict. c.* 35).

The appellant appealed against his assessment for income tax. He sent in a schedule of accounts, and, on appearing before the special commissioners, tendered himself for examination on oath for the purpose of verifying his schedule. The commissioners refused to put him upon oath, and upon the evidence before them confirmed the assessment. The appellant obtained a rule nisi *for a* mandamus *to the commissioners to hear and determine the matter, or to state a special case.*

Held (*affirming the decision of the Queen's Bench Division*), *that the decision of the commissioners was a decision merely on a question of fact; but, assuming that there was a point of law in the appellant's contention that the commissioners were bound to put him on oath, and that his oath as to the correctness of his schedule would be conclusive, nevertheless it was not one in respect of which the court ought to grant a* mandamus.

THIS was an appeal from the decision of the Queen's Bench Division (Mathew and Kennedy, JJ.) discharging a rule *nisi* for a *mandamus* to the Special Commissioners for Income Tax.

The facts appear in the judgment of Mathew, J.

The Income Tax Act 1842 (5 & 6 Vict. c. 35) provides as follows:—

Sect. 118 provides that a person who wishes to appeal against an assessment may, on

(*a*) Reported by HENRY LEIGH and E. MANLEY SMITH, Esqrs., Barristers-at-Law.

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giving notice in writing to the inspector or surveyor, appeal to the commissioners for general purposes; and it further provides as to the time during which such appeals may be made and heard.

Sect. 120 provides:

That upon receiving notice of appeal . . . the said commissioners shall direct their precept to the person appealing, to return to them, within the time limited therein, a schedule containing such particulars as the said commissioners shall demand respecting the property of such person . . . and the amount of the balance of his profits and gains . . . and so from time to time until a complete schedule, to the satisfaction of the said commissioners, of all the particulars required by them, shall be delivered. . . .

Sect. 122 provides that

. . . If, upon the hearing of any such appeal as aforesaid, the said commissioners shall be satisfied with the assessment made by the additional commissioners, or after a delivery of a schedule they shall be satisfied therewith, and shall have received no information of the insufficiency thereof, the said commissioners for general purposes shall direct such assessment to be confirmed, or altered according to such schedule, as the case may require; provided that in every case where they shall think proper that the said . . . schedule . . . should be verified, they shall direct the assessor to give notice to the person to be charged with the said duties, to appear before them to verify the said statement or schedule in the manner hereinafter mentioned; and every such person is hereby required to appear accordingly before the said commissioners, and, on oath, as aforesaid, to verify the contents of his statement or schedule . . . provided always, that such person shall be at liberty to amend his said statement or schedule before he shall be required to take such oath; and after such oath, and in every case where such statement or schedule shall not have been objected to as aforesaid, and the said commissioners shall be satisfied therewith, they shall make an assessment according thereto, on the amount therein stated, at which the duty shall have been computed. . . .

The *Solicitor-General* (Sir R. T. Reid, Q.C.), *Danckwerts* and *Langley* with him, showed cause against the rule.

Loehnis appeared in support of the rule.—The appellant had delivered a schedule containing such particulars as were required by the precept of the commissioners in pursuance of sect. 120 of the Income Tax Act 1842, and no objections were raised to it. If the commissioners were satisfied with the schedule they should have assessed according to it; if they were not satisfied, then they should have proceeded according to sect. 124. They were not justified in disregarding the schedule and proceeding to confirm the assessment, for none of the conditions laid down in sect. 126, which alone enables the commissioners to make an assessment according to the best of their judgment, had been fulfilled. It has never been suggested that the commissioners are entitled to demand the production by the appellant of his books. [Mathew, J.—It is perfectly clear they have this power.] There has been no refusal here to verify on oath, and there has been no hearing or determination within the meaning of the Act.

Mathew, J.—This is an application on the part of the appellant against an income tax assessment, to compel the commissioners to hear and determine the appeal, and alternatively to state a special case for the opinion of the court. The commissioners answered that they had heard and determined the appeal, and that there was no point of law as to which they could be required to state a special case. The case is important owing to the position taken up by the appellant, viz., that, in an appeal against an assessment if the appellant was willing to make an affidavit as to the amount of his profits, the commissioners were conclusively bound by that affidavit. That is a startling proposition, and one that is at any rate totally opposed to my view of these sections of the Income Tax Act. I have since examined them very carefully, and followed the argument of the learned counsel from section to section, and I remain clearly of opinion that the position of the appellant is one which is wholly untenable, and that the commissioners were not and ought not to be bound by the affidavit which it was conceded that the appellant was prepared to make. The appellant carried on business as a coal merchant and carrier. There had been an appeal in the previous year against the assessment made upon him; he had been assessed at 700*l.*, but the commissioners had reduced that to 300*l.* In the year in question the assessment was put at the same figure, but the appellant contended that his income was only 13*l.*, and that the assessment therefore was excessive. Upon his objection to the assessment, and upon appeal to the commissioners, the course was taken of requiring him to furnish them with a schedule under the Act, showing how his profits were arrived at. It is clear to me upon the affidavits that, on the appeal being heard, he took the position subsequently taken by his counsel, that if he was prepared to make the affidavit referred to in the Act, verifying the schedule, the commissioners were precluded from making any further inquiries. They regarded his figures under the circumstances with some suspicion, and appear to have thought that he was putting forward figures which had been prepared by somebody else, and in respect to which he could give no satisfactory information. But it is clear to me that he was in a position to answer any question put to him, and the commissioners dealt with the schedule as if it were his own. Now, upon the face of it there were considerable outgoings, large sums of money in respect of which there would be in the ordinary course of business entries in his books, or the ordinary business vouchers. When the appellant took the position that he was prepared to verify by affidavit, questions *vivâ voce* were put to him by the commissioners. It is quite clear beyond dispute that under the Act they were entitled to take that course, and to put to him either written or *vivâ voce* questions. It is equally clear that he was not bound to answer any one of those questions, and that he might peremptorily refuse (to take the language of the Act) to answer any, but if he did so, under sect. 126, he was exposed to the reasonable inference that his statements and his figures were not to be relied upon, and the commissioners would be justified in fixing his assessment at whatever sum they thought right. He did not take exactly that course, but he took a course which was nearly equivalent, because when they said to him, "Are you willing to produce your books, and to let us see your vouchers: and are you willing to let us see your bankers' book?" upon each inquiry he said there was no occasion

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to produce them. But he said, "You are bound to act upon my affidavit." That is how I construe the affidavits in this case, and I am fortified in that view by the position which was taken by his counsel, who insisted that the appellant was right in taking that course. As I said before, he was not called upon to answer any of those questions in any other way than that in which he chose to. He was entitled to refuse to allow any inquisition into his books, and he was entitled to refuse to allow the commissioners any opportunity of verifying his figures, but if he did that, they were not bound by his affidavit, and they were entitled as reasonable men to come to the conclusion that the figures could not be relied on. The commissioners dismissed his appeal, and I think they were reasonably and well warranted in doing so. If Mr. Loehnis be right, a man might be notoriously spending a large amount of money every year without incurring debts, and yet he might have the hardihood to swear that his income was not 5000*l.* as it appeared to be, but only 500*l.* According to Mr. Loehnis the commissioners then would be bound to believe his statement. I am of opinion that the commissioners are not placed in any such position. Mr. Loehnis contended that there was a mode pointed out which ought to have been followed, namely, that written questions and *vivâ voce* questions might have been put to him, and that his answers might have been taken down, and that he might have been allowed to reconsider his answers, and then might have been called upon to verify such answers by affidavit. That is quite true, but what was the use of asking any further questions, either written or *vivâ voce*, of a man who took up the position, "You the commissioners are bound by my affidavit, and I will give you no further information?" If the appellant has been over-assessed, which may or may not be the case, he has only himself to blame, for, if he had given further information to the commissioners, the right figure might have been arrived at. He has chosen to take the position I have mentioned, which involves, as it seems to me, no point of law, and he has exposed himself therefore to the inference which every man is exposed to who has the power to give information and does not give it. I think, therefore, that this appeal must be dismissed.

KENNEDY, J. delivered a judgment to the contrary effect, but withdrew it so that there might be an appeal.

George Fletcher appealed.

Loehnis for the appellant.

The *Attorney-General* (Sir R. Reid, Q.C.) and *Danckwerts* for the commissioners.

Lord ESHER, M.R.—Two views of this case have been presented to us. One is that, on appearing before the special commissioners, the appellant raised a point of law that, if they required him to be sworn, and he swore that his schedule was true, they were then bound to accept his oath and to come to the conclusion that his schedule was correct. The other view is, that the commissioners were not entitled, upon the ground of the appellant's refusal to produce his books, and for other reasons to which they drew attention, to draw an inference that the items in his schedule were wrong. Upon this latter view the question seems merely to be one of fact, a question of the true inference to be drawn by the commissioners from the evidence before them. That is a matter as to which we can entertain no appeal, and is not a subject for *mandamus*. As to the other view, the point which the appellant meant to take seems to me to have been this, that his oath to the accuracy of these items was conclusive, whatever other evidence there might be. I think that the commissioners accepted that as his contention and overruled it, and then heard and determined the whole matter. They considered the items, and decided to adopt the assessment of 300*l.* Now I am inclined to think that there is no question of law there, but I will assume for the purposes of my judgment that there is. Then, in my opinion, it is an idle point of law which has no colour in it, and is so clearly a bad point that the court ought not to listen to it, and upon either view that has been placed before us we must refuse the application and dismiss the appeal.

LOPES, L.J.—I am of the same opinion. If the appellant raised any such point of law as that which has been indicated by the Master of the Rolls, that the special commissioners were bound to accept the appellant's oath as conclusive so that they were not entitled to consider further evidence of any kind, I can only say that, in my opinion, it was a bad point, and one respecting which the court could not grant a *mandamus* requiring the commissioners to state a case. It would really amount to this, that the revenue might be defrauded by any dishonest person who recklessly made a false statement in order to evade a payment which he ought by law to make. But I do not think myself that the appellant did raise, or did intend to raise, any point of law. The question that came before the commissioners was, in my opinion, a mere question of fact, and upon the evidence before them they came to a decision in respect of which there is no appeal, and no order for a special case could be granted. Now the case stood thus: There were before the commissioners originally the statement of the appellant, the assessment that had been made, and the schedule. Taking those things into consideration and other matters with regard to the appellant, the commissioners came to the conclusion that they could not rely upon the statements made by the appellant in his schedule, and that they were satisfied with the assessment that had been made. That seems to me to be purely and simply a decision upon the facts and on the evidence before them, which they were fully justified in arriving at. I agree that the appeal should be dismissed.

RIGBY, L.J.—I am of the same opinion. The case turns upon the construction of sect. 122 of the Income Tax Act 1842. It is the duty of the special commissioners in every case to consider first of all whether they are satisfied with the assessment. If a schedule has been delivered, they have also to consider whether they are satisfied with it, and to proceed according as they decide upon those two things. As I read the Act, they are not bound to call for any additional evidence. The schedule may be drawn in such a way as to satisfy men of business that it is not a *bonâ fide* schedule. It is entirely a matter for their discretion whether they should have the assessment or schedule verified by oath; there is nothing in the Act authorising a man to require

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to be put on his oath. If the commissioners find that the schedule is in itself an unsatisfactory document, and if they have reason to suppose that the appellant is not a man whose oath can be taken as satisfactory, they may properly decide that it is not right to ask for a verification of the schedule upon oath. In my judgment there was sufficient *primâ facie* evidence in this case of the correctness of the assessment, sufficient ground for suspecting the accuracy of the schedule, and sufficient ground altogether for the conclusion which the commissioners arrived at. In the view I take of the case sect. 126 is not at all brought into action. I think it right to add that, so far as I see, there is no ground for supposing that the judgment of this court gives any sanction to the idea that the commissioners are entitled, *brevi manu*, when they find that the books are not produced, to rely upon that circumstance as deciding against the appellant.

Appeal dismissed.

Solicitors for the appellant, *Douglas Norman* and *Co.*

Solicitor for the respondents, *The Solicitor of Inland Revenue.*

July 13 *and Nov.* 8.

(Before Lord ESHER, M.R., LOPES and RIGBY, L.JJ.)

NEPTUNE STEAM NAVIGATION COMPANY v. SCLATER AND PROCTER. THE DELANO. (a)

APPEAL FROM THE DIVISIONAL COURT.

Admiralty—County Court—Right of appeal—County Courts Admiralty Jurisdiction Act 1868 (31 *&* 32 *Vict. c.* 71), *ss.* 26, 31—*County Courts Act* 1888 (51 *&* 52 *Vict. c.* 48), *s.* 120—*Bill of lading — "Ship may commence discharging immediately on arrival"—Custom of dock.*

Under sect. 120 *of the County Courts Act* 1888 *there is a right of appeal in an Admiralty cause or suit on a point of law, whatever the amount involved.*

Semble: *There is a right of appeal on a question of fact, if the amount exceeds* 50*l.*, *under sects.* 26 *and* 31 *of the County Courts Admiralty Jurisdiction Act* 1868.

Where there is a provision in a bill of lading that the ship "may commence discharging immediately on arrival," it gives the shipowner the option of delivering before the lapse of what would be a reasonable time according to the custom of the dock and the usual mode of discharge.

THE plaintiffs, who were the owners of the steamship *Delano*, claimed from the defendants, as consignees under certain bills of lading in respect of the vessel, the sum of 49*l.* 9*s.* 4*d.* for one day's detention of the *Delano* in the river Tyne, at the rate of fourpence per ton per day on 2968 tons.

Clause 5 of the bill of lading provided that:

The ship may commence discharging immediately on arrival and discharge continuously, the collector of the port being hereby authorised to grant a general order for discharge immediately on arrival, and if the goods be not taken by the consignees within such time as is provided by the regulations of the port of discharge, they may be stored by the carrier at the expense and wish of their owners.

(a) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

The *Delano* brought a cargo from America and proceeded to Rotterdam, where she discharged a portion, and then came on to the Albert Edward Dock at Newcastle to discharge the remainder: and it was here that the alleged detention occurred.

The ship arrived at the port of discharge at 5 a.m. on Saturday, the 11th Nov. 1893. All discharging is done by the Tyne Commissioners, and the master delivered the manifest at 10 a.m. requesting them to unload the ship. Upon that manifest it appeared that the master was not allowed to hand over any portion of the cargo until such delivery was made. There is only one berth for grain cargoes, and it was then occupied until after 1 p.m. The *Delano* was hauled into the berth at 3 p.m., which was after working hours on Saturdays. She began discharging on Monday, the 13th. at 7 a.m., and thence proceeded continuously till 10 p.m. each day, the discharge being completed on the following Friday.

The owners of the *Delano* brought an action in the Sunderland County Court for damages for one day's detention of the vessel. The learned County Court judge, in giving judgment for the plaintiffs for one day's detention, said: "The cases cited by Mr. Bolam (for the plaintiffs), commencing with *Randall* v. *Lynch* (2 Camp. 352), clearly establish that in such a case as the present the owner is entitled to damages for demurrage or detention, although the delay may have been occasioned by the crowded state of the docks, or other causes, not occasioned by default of the shipowner or his agents. The case of *The Jaederen* (68 L. T. Rep. 266; 7 Asp. Mar. Law Cas. 260; (1892) P. 351), relied on by Mr. Greenwell for the defendants, is distinguishable. In that case the ship was "to be discharged as fast as she could deliver," and the judgment appears to have turned upon those words. The ship was delayed, as in this case, by the crowded state of the quay, but she delivered as fast as she could under the circumstances. Barnes, J. said: "It rests upon the plaintiffs, when they assert that the vessel has been discharged as fast as she can deliver, to show that she has not been delivered as fast as she could deliver; in fact, that she could have been delivered under the circumstances in which she was placed at a greater rate than in fact was the case."

The defendants appealed.

The appeal was heard on the 3rd May 1894, before the President (Sir F. H. Jeune) and Barnes, J., sitting as a Divisional Court.

Chitty (*Newbolt* with him) submitted a preliminary objection that there was no right of appeal. [BARNES, J.—That raises the point in *The Eden*, 66 L. T. Rep. 387; 7 Asp. Mar. Law Cas. 174; (1892) P. 67.]

The Cashmere, 62 L. T. Rep. 814; 6 Asp. Mar. Law Cas. 575; 15 P. Div. 121;
Pole v. *Bright*, 65 L. T. Rep. 748; (1892) 1 Q. B. 603.

[He was stopped.]

Boyd, for the appellants, referred to the practice of the dock as to discharge. [BARNES, J.—I had a case before me from the Mersey in which the dock took entire charge.] That was *The Jaederen* (*ubi sup.*). The only point submitted is, that there are no fixed lay days; neither party

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is in default, and therefore the fault must remain where it is, with the plaintiffs. The County Court judge did not sufficiently appreciate the difference between *Randall* v. *Lynch* (*ubi sup.*) and cases where the custom of the dock has to be incorporated in the agreement. In *Hick* v. *Raymond* (68 L. T. Rep. 175; 7 Asp. Mar. Law Cas. 233; (1893) A. C. 22) we find the converse of the case of *Budgett* v. *Binnington* (25 Q. B. Div. 320). My construction of clause 5 of the bill of lading is that the ship is to be at liberty to discharge on arrival whether in or out of working hours; but the consignees are not bound to be there out of working hours:

Postlethwaite v. *Freeland*, 42 L. T. Rep. 845; 5 App. Cas. 599;
Rodgers v. *Forresters*, 2 Camp. 483;
Burmister v. *Hodgson*, 2 Camp. 488.

[He was stopped.]

Chitty.—If the County Court judge decided the question as one of fact there is no appeal. *Smith* v. *Baker* (65 L. T. Rep. 467; (1891) A. C. 325) is clear upon this point. As to the custom of the port there is no reference in the clause:

Hick v. *Rodocanachi*, 65 L. T. Rep. 300; (1891) 2 Q. B. 626.

If there is no time named the court infers a reasonable time; but if a time is named the consignees are liable if the discharging is not done within that time. Here the circumstances prevented immediate unloading. [BARNES, J.—The wording of the clause shows that it was contemplated that the discharging should be done under the regulations of the port.] The obligation on the consignees is that the ship shall be at liberty to discharge at once. As to the construction of the word "immediately" see Cockburn, C.J. in *Reg.* v. *Berkshire Justices* (4 Q. B. Div. 469). [The PRESIDENT. — "Immediately" is no doubt a stronger expression than "within a reasonable time." "Immediately" means "as soon as possible."] Clause 5 meant that the ship was to be discharged immediately, and in point of fact she was not so discharged.

The PRESIDENT.—The learned judge appears to me clearly to have come to a decision upon a point of fact, and to a decision upon a point of law. Now, the decision upon the point of fact is, that the vessel was delayed by reason of the crowded state of the dock, and from that finding of fact I deduce two things. The first is that, referring to a case of *Randall* v. *Lynch*, he says the owner is entitled to damages for demurrage or detention, though the delay may have been caused by the crowded state of the docks or other causes not occasioned by the default of the shipowner or his agents That is what I think he means to say in the present case; and then, what is stronger, he says, referring to another case: "The ship was delayed, as in this case, by the crowded state of the quay, but she delivered as fast as she could under the circumstances." That I take to be a finding of fact. Then it is equally clearly a finding upon a point of law. He says this case is governed, in his view, by *Randall* v. *Lynch* (*ubi sup.*) and the case following. In the case of *Randall* v. *Lynch* there were words which implied an obligation on the part of the consignees not to delay the ship beyond a certain time. The ship was to be unloaded in forty days, and there it was held there was an implied covenant that he would keep her no longer; and it was further held that, under those circumstances, he was responsible for the various vicissitudes which prevented the ship being restored to the owner at the end of that period. That shows that the learned judge meant to decide that this case presented features similar to that of *Randall* v. *Lynch*, and that there was a guarantee on the part of the consignees that the ship should be able to commence discharging immediately on her arrival, and should discharge continuously. I do not dispute what was said as to the meaning of the words "on her arrival." or "continuously," or "immediately," but I do not think those words import any guarantee of that kind. It appears to me the clear meaning of those words is, that the ship might, if she could, commence at once, and the consignees would be ready to take as soon as she did come. The latter words also, I think, are quite consistent with my view that it was an authorisation and not a guarantee.

BARNES, J.—I do not think there is any dispute as to the law applicable to this case. This case turns upon the question of whether, having regard to the whole of the contract, and the clause which has been so much discussed, the plaintiffs have made out a positive obligation on the part of the defendants that the discharge of the ship shall begin at the moment of her arrival, and run on continuously, so as to give rise to a liability for demurrage if it does not so begin and go on? It seems to me it would strain the language of that clause to an excessive extent if it were read as imposing such a stringent obligation upon the consignees, having regard to the form of the contract and the circumstances of the case, and having regard to the fact that the ship is to be discharged, to some extent at any rate, by the regulations of the port of discharge. Therefore, upon the words alone I should have thought the obligation was not carried to the extent contended for by the plaintiffs. But there are two other matters which strike me; one is that, if the clause is to be construed in the strict sense which Mr. Chitty has contended for, the discharge would go on continuously, and there is nothing to limit it to day or night, or one part of it from another; yet it can hardly be said that the regulations of the port did not come in at some time. Again, I notice that the learned judge appears to have given the first day's demurrage when nothing was done, though demurrage could only really be given for any time that was in excess of the time occupied in discharging in accordance with the terms of the contract. I do not see that the ship was, in fact, detained beyond the time she would have been kept if the regulations had been simply acted upon.

Appeal allowed.

The plaintiffs appealed.

The appeal came before Lord Esher, M.R., Kay and Smith, L.JJ., on the 13th July.

By sect. 26 of the County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71):

An appeal may be made to the High Court of Admiralty of England from a final decree or order of a County Court in any Admiralty cause, and, by permission of the judge of the County Court, from any interlocutory decree or order therein, on security for costs being first given, and subject to such other provisions as general orders shall direct.

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By sect. 31:

No appeal shall be allowed unless the amount decreed or ordered to be due exceeds the sum of 50*l*.

By sect. 120 of the County Courts Act 1888 (51 & 52 Vict. c. 43):

If any party in any action or matter shall be dissatisfied with the determination or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, the party aggrieved by the judgment, direction, decision, or order of the judge may appeal from the same to the High Court, in such manner and subject to such conditions as may be for the time being provided by the rules of the Supreme Court regulating the procedure on appeals from inferior courts to the High Court; provided always, that there shall be no appeal in any action of contract or tort, other than an action of ejectment or an action in which the title to any corporeal or incorporeal hereditament shall have come in question, where the debt or damage claimed does not exceed 20*l*., nor in any action for the recovery of tenements where the yearly rent or value of the premises does not exceed 20*l*., nor in proceedings in interpleader where the money claimed, or the value of the goods or chattels claimed, or of the proceeds thereof, does not exceed 20*l*., unless the judge shall think it reasonable and proper that such appeal should be allowed, and shall grant leave to appeal. At the trial or hearing of any action or matter, in which there is a right of appeal, the judge, at the request of either party, shall make a note of any question of law raised at such trial or hearing, and of the facts in evidence in relation thereto, and of his decision thereon, and of his decision in the action or matter.

Newbolt (*Chitty* with him), for the appellants, again raised the question as to whether there was any right of appeal from the County Court, and the Court adjourned the case in order to give counsel time to look up the point.

Boyd for the respondents.

On Nov. 8, the appeal came on for hearing before Lord Esher, M.R., Lopes and Rigby, L.JJ.

Chitty (*Newbolt* with him) for the appellants.—There is no right of appeal unless the amount is under 50*l*. and security is given. The Divisional Court were bound by a previous decision of their own. The question turns on sects. 26, 34, and 231 of the Act of 1868. The appeal was heard, and no security given, and it was held that the Act of 1888 had repealed all those sections:

The Forest Queen, 23 L. T. Rep. 544; 3 Mar. Law Cas. 508; 3 Adm. & Eccl. 299;
The Falcon, 38 L. T. Rep. 294; 3 Asp. Mar. Law Cas. 566; 3 P. Div. 100;
County Courts Act 1888, ss. 120, 125;
Thames Conservators v. *Hall*, 18 L. T. Rep. 361; 3 Mar. Law Cas. 73; 3 C. P. 415;
The Eden (*ubi sup.*).

[LOPES, L.J.—*The Eden* does not seem to be reconcilable with *The Cashmere* (62 L. T. Rep. 814; 6 Asp. Mar. Law Cas. 515; 15 P. Div. 121). He referred to *Reg.* v, *Judge of the City of London Court*, 66 L. T. Rep. 135; 7 Asp. Mar. Law Cas. 130; (1892) 1 Q. B. 273.] *The Eden* is apparently founded on *The Hero* (65 L. T. Rep. 499; 7 Asp. Mar. Law Cas. 86; (1891) P. 294). He also referred to

The Humber, 49 L. T. Rep. 604; 5 Asp. Mar. Law Cas. 181; 9 P. Div. 12;
The Dart, 69 L. T. Rep. 251; 7 Asp. Mar. Law Cas. 353; (1893) P. 33;
The Alne Holme, 68 L. T. Rep. 862; 7 Asp. Mar. Law Cas. 344; (1893) P. 173.

Boyd for the respondents.—It is not contended that there has been a repeal of any section of the Act of 1868, but it is suggested that in that Act the Legislature thought fit to give a full right of appeal, *i.e.*, on fact as well as on law. The sections are 26 and 31. It is submitted that under the Act of 1888 there is a right of appeal in an Admiralty cause on a point of law, even although the amount claimed is under 50*l*. Now the law is that, if the appeal is on a point of law, and the amount is under 50*l*., it must be brought under the Act of 1888, but if on law and fact, then the procedure is under the Act of 1868. [Lord ESHER.—It would not be unwholesome for the Legislature to say that an appeal shall be allowed in Admiralty cases on a point of law, whatever the amount, and on a question of fact only in cases where the decree exceeds a certain amount.]

Rockett v. *Chippendale*, 64 L. T. Rep. 641; (1891) 2 Q. B. 293.

The Cashmere (*ubi sup.*) is strongly in my favour. [Lord ESHER.—None of the cases go so deeply into the matter as you and Mr. Chitty have to-day.]

The Court then proceeded to give judgment on the question of jurisdiction.

Lord ESHER, M.R.—Taking the Act of 1888 first, and the 120th section, it seems to me that the words at the beginning of that section are large enough to include all County Court actions, and I am of opinion that a cause on the Admiralty side of the County Court is a County Court action. Therefore, if you read the words of sect. 120 to the full extent of their ordinary meaning, the section says that if any party in any action—which I think must be in any action or suit in the County Court—shall be dissatisfied with the determination or direction of the judge on a point of law, the party aggrieved by the judgment may appeal, and appeal without any restrictions. I think it is a rule of construction that you are bound to give to the words in an Act of Parliament which are in large terms the full meaning and largeness of those terms, unless you are prevented by something else. But then there is the Act of 1868, and the Act of 1868 deals with Admiralty actions also, and has large words. It says an appeal may be made to the High Court of Admiralty from a final decree or order of the County Court in an Admiralty cause, on security for costs being first given. That is the 26th section. The 31st section says no appeal shall be allowed unless the amount decreed or ordered to be due exceeds the sum of 50*l*. Through the 26th section, if you read it by itself, an appeal may be made from the final decree or order of the County Court in an Admiralty cause. That, by itself, would mean from any decree or order, but in the very same Act of Parliament you have another section which says no appeal shall be allowed unless the amount exceeds 50*l*. You have, therefore, to turn back from that section to sect. 26, to limit the largeness of the words in sect. 26, which says that there may be an appeal from any final decree, and say that there shall only be an appeal from a final decree where the amount decreed exceeds the sum of 50*l*. Upon that statute, therefore, there is no appeal if the amount is under 50*l*. But if the words of sect. 120 of the subsequent Act can fairly be made to apply to the Act of 1868, you have that

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section not dealing with the whole of the appeal which is dealt with in the Act of 1868, but dealing only with part of it, viz., where there is an appeal upon a matter of law. It does not deal with the part which says there is to be an appeal on a question of fact. It deals, therefore, with part of it. But if the Act of 1888 were inconsistent with the whole of the Act of 1868, it would repeal the whole of it. If it is inconsistent with only part of it, but is consistent with part of it, what is the rule? It repeals so much of the former Act as it is inconsistent with, but not the rest of it. If, therefore, it is inconsistent with that part of the 1868 Act which deals with the question of law, and only inconsistent with that, it repeals that part, but leaves standing the appeal on the question of fact, as that part is dealt with in the Act of 1868. If, therefore, the 120th section repeals so much of the Act of 1868 as deals with an appeal on a question of law, it repeals a part of sect. 31, and repeals that part of sect. 26 which applies to an appeal on a question of law. Where, then, an appeal in an Admiralty cause from the County Court is upon a question of law, there is an appeal without any condition or stipulation. There is a clear appeal. But where it is an appeal on a question of fact, then that question of fact remains under the Act of 1868, and there may be an appeal if the amount is above 50*l.* That appeal is to be subject to security for costs being given, and if it is upon a question of fact and the amount is under 50*l.*, there is no appeal at all. The whole question, therefore, seems to be whether you can say that the general words of sect. 120 of the Act of 1888 are applicable at all to an Admiralty action or suit in the County Court. There are strong reasons for saying that the section does not apply to Admiralty actions at all; but the words, in my opinion, are large enough to include them, and I think there is no law which prevents us from saying that the words of sect. 120 do apply to an appeal in a County Court cause on the Admiralty side of it as well as to others. I conclude, therefore, on the whole, that it does apply, and that the law now stands thus: On an Admiralty cause or suit being tried in the County Court, if the amount is under 50*l.* but the question to be appealed against is a question of law, the party aggrieved may appeal. Of course he may appeal if the amount is above 50*l.* On a question of law, therefore, he may appeal if the amount is under or over 50*l.*, and under that statute. But on a question of fact he is confined to the appeal given in the statute of 1868. There is no appeal on a question of fact under 50*l.* There is an appeal on a question of fact above 50*l.*, but that must be upon security for costs being given. I think as I have said, that sect. 120 of the later Act repeals part of sect. 31 of the Act of 1868, and also repeals a portion of sect. 26, so far as that deals with questions of law as distinguished from questions of fact.

LOPES, L.J.—The conclusion at which the Master of the Rolls has arrived in his judgment is beyond all question a very salutary one. I think it is a result at which in all probability the Legislature would have arrived if the matter had been brought to their notice—I mean if the Act of 1868 had been sufficiently brought to their notice at the time the Act of 1888 was passed. I do not propose to differ from that view, but I cannot help saying that I should have great difficulty in arriving at it unaided by the Master of the Rolls, and what I understand to be the opinion of my brother Rigby. I think, as I again say, that it is a salutary conclusion, and one at which I rejoice. But I also recollect that we are following the decision of *The Eden* (*ubi sup.*). I therefore do not dissent from the judgment which has been given, but I desire to say that I arrive at it with great hesitation.

RIGBY, L.J.—Sect. 120, if it were considered apart from all other statutory provisions, would most plainly give this appeal in every action or matter which would come before a County Court judge. Why should we not give effect to the general words of that section? I have not forgotten that there are considerations which have passed through my mind, which are not without weight. I question whether we could cut down the words of sect. 120, but considering that this is intended to be a code—I will not say a complete code—as I gather, for procedure in the County Courts, except so far as the existing enactments were not inconsistent, I see no sufficiently valid reason why we should not give the larger interpretation, which is the natural interpretation, and which is the interpretation that is most consistent with the whole scheme. I do not say absolutely consistent, for I cannot disguise from my mind that in all probability the attention of the Legislature was not, when this sect. 120 was being dealt with, distinctly called to the matters to which it was to apply. But I think it is the duty of courts of justice, as far as they can without interfering with any principles of common sense, and without straining words beyond their customary and usual meaning, to consider the effect of the section, and to consider whether there was anything in the scheme of this Act that should have prevented the Legislature, if they had been so minded, from applying this particular provision to the case of Admiralty actions. I can find no reason satisfactory to myself for saying so, and though I do think that to a certain extent the proceedings in Admiralty actions had not been present to the minds of the Legislature, because otherwise they might have given an inferior limit, as they have done in the cases of actions of replevin and actions for the recovery of land, and probably would have done so, I take it altogether that the safer way is to abide by the natural construction of the words, and give them their natural and usual effect, unless you can be quite satisfied that they were intended, by implication, to be cut down. That is what I fail to satisfy myself of, and I therefore agree with the decision of my learned brethren.

The appeal was then heard on the point of law.

Newbolt.—The preliminary point submitted is that there can only be an appeal if a point of law was raised at the trial, and a note taken by the judge. The whole dispute in the Divisional Court was as to clause 5, and in the County Court it was assumed that we were right on that. The question as to the time when delivery should take place depends on that clause. [LOPES, L.J. referred to Lord Halsbury's judgment in *Smith* v. *Baker* (*ubi sup.*)] The judge has made no note of the point of law. It was contended in the

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County Court that "immediately" meant delivery within a reasonable time:

Reg. v. *Berkshire Justices* (*ubi sup.*).

Boyd was not called upon.

Lord Esher, M.R.—It is a perfectly clear case, and ought never to have been appealed at all. The only question before the County Court was what was the proper construction of the bill of lading. You cannot construe a bill of lading by reading two lines and leaving out all the rest, but by reading the whole of it, and when you come to construe a bill of lading as to the obligation of the consignee to take delivery you must find out where the obligation is, and what is the right of the shipowner to require him to take delivery. Here the beginning of the bill of lading is, that the shipowner shall receive these goods on board and take them to this named dock on the Tyne, and there deliver them. If that stands alone he is bound to be ready to deliver them within a reasonable time after his arrival at the dock, and what is a reasonable time is generally determined when you come into dock, by the custom of the dock and by the habitual mode of discharge. The meaning of it would be that he is to be ready to deliver on arrival at that dock within a reasonable time according to the usual mode of giving delivery at that dock. Then there is clause 5. Does that alter his obligation to give delivery? It seems to me it only gives him the option to say that he will deliver before the lapse of that which would without that clause be a reasonable time. That is what Barnes, J. says. He may impose upon the consignee the obligation to take delivery, not where grain is delivered, but to take delivery sooner. Supposing the berth to be occupied for five days, the shipowner would have been entitled to say, "No! I don't intend to wait these five days; I will give you delivery over the side of my ship where she lies, here in the dock." The consignee would have been obliged to take delivery then, and if he declined he would have had to pay demurrage. But the clause did not oblige the shipowner to give delivery. On the other side it was said that, whether the master did or did not require the consignees to take delivery before what would otherwise be reasonable time, he was bound to take delivery before what would otherwise be reasonable time. That is a wrong construction. That is what they contended for in the County Court, and that is what they contended for in the Divisional Court. I am of opinion that Barnes, J.'s construction of this bill of lading was quite right, and that, therefore, this appeal must fail.

Lopes and Rigby, L.JJ. concurred.

Solicitors: *Rowcliffes, Rawle,* and *Co.,* for *Cooper* and *Goodger,* Newcastle-on-Tyne; *Downing, Holman,* and *Co.,* for *Pinkney* and *Bolam,* Sunderland.

HIGH COURT OF JUSTICE.

QUEEN'S BENCH DIVISION.

July 27 and Aug. 6.

(Before Mathew and Kennedy, JJ.)

Re The London and North-Western Railway Company and Lord Gerard.(a)

Railway—Notice to treat—Purchase of surface and minerals except coal—Right of owner to work coal—Compensation—When to be made—Railways Clauses Act 1845 (8 *&* 9 *Vict. c.* 20), *ss.* 77 *to* 85.

In the case of a notice under the Railway Clauses Act 1845, *to treat "for the purchase of land, and the stone, sand, clay, and gravel, within or under the same," but excepting coal, the owner of the coal is not entitled to claim present compensation in respect of the coal; he may get his coal subject to the due protection of the railway undertaking on the surface, and if such due protection prevents his working the coal, or renders it more costly, he is then entitled to compensation, but not before.*

Sects. 77 *and the following sections of the Railways Clauses Act* 1845, *apply not merely where the mines and minerals are taken by the railway company with the lands, but also in every case in which the railway company has purchased with the land certain specified subjacent minerals, but has left the others to the owner.*

In this case a rule *nisi* had been obtained on behalf of the London and North-Western Railway Company, calling upon Lord Gerard to show cause why a submission to arbitration entered into between the parties should not be set aside upon the grounds that the arbitrator therein had exceeded his jurisdiction, and was about further to exceed his jurisdiction by entertaining certain claims, and receiving certain evidence in support thereof, which claims he had no legal power to entertain, and which evidence was inadmissible, whereby he had misconducted himself in the matter of the said arbitration.

The facts of the case are shortly as follows:—

On the 3rd June 1889 the London and North-Western Railway Company gave Lord Gerard notice to treat for the purchase of a certain portion of his property, of which he was tenant for life, "together with the stone, sand, clay, and gravel, within and under the same." There were a number of seams of coal under the land, but no mention was made of them.

The company entered into possession under this notice to treat, and in 1891 requiring more land, they gave a second notice to treat as to certain other lands and hereditaments, "together with the mines and minerals thereunder, except such as are mentioned in the second schedule hereinafter written." In the second schedule there were excepted "all mines, beds, and seams of coal."

A dispute arose between the parties as to what purchase money Lord Gerard was entitled to, and as to whether he was entitled to receive present compensation in respect of subjacent and adjacent coal, which he alleged he was bound to leave unworked, in order to afford the necessary vertical and lateral support to the lands and

(a) Reported by Henry Leigh, Esq., Barrister-at-Law.

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minerals which the company were about to acquire. In consequence, on the 7th May 1894, an agreement was entered into between the parties to have the amount of the purchase money and compensation settled by arbitration. An arbitration was appointed, and evidence was tendered and accepted by the arbitrator, for the purpose of supporting Lord Gerard's claim to receive present compensation for the coal which he alleged he would be bound to leave unworked in order to leave the aforesaid support, and which coal it was said it would be impossible to work without taking away part of the lands and minerals actually sold, or which if he could work he would have to do so at greater expense.

The railway company thereupon obtained the rule *nisi*, on the ground that evidence had been received of a claim that was not maintainable.

Sir *Richard Webster*, Q.C. (with *Moulton*, Q.C., and *Pollard*) showed cause for Lord Gerard.—The evidence as to present compensation was admissible. Except in cases where the company have not purchased minerals, the sections (77 to 85) relating to mines under or near railways, of the Railways Clauses Act 1845, do not apply.

Moulton, Q.C. cited

Elliot v. *The North-Eastern Railway Company*, 8 L. T. Rep. 337; 10 H. of L. (Clark) 333;
London and North-Western Railway Company v. *Evans*, 66 L. T. Rep. 526; (1893) 1 Ch. 16.

The railway company is entitled to have support to what they have bought. The interpretation of the Railways Clauses Act is, that if you choose to buy surface these clauses apply, but if you go and buy that which is excepted then these clauses do not apply. Lord Gerard is not entitled to pass through the soil of the company for the purpose of getting at the coal on the other side. Sect. 77 of the Railways Clauses Act 1845, which commences, "and with respect to mines lying under and near the railway," is the controlling section of the whole group, and the subsequent clauses apply to the case where only the surface is purchased. If the railway company choose to purchase more than is given them by sect. 77 they have got the right to restrict it; if they do not choose to restrict it they purchase as ordinary purchasers, and if they do not avail themselves in any way of the power to purchase everything, they are just in the same position as any ordinary freeholder. In this case they have bought not only a good deal more than they were bound to buy, so that it was a voluntary purchase by them, not necessary for their undertaking, but also certain landed rights with regard to which there is nothing in these clauses which are devoted to the question of the support of the surface and the works thereon, which deal with the support of these strata which are voluntarily purchased. It is submitted that what the company bought included the right of support, and that the arbitrator was right in taking this evidence.

Sir *Henry James*, Q.C. (with *H. D. Greene*, Q.C., and *E. Page*) appeared in support of the rule, and referred to

Errington v. *Metropolitan District Railway Company*, 46 L. T. Rep. 443; 19 Ch. Div. 569;
The Ruabon Brick and Terra Cotta Company v. *The Great Western Railway Company*, 67 L. T. Rep. 707; 68 Ib. 110; (1893) 1 Ch. 427;
Elliot's case, 8 L. T. Rep. 337; 10 H. of L. 333;
Caledonian Railway Company v. *Sprot*, 2 Macq. H. of L. 449.

The reason the company gave the notice to treat was, not to get support for the surface and minerals, but to prevent the application of the *Ruabon* case. It is submitted, first, that if only the surface of the land be taken, there is no right to support from the minerals belonging to the mine owner given to the undertakers; secondly, that there is no greater right given to the undertakers, that is the railway company, of support if they purchase something below the land, whether it be coal or any other mineral, than the right to the support they would have obtained if they had taken the surface only. The Railway Clauses Act 1845 has altered the relative rights of the purchaser of the surface and the person from whom he purchased:

The Proprietors, &c., of the Great Western Railway Company v. *Bennett*, 16 L. T. Rep. 186; 2 E. & I. App. Cas. 7;

which case renders inapplicable the two cases of *The Caledonian Railway Company* v. *Sprot*, and *Elliot* v. *North-Eastern Railway Company*. The case of the railway company has been based upon the case of

Holliday v. *The Mayor, &c., of Wakefield*, 64 L. T. Rep. 1; (1891) A. C. 81.

It is said on the other side that they will never be able to touch the coal; that they will never be able to pass through the minerals, but if according to the *Ruabon* case (*ubi sup.*), the mine owner can take the surface by virtue of his right in the coal mineral which has not been purchased, and, as in the *Errington* case (*ubi sup.*), has the right to take his coal even at the cost of destroying the surface, surely he has an equal right to pass through the mineral that is beneath the surface.

Cur. adv. vult.

Aug. 6.—The following written judgment of the court (Mathew and Kennedy, JJ.) was now delivered by

Kennedy, J.—In this case the application is in form to revoke a submission to arbitration. In reality, it is made for the purpose of obtaining a decision from the court as to the validity of certain heads of claim which one of the parties to the arbitration has put forward, and which the other party asserts to be improper. In order that the point may be raised before us, the claimant has adduced, as early as possible in the arbitration proceedings and the learned arbitrator has received, certain evidence which is admissible only if the disputed heads of claim are proper; and thereupon the question of law which the parties desire to have authoritatively decided, before further expense is incurred in the arbitration, has been raised in its simplest and most convenient form by the application which is now before us. The following are the material facts:—Lord Gerard is the tenant for life of certain lands, having subjacent mines near Wigan, through which the line of the London and North-Western Railway Company passes. In reference to a portion of these lands the railway company gave notice to treat on the 3rd June 1889, and in reference to another portion of them they gave notice to treat on the 23rd July 1891. The agreement of reference reciting these notices is dated the 7th

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May 1894. The only material point in regard to these notices, and indeed it is this point that gives rise to the present dispute between the parties, is that in each notice the railway company states that it requires to purchase and take not merely the lands set out in the schedule to the notice, but also "the stone, sand, clay, and gravel, within or under the same." In substance, that is to say, the railway company requires to purchase and take the surface lands, and also all the strata underneath the lands, with the one important exception of the coal, several seams of which run under parts of the lands in question, and are there as yet unworked. Lord Gerard claims, and has tendered evidence to the learned arbitrator in support of his claim, that he is entitled to receive present compensatiom in consequence of being bound in law to leave unworked large quantities of coal both subjacent and adjacent to the land (including in the term "land," those minerals which are specified in the notices to treat), in order to afford the necessary vertical and lateral support to such land and minerals, and also in consequence of its being impossible to work the coal (as he alleges) without taking away part of the land and minerals actually sold. He also claims present compensation on the ground that in consequence of the railway company's taking the minerals specified in the notice to treat, he will have (as he alleges) no power or right to remove or pass through such minerals, and will thus be prevented from working certain of the coal belonging to him either at all, or at the same cost as that at which he might otherwise have worked it. The evidence objected to by the railway company and admitted by the learned arbitrator is evidence in support of these claims of Lord Gerard. From a pecuniary point of view, as the claims under these heads amount to upwards of 180,000*l.*, the matter is one of great importance. If Lord Gerard's contention is well founded the effect of the notices to treat is to make the railway company pay not only the price of the lands, and the clay, sand, stone, and gravel, specified in the notices, but also compensation in respect of all the subjacent coal, and further of the adjacent coal to the extent of the buttress required to support the minerals included in the notices, besides additional compensation for severance by reason of the property taken by the railway company preventing the coal on the one side of the line from being worked from pits on the other side, and so necessitating the sinking of pits on both sides the line. The argument put forward by Lord Gerard's counsel is this: "The railway company is not merely taking 'lands,' "if it were so," say they, "we consider that these claims could not be put forward now or in this arbitration. The matter would be one which could be dealt with only when the owner of the coal seeks to win his coal under and near the railway, and it would then be dealt with under the provisions in respect to mines lying under or near the railway, which are contained in the 77th and following sections of the Railways Clauses Act 1845. But in this case the railway company is taking besides lands, the stone, sand, clay, and gravel, within or under the lands, all the strata in effect under the surface, except the coal. The effect of this is that, as regards the subjacent coal, the owner of the coal cannot get any of it. It is so interposed between the strata which the railway company has bought from us, that he cannot win it without removing and taking away portions of those strata, and he cannot lawfully remove and take away that which is not his, but the company's property. To do so would be a wrongful act. In the next place, apart from any question as to letting down the surface of the lands, the owner cannot get his coal without letting down the strata which the railway company has bought from him; with the grant to the company of the stone, sand, clay, and gravel, there has passed to the company the right to have these strata supported; therefore the coal owner cannot lawfully get the coal, either subjacent or adjacent, by which they are supported. Lastly, by reason of the purchase of the specified minerals as well as the lands, the coal owner cannot work the coal on one side of the railway as he might otherwise have done from the other side without committing a trespass; therefore he must sink pits on both sides. For all these losses he is entitled to be compensated immediately." It appears to us that these contentions are not well founded in law. In our judgment the provisions of the 77th and following sections of the Railways Clauses Act 1845, apply not merely in cases where no mines and minerals are taken by the railway company with the lands, but in every case in which any mine or mineral is taken with the lands. The 77th section enacts that unless they are expressly included, subjacent mines of coal, ironstone, slate, or other minerals, are not included in the purchase of "lands." The 78th section enacts that if the person entitled to any mines or minerals under or near the railway, or the railway works, wishes to work them, he must give the railway company a certain notice of his intention, and if the railway company deems it needful for the safety of their works to prevent such getting of the mines or minerals, the railway company may prevent the owner from getting them, paying him compensation for such prevention. If the railway company is not willing to entertain the question of compensation, then, under the 79th section, it is lawful for the mine owner to work "the said mines or any part thereof for which the company shall not have agreed to pay compensation, so that the same be done in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district where the same shall be situate." The effect of sects. 80, 81, and 82, of the Railways Clauses Act 1845, is dealt with in an instructive manner by Pearson, J., in his judgment, in the case of *The Midland Railway Company* v. *Mills* (30 Ch. Div. pp. 639, 640, 641), in which the learned judge dealt with the question of severance by reason of the railway company having for the safety of their works prevented the working of mines under their railway by purchasing them, and so severed mines on the one side of their railway from mines on the other side. In such cases the owners of the severed mines may make all necessary mining communications through the barrier which the railway company's action has created, but not over the railway or the railway works, or so as to injure them or impede the passage thereon. The railway company on its part is bound to compensate the mine owner for additional cost and loss thrown upon him in the getting of his minerals, and for

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all coal which he is altogether prevented from getting by the making and maintenance of the railway and railway works. The railway company is further bound to compensate any third party who is the owner of surface land injuriously affected by the mine owners creating the mining communications for loss or damage caused to such third party thereby. Sects. 83, 84, and 85, contain provisions for securing to the railway company means to detect and prevent any improper working of mines which threatens the safety of their works. We see nothing in these sections to render their provisions inapplicable to a case in which the railway company has, as in the present case, purchased with the "lands" certain specified subjacent minerals, but has left the others to the owner; nothing which confines their provisions for the adjustment of the relations between the railway company and the owner of subjacent minerals to the case of the purchase of lands only. We fail to find any ground for the distinction contended for by Lord Gerard's counsel between letting down surface soil and letting down minerals bought by the company with the soil, or for the argument that Lord Gerard would be a wrongdoer if, in properly working his works, he interfered by removal or otherwise with the clay or sand which the company has bought under the surface, when he would not be a wrong doer if he interfered with the soil on the surface. The railway company can legally acquire surface or minerals for the purpose of their undertaking, and for that purpose only; and the scheme of these statutory provisions appears to us clearly to be that the owner of any subjacent minerals not purchased by the company, may lawfully get them by proper working, whatever else the company may have bought, subject only to the due protection of the works of the undertakiug; and if, and so far as, such due protection prevents his getting his minerals, or renders it more costly, he is to be compensated when the time for working under or near the railway works arrives, and not before. For these reasons in our judgment these claims of the respondent company to this application fail, and the learned arbitrator should have rejected the evidence tendered in support of them. Submission to be withdrawn, unless the claims and the evidence in support thereof be abandoned.

Solicitors for Lord Gerard, *Meynell* and *Pemberton*.

Solicitor for the railway company, *C. H. Mason*.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Oct. 30 and Nov. 13.

(Before the PRESIDENT (Sir F. Jeune.)

THE BONA. (a)

Marine insurance — General average — Stranded vessel—Extraordinary use of engines—Contribution for extra coal consumed.

A steamship, whose hull and machinery were insured by a policy of insurance effected by the plaintiffs, her owners, with the defendants, ran aground, and was eventually got off by means of her engines and by lightening the ship. On the question as to whether the defendants were liable to contribute pro ratâ *in general average in respect of the coal so consumed:*

Held, that, as there had been an abnormal use of the engines which constituted a general average act, there must be contribution for the coal used.

HEARING of a point of law on an agreed statement of facts.

The plaintiffs were the English and American Shipping Company Limited, owners of the steamship *Bona*, and the defendants were the Indemnity Mutual Marine Insurance Company Limited.

By a policy of insurance, dated the 4th March 1892, effected by the plaintiffs with the defendants, the latter insured the hull and machinery, &c., of the *Bona*, valued at 25,000*l.*, in the sum of 3000*l.* against the ordinary marine risks for twelve months from the 9th March 1892.

On the 11th Jan. 1893, whilst the *Bona* was on a voyage from Galveston to Liverpool with a cargo of cotton and flour in bags, under a bill of lading dated the 7th Jan. 1893, she stranded upon Galveston Bar, from no fault of those on board, and so remained until the 14th Jan., exposed to the action of strong currents. Owing to the state of the wind and sea she strained, vibrated heavily from time to time, and repeatedly struck the ground with great force, causing her iron decks to work and undulate. During the worst of the weather, between the 11th and 14th Jan., seas swept right over the decks, so that the vessel was in a position of considerable risk and danger.

While the *Bona* lay stranded on the Bar her engines were from time to time properly employed in the attempt to get her off into deeper water. With this end in view the engines were worked ahead and astern as required, steam being constantly maintained, and in consequence the engines were put to unusual strain, and a considerable amount of damage was sustained. By means of the engines and by means of a considerable lightening of the vessel she came off about mid-day on the 14th Jan., and was subsequently anchored in Bolmer Roads, Galveston, and there surveyed. She afterwards proceeded to Liverpool and was there repaired.

The repairs to the *Bona's* hull were effected at a cost of 2878*l.* 8*s* .3*d.*, and the repairs to the engines and machinery at a cost of 356*l.* 11*s.* 2*d.*, as appeared in an average statement by Mr. F. C. Danson, dated the 7th July 1893. The defendants paid their proportions of these amounts in particular and general average as assessed in that statement. The damage sustained by the engines and machinery was apportioned as follows: General average 273*l.* 16*s.* 4*d.*, and ship 82*l.* 14*s.* 10*d.*, and the defendants paid their proportions of these several amounts. They did not, however, admit that the working of the engines under the circumstances above stated was a general average act.

About fifty-two tons of coal were burnt in working the engines during the time they were being used in getting the vessel off the ground, and the value of the coal was agreed at 390 dollars.

It was contended on behalf of the plaintiffs that the damage sustained by the engines was a general average loss, and that the value of the coal burnt as above mentioned should on the same principle be contributed to in general

(a) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

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average. The defendants contended that the value of the coal was not a subject for general average contribution.

The case now came before the court on the above agreed facts for determination as to whether the defendants were liable to contribute *pro ratâ* in general average in respect of the value of the fifty-two tons of coal. The policy of insurance, the bill of lading, and the average statement formed part of the case. A copy of the York Antwerp Rules 1890 was also included, but the plaintiffs did not admit that they were either relevant or material.

Rules 7, 8, and 9 are as follows:—

Damage caused to machinery and boilers of a ship, which is ashore and in a position of peril, endeavouring to refloat, shall be allowed in general average, when shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage.

When a ship is ashore and, in order to float her, cargo, bunker coals, and ship's stores, or any of them, are discharged, the extra cost of lightening, lighter hire, and reshipping (if incurred), and the loss or damage sustained thereby, shall be admitted as general average.

Cargo, ship's material, and stores, or any of them, necessarily burnt for fuel for the common safety at a time of peril, shall be admitted as general average, when, and only when, an ample supply of fuel has been provided; but the estimated quantity of coals that would have been consumed, calculated at the price current at the ship's last port of departure at the date of her leaving, shall be charged to the shipowner and credited to the general average.

Sir *Richard Webster* and *Holman* for the plaintiffs.—The damage to the engines is a general average loss. On the same principle the extra coal burnt should be contributed to in general average. The peril was not an ordinary detention, but a serious danger, Coals put on board to take the vessel to her destination in the ordinary course of navigation are not to be spent in unusual efforts to rescue in a common peril.

Birkley v. *Presgrave*, 1 East, 220; 6 Rev. Rep. 256.

It is not possible to distinguish between coals put on board for driving at peril and for tackling the ship: (see per Kenyon, C.J., p. 227 East.) [The PRESIDENT.—Is it using the engines in a way in which it is not intended that they should be used, or using them to an extent and subject to a strain, which is unusual?] It is the first. The engines are meant to be used while the ship is afloat, and not in a place where the propeller might be broken. It is the exact parallel of the hawser in *Birkley* v. *Presgrave* (*ubi sup.*). Lord Blackburn's judgment in *Wilson* v. *The Bank of Victoria* (16 L. T. Rep. 9; L. Rep. 2 Q.B. 203) recognises the principle in that case. In *Harrison* v. *The Bank of Australasia* (25 L. T. Rep. 944; 1 Asp. Mar. Law Cas. 198; L. Rep. 7 Ex. 79), although the judges differed, the grounds on which they differed in no way affect our contention. If we are not right the shipowner would be bound to provide enough coal to drive the ship if she runs aground. They also referred to

Robinson v. *Price*, 36 L. T. Rep. 354; 3 Asp. Mar. Law Cas. 407; 2 Q.B. Div. 295;
Lowndes on General Average, 5th edit. p. 95;
Parsons' Marine Insurance, 1868, p. 318.

Joseph Walton, Q.C. and *Carver* for the defendants.—The price of these coals should not be allowed as general average. The case is not governed by any authority, and so first principles must be relied on. It is submitted that in a case of general average there must be peril, an intentional sacrifice, and that sacrifice must be extraordinary in kind and for the benefit of all interests. If the damage to the engines is not a general average sacrifice, then the cost of the coals cannot be. Mere exposure of ship's materials to danger has never been held to be a general average sacrifice. They are intended to be exposed to extraordinary risks at sea. We do not mean an actual and direct sacrifice. [The PRESIDENT.—That is rather a fine distinction, and is not really the test. There is, however, a distinction between using a thing in a natural and in an unnatural way.] The sacrifice must be extraordinary: (see *Birkley* v. *Presgrave* (*ubi sup.*) and Lord Blackburn in *Wilson* v. *The Bank of Victoria*, at p. 213 Q. B.) In the former case the cutting of the cable was in itself an extraordinary thing. [The PRESIDENT.—The distinction there is between natural and unnatural use.] If a vessel was driving on to a lee shore and a sail was exposed to almost certain destruction in order to get her off, that would not be a general average loss:

Covington v. *Roberts*, 2 Bos. & Pull. N. R. 378;
Power v. *Whitmore*, 4 M. & S. 341.

Then as to the engines, there was no extraordinary use. If the vessel strands the master is entitled to use them to get her off. If the engines were not damaged in getting her off, then the cost of the coals is not general average. [The PRESIDENT.—The use of the coal is inevitable, and is part of the sacrifice if there was one.] They also referred to

Taylor v. *Curtis*, 6 Taunt. 608.

Sir *Richard Webster* in reply.—The master is not bound to work the engines at the expense of the ship. It is not because the accident occurs in the course of ordinary user that general average arises. In *Covington* v. *Roberts* (*ubi sup.*) the press of sail was a common sea risk. The coals are *à fortiori*. They might have been jettisoned to lighten the vessel. They cannot be employed in this way without the sacrifice. It is the voluntary act of using part of the equipment of the ship, and consequently the coal, in an extraordinary way which differentiates this case:

Attwood v. *Sellar*, 42 L. T. Rep. 644; 4 Asp. Mar. Law Cas. 283; 5 Q. B. Div. 286.

Judgment was reserved and delivered on the 13th Nov.

The PRESIDENT.—In this case the question which I have to decide is whether the coal consumed to work the engines which were used while the *Bona* was on Galveston Bar is the subject of general average contribution. The cost of repairs to the engines rendered necessary by their being strained by such use has been allowed in the average statement; and, having regard to the express provision of the York-Antwerp rules of 1890 on this subject, and to the reference made to such rules in the policy and bills of lading, probably the cost of these repairs could not be excluded from general average in the present instance. But I understand that the parties do not desire that this inclusion of the expenditure on the engines should be held to conclude the question of the coal; and, in any case, it seems to

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me that the question whether the cost of the coal is to be treated as general average depends on the principles on which the cost of repairs to the engines is held, if it be held, to be the subject of general average. It is necessary, therefore, to consider the principle by which a claim to treat damage to engines caused by their use in the attempt to relieve the position of a stranded vessel as general average is to be tested. The question as one of English law appears to me to be governed by decided cases, and therefore it is not necessary to refer to the earlier authorities, to foreign law, or to the views of text writers. Two of the elements of general average, a common peril and an act done for the common advantage of the adventure, were beyond question present in this case. The third element which is necessary is that of sacrifice—a term which implies that voluntary, or intentional, character in the act which has been held to be essential. Where it is part of the cargo which has been dealt with while a vessel is at sea for the general advantage, no question is likely to arise on the point of sacrifice. The destruction, or abandonment, or employment for some purpose connected with the navigation of the ship, or any part of the cargo at once impresses the act with the needful characteristic of a sacrifice. But where the subject is part of the ship's equipment it is more difficult to determine whether the act does or does not give rise to general average. There are cases, such as the cutting away of a mast, where it is clear that there is a destruction of part of the ship's equipment for the common advantage. The question in such a case is, whether the loss incurred was unavoidable, then or soon thereafter; or whether it was so far avoidable that it was accepted in order to save the ship and cargo, and so became a sacrifice. (See *Shepherd* v. *Kottgen*, 37 L. T. Rep. 618; 3 Asp. Mar. Law. Cas. 544; 2 C. P. Div., 585.) But there are cases when the advantage is gained, not by destruction or abandonment, but by the employment of part of the ship's material. What is the test in that case? It is, I think, whether the employment is in its nature of an ordinary or extraordinary kind; and we must observe that, though that course will be a use of the ship's equipment extraordinary in its nature under ordinary circumstances, there may be a use ordinary in its nature under extraordinary circumstances. The terms use or misuse of the ship's equipment have been employed to express such an abnormal or unnatural use as gives rise to an average act. In the well-known instance quoted by Abbott from Emerigon, of a boat sent sent adrift with a lantern on a mast in order to mislead a pursuing enemy, we have a simple case of misuse of part of the equipment of a ship, which gave rise to general contribution. In *Birkley* v. *Presgrave* (*ubi sup.*) we find the same principles applied in circumstances more nearly akin to the present. There, in order to secure a ship to a pier when it was all important to do so instantly, not only were the ship's hawser and towing line employed, but the cable on the lower anchors was cut and used for the purpose. It was held that a claim for contribution did not arise in respect of the hawser and towing line, because they were used only for the ordinary purposes of such articles, but did arise in respect of the anchor cable, because it was cut from its anchor and employed for a purpose for which it was not intended. "All these articles," Lord Kenyon said (1 East, 227) "which are made use of by the master and crew upon the particular emergency and are by the ordinary course for the benefit of the whole concern, must be paid proportionally as general average." It is clear that by the words out of "the" ordinary course Lord Kenyon meant out of "their" ordinary course—that is to say, in a manner unnatural for them, and, so read, the words of his Lordship appear to me to express the test necessary for the decision of the question which I am now considering. I think that Mansfield, C.J. in *Covington* v. *Roberts* (*ubi sup.*), summed up the view taken in *Birkley* v. *Presgrave* by saying that in that case the cable was sacrificed. The case of *Harrison* v. *Bank of Australasia* (*ubi sup.*) and that of *Robinson* v. *Price* (*ubi sup.*) afford illustrations of the above principle. In the former of these cases ship spars and wood, part of the ship stores, were used as fuel for the donkey engine engaged in pumping the ship. The court was equally divided on the question at issue, because, while it appeared to Kelly, C.B., and Bramwell, B., that the fact showed an imminent peril requiring the sacrifice of the spars and wood, Martin and Cleasby, BB., were of a different opinion on this point. I think it must be admitted that the reasoning of Cleasby, B., negatives the right to general contribution, even if a reasonable supply of coals for the donkey engine had been provided; but the judgments, not only of Kelly, C.B. and Bramwell, B., but also, apart from the question of imminency of the peril, I think that of Martin, B., admits the right to general average contribution. In *Robinson* v. *Price* ship spars and wood, part of the cargo, were used for the donkey engine in circumstances of imminent peril, and, when it was made clear that there had been a reasonable supply of coal for the donkey engine on board, the Court (Mellor and Lush, JJ.) held that the consumption both of ship spars and the part of the cargo was to be contributed for as general average. The diversion of the ship's spars from their proper object would appear to have constituted the sacrifice in both these cases. On the other hand, the authorities are clear that when the equipment of the ship is employed for its ordinary purposes, though it may be under circumstances imposing unusual demands upon it, there is no sacrifice and no right to general contribution. In *Covington* v. *Roberts* (*ubi sup.*) injury done to a ship and her mainmast in carrying press of sale to escape from a privateer was held not to be a subject of general average, on the ground that there was no sacrifice, but only a common sea risk. The circumstances were extraordinary, but the use of ship and mast was not. In *Power* v. *Whitmore* (4 M. & S. 141), on a similar principle, a claim of general average was refused in respect of damage to the ship and tackle caused by standing out to sea in tempestuous weather, when press of sale was necessary in order to avoid an impending peril of being driven on shore. Lord Ellenborough distinguished the case from that of *Plummer* v. *Wildman* (3 M. & S. 482), where a master cut away his rigging to preserve the ship, and, on the ground that "general average must lay its foundation in a sacrifice of part for the sake of the rest," said that the damage incurred while standing out to sea was not an object of contribution.

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Taylor v. *Curtis* (*ubi sup.*), where a claim for contribution in respect of ammunition expended and wounds of seamen incurred in a conflict was rejected, is another illustration of the same principle. The Court held that "no particular part of the property was voluntarily sacrificed for the protection of the rest." The consumption of ammunition is the result of the natural use of guns, and wounds to combatants are the natural result of a combat. In the present case I think that there was a sacrifice of the engines within the principles above indicated. In the framing of the York-Antwerp rules of 1890, it was made a condition that the damage to them must be shown to have arisen from an actual intention to float the ship for the common safety at the risk of such damage. The engines were worked ahead and astern—no doubt to prevent the vessel from settling in the sand—and were used when the vessel was stranded in order to force her off. This was not an ordinary or natural use of the engines. I do not, of course, say that using the engines of a vessel when just touching ground would lay the foundation for a claim for general average. That would not be an abnormal employment of the vessel's steam powers: but that is not the present case. In the above view, it seems to me to follow that the coal consumed in working the engines while the vessel was stranded should be the subject of contribution. Such a use of the coal was abnormal, just as the working of the engines was abnormal. If the claim for damage to the engines were based on their being used with a pressure of steam, or a number of revolutions unusual in character, it might be that such claim could extend only to a portion of the coal expended. But then the use of the engines at all was, under the circumstances in which they were used, extraordinary, and constituted a general average act; and, if that be so, it is, I think, clear, and indeed was conceded in argument, that there must be contribution for the coal consumed. The case of *Wilson* v. *Bank of Australasia* (*ubi sup.*) may be referred to as showing that the cost of coal consumed depends on the nature of the use to which the engines driven by its consumption are applied. In that case it was held that the freighters had a right, without contribution, to the services of the auxiliary screw, and therefore to disbursements required to provide the necessary fuel, on the ground that the expenditure in respect of which contribution is claimable must not "only be extraordinary in amount, but incurred to procure some service extraordinary in its nature." Here the service which the coal was expended to provide was extraordinary in its nature. I am of opinion, therefore, that there must be judgment for the plaintiffs.

Solicitors: for the plaintiffs, *Downing, Holman, and Co.*; for the defendants, *Waltons, Johnson, Bubb*, and *Whatton*.

Judicial Committee of the Privy Council.

July 12, 17, *and Nov.* 10.

(Present: The Right Hons. The EARL of SELBORNE, Lords WATSON, HOBHOUSE, MACNAGHTEN, MORRIS, and SHAND, and Sir R. COUCH.)

THE MAYOR OF CANTERBURY *v.* WYBURN AND OTHERS. (*a*)

ON APPEAL FROM THE SUPREME COURT OF THE COLONY OF VICTORIA.

Mortmain—Mortmain Acts (9 *Geo.* 2, *c.* 36; 51 & 52 *Vict. c.* 42)—*Effect—Colonial will directing purchase of land in England.*

An English statute will not be held to make void a bequest made by a colonial will, on the ground that it contravenes the local law of England, without very clear ground appearing in such statute.

The English Statutes of Mortmain do not operate to invalidate a gift of money coupled with an obligation to lay it out in land, bequeathed by a valid will.

A domiciled inhabitant of the Colony of Victoria, by his will, which was valid according to the law of Victoria, bequeathed a sum of money to the Mayor and Corporation of the city of Canterbury in England, for the purpose of buying a site for, and erecting, a free library.

Held (*reversing the judgment of the court below*) *that the bequest was valid.*

Attorney-General *v.* Mill (5 *Bli. N. S.* 593; 2 *Dow & Clark*, 393) *discussed and distinguished.*

THIS was an appeal brought by the mayor, aldermen and citizens of the city of Canterbury in England, from the judgment of the full court of the Supreme Court of the Colony of Victoria.

The facts are fully stated in the judgment.

July 12.—The case came on for argument before Lords Watson, Hobhouse, Morris, and Shand, and Sir R. Couch.

Everitt, Q.C. and *Dauney*, for the appellants, argued that the testator was domiciled in Victoria at the time that he made his will, and at the date of his death, and that the will must be construed according to the law of Victoria, where the English Statutes of Mortmain, or any similar enactments, are not in force. See

Attorney-General v. *Stewart*, 2 Mer. 143;
Whicker v. *Hume*, 7 H. of L. Cas. 124;
Jex v. *McKinney*, 60 L. T. Rep. 287; 14 App. Cas. 77.

It is not a bequest of land to the trustees, but a bequest of money which they can lay out under the Act 51 & 52 Vict. c. 42. The bequest is not invalid, as it may be validly carried out by the corporation. See 17 & 18 Vict. c. 112 (the Literary and Scientific Societies Act), 18 & 19 Vict. c. 70 (Public Libraries), and the Public Libraries Act 1892 (55 & 56 Vict. c. 53). See also *Harrison* v. *Corporation of Southampton* (2 Sm. & Giff. 387), where a bequest was held valid under 8 & 9 Vict. c. 43; and *Incorporated Society* v. *Richards* (1 Dr. & War. 258). The proper course is to pay over the fund to the corporation, and leave it to them to see if they can carry out the bequest:

Forbes v. *Forbes*, 18 Beav. 552;
Chamberlayne v. *Brockett*, 27 L. T. Rep. 92; L. Rep. 8 Ch. 206.

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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The Acts only apply to persons domiciled in England.

The *Attorney-General* (Sir J. Rigby, Q.C.) and *Methold*, for the respondents, the Melbourne Hospital, contended that the Statutes of Mortmain were an integral part of the English law of real property. They were passed to prevent English land from being tied up. It is not a question of personal ability or disability, but of the English real property law. If an Englishman domiciled in England cannot do this, how can a man domiciled in the colony? (See *Attorney-General* v. *Day*, 1 Ves. sen. 218; *Attorney-General* v. *Mill*, 3 Russ. 328; affirmed on appeal, 5 Bli. N. S. 593; 2 Dow & Clark, 393.) Westlake in his "Private International Law" (3rd edit. 1890), sect. 165, p. 191, and Story in his "Conflict of Laws," sect. 446, lay down the law in accordance with the judgment of the court below. See also

Sugden's "Law of Property," p. 419;
Mack v. *Townsend*, 16 Ves. 330.

The gift is void under the statute 51 & 52 Vict. c. 42.

C. E. Jones and *Dunlop Hill*, for the executors, took no part in the argument, but submitted to the judgment of the court.

Everitt, Q.C. was heard in reply.

Their Lordships required further argument, and, on the 17th July, the case was re-argued before the same board, with the addition of the Earl of Selborne and Lord Macnaghten, by *Everitt*, Q.C. for the appellants, and Sir *J. Rigby*, Q.C. (A.-G.) for the respondents.

In addition to the authorities cited on the previous argument, they referred to

Sorresby v. *Hollins*, 9 Mod. 221;
Attorney-General v. *Graves*, Ambl. 155;
Oliphant v. *Hendrie*, 1 Bro. C. C. 571.

At the conclusion of the arguments, their Lordships took time to consider their judgment.

Nov. 10. — Their Lordships' judgment was delivered by

Lord HOBHOUSE.—On the 13th June 1891, J. G. Beaney, an inhabitant of Melbourne and a domiciled Victorian, died, having by a codicil to his will bequeathed legacies to the appellants in the following terms:—"I direct my said trustees to pay to the mayor and corporation of the said city of Canterbury, for the time being, the sum of 10,000*l.* for the purpose of their buying a suitable piece of ground at Canterbury aforesaid, and erecting thereon, with as little delay as possible, a free library and reading-room for the working classes, such building, when erected, to be called 'The Beaney Institute for the Education of Working Men.' And I also bequeath to the said mayor and corporation of the said city of Canterbury all my medical diplomas and military commissions for the purpose of their being hung up and exhibited in the principal hall of the said building so to be erected as aforesaid." By another codicil he bequeathed some more articles of a like kind in a like way. His residuary legatees are certain charitable institutions in Melbourne, out of which the respondents have been selected to defend the interests of all. They contend that the gift to the appellants must fail by reason of the English statute law which restricts gifts to charitable uses. The case was argued before Mr. Justice A'Beckett upon certain questions propounded for the court to answer, and by his answers that learned judge maintained the validity of the gifts, and directed the executors to comply with the directions of the testator. He finds that there is nothing in the law of Victoria to forbid such a testamentary gift. He adds:—"If it had not been shown that, under the law as it stands in England, the corporation of Canterbury could not lawfully spend 10,000*l.* in buying land and erecting a building as contemplated by the testator, and therefore that the object of the testator could not lawfully be accomplished, I should not direct the executors to pay the legacy to the corporation. This has not been shown. It appears that the corporation could lawfully have expended 10,000*l.* in this manner if the testator had sent the money to them in his lifetime, and that they will have the right to spend it in this manner if sent them by his executors as directed by his will." The residuary legatees appealed, and the Full Court varied the decision of the first court by holding that the bequest of money was invalid, and the bequests of chattels valid. The reasons of the three learned judges are in substance identical. They consider that, as the 10,000*l.* is given for the purchase of land in England, the case is the same as if the testator had actually devised land of his own in England, and they argue, justly enough, that nobody can so operate on English land. From their order the present appeal is brought, and their Lordships have to consider whether it is right. Of course there is no doubt of the competency of the English Legislature to forbid such gifts. The question is whether it has done so? It would seem that this is the first occasion on which such a question has come into this court for decision. It appears to their Lordships that the arguments relied on by the full court and by the respondents' council at this bar err in exaggerating the amount of prohibition imposed by the English statute, and in ascribing to it a more absolute effect than it really has. The Attorney-General, indeed, in his argument for the respondents, insisted on the title of the Act of 9 Geo. 2, c. 36, passed in the year 1736—"An Act to restrain the disposition of lands, whereby the same become inalienable." That title correctly expresses the object of the Act; but it is manifest, from the preamble and the operative parts of the Act, that it does not purport to restrain every such disposition, nor does the title say that it does. If there was an absolute prohibition of all gifts of lands for charitable uses, Mr. Beaney's gift could not take effect. But as, in fact, the English statutes leave all persons as free as they were by common law to give or to receive any amount of land for those purposes, provided only that they observe the positive rules prescribed for them, the question in each case is whether the mode of acquiring land is a lawful or a forbidden one. The statute which now governs this question was passed in 1888 (51 & 52 Vict. c. 42), and, according to a modern practice, it has no preamble to give the key to its policy. But it is mainly an Act of consolidation; if it effects any alteration in the previous law, the difference does not concern the question now to be decided; and it must be taken that its provisions rest upon precisely the same policy as those of the statute 9 Geo. 2, c. 36. The preamble of that statute refers to the older statutes passed to restrain the mischiefs of gifts

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in mortmain. Then it proceeds: "Nevertheless, this public mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called 'charitable uses,' to take place after their deaths, to the disherison of their lawful heirs; for remedy whereof it be enacted," &c. This, then, was the mischief which the Legislature desired to abate —the increase of land held in mortmain by gifts which may for brevity, and somewhat loosely, be termed "deathbed gifts." The mode taken to restrain this mischief was to enact that no land, nor any money to be laid out in the purchase of land, should be given to any person for the benefit of any charitable use, unless the gift be made by deed executed twelve calendar months at least before the death of the donor, and enrolled in Chancery within six calendar months of its execution, and unless the gift be made to take immediate effect. Another section extends the prohibition to charges affecting land, which is a large class, at that date a much larger relative class than now, of personal estate; and it declares that the prohibited gifts shall be absolutely null and void. Therefore, in all cases of wills to which the statute applies, such gifts are prohibited by its express terms. It is expressly enacted that the statute shall not extend to the grant of any estate in Scotland. After a time came the question whether it extends to the colonies, and that question was settled in the negative in the case of *The Attorney-General* v. *Stewart*, decided by Sir William Grant in the year 1817 (2 Mer. 143). He considered that both the mischief struck at by the Act and the methods prescribed for lawful gifts were of a local character, peculiar to England. Therefore, he held that the Act did not extend to Grenada, though it is in general terms, and though the laws of England had been extended in general terms to the island when first ceded in 1763, and again when recovered in 1784. That opinion has ever since prevailed, and in the case of the Gilchrist foundation, *Whicker* v. *Hume* (7 H. L. C. 124), it was applied to a gift of land in New South Wales. In that state of the law the present Act of 1888 was passed. By sect. 4, sub-sect. 1, it is enacted thus: "Subject to the savings and exceptions in this Act every assurance of land to or for the benefit of any charitable uses, shall be made in accordance with the requirements of this Act, and unless so made shall be void." The requirements of the Act are substantially those of the Act of 1736. If the assurance is of personal estate, not being stock in the public funds, it must be made by deed enrolled within six months of the execution, and if it is not made for full and valuable consideration, executed twelve months before the death of the assuror. By the interpretation clause, the term "assurance" includes a will. This Act, therefore, subject to some special exemptions, prohibits "death-bed gifts" as strictly as does the earlier Act. But it is impossible to suppose that the English Legislature intended to affect a will subject to the law of Victoria. All the reasons against such a construction which were applied to the earlier enactment apply to the later one. It is expressly declared that the Act does not extend to Scotland or Ireland. To declare that a bequest made by a colonial will shall be void on the ground that it contravenes the local law of England may not be beyond the competence of the Imperial Parliament, but is quite beyond its ordinary scope, and such an intention ought not to be imputed to it without very clear grounds. Seeing, indeed, that the repealed and consolidated statutes did not apply to the colonies, and that Scotland and Ireland are expressly excepted from the new statute, it is impossible, without express words, to suppose that there was any intention of affecting the colonies by the new statute. Moreover, Sir William Grant's other reasons apply exactly to the present question. It cannot have been intended that methods of a local character prescribed for making a lawful gift should be adopted in a distant colony, or, if not, that the gift should be invalid. Indeed, the case for the residuary legatees is not rested on any such broad ground as this. The courts below are agreed that the Victorian testator is quite free to make such a gift as he has made; nor has the contrary been contended here. But for that conclusion the word "assurance" in this Act must receive the qualification that it means something which is governed by English law. Of course, it is a different thing to say that English law must decide whether English land can be bought with money coming from such a source as a foreign will; and that, if it decides in the negative, the bequest must fail, not because it is illegal, but because it is impossible of execution. The Attorney-General stated broadly that the prohibitions of the Statutes of Mortmain are an integral part of the English law of real property. So they are; but the question is how far they operate. The suggestion is that they operate to invalidate gifts of money, coupled with an obligation to lay them out in land, if they have their origin in a will, though a perfectly valid will. Their Lordships cannot find such a prohibition in the Act. They have reached the conclusion that this will is not invalidated by sub-sect. 1. At what point, then, of the transactions does the English law come in? Not between the Victorian testator and his Victorian executor. In their Lordships' view the English law will operate whenever a purchase of land for the charitable uses is effected, but no earlier. The assurance of that land must be made in accordance with the provisions of the Act. Anybody may give money for such a purpose in the permitted mode. The testator might himself have bought land in Canterbury, and have devoted it to charitable uses quite lawfully. What he might do himself he might do through trustees, by giving money to trustees for the purpose of acquiring land in a lawful way. Is there anything to prevent him from ordering his executors to do the same thing? The answer is that his will is not affected by English law. It is a valid will, binding on his executors; and a Victorian court of justice should direct them to perform their obligation. It has been contended very earnestly that the point is settled by the decision in *Attorney-General* v. *Mill* (2 Dow & Clark, 393). In that case the testator was a native of Montrose. He spent many years in the island of Cariacou, where he owned land and amassed a large fortune. He returned to Montrose, and stayed there about five years. Then he came to England and resided, first in London, and afterwards in Bath up to his death in 1805—fourteen years afterwards. In 1791 he executed a will and a deed, by which he gave money to be invested in

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he purchase of land, ordering the income to be aid to certain Scotch trustees for the benefit f indigent ladies in Montrose. His will, with our codicils all in English form, was proved in ngland. In his will and contemporaneous deed e described himself as of the island of Cariacou, ow residing in Marylebone. His codicils, it was tated at the bar, contained similar descriptions. Iis foreign assets were transmitted to England nd were administered under the direction of the Court of Chancery, and were subject to a decree hich paid no regard to the charitable gift. Subsequently an information was filed by the Attorney-General for the establishment of the charity by urchase of land in Scotland. It was held by ord Lyndhurst, first in Chancery and afterwards n the House of Lords, that the testator must be aken to have directed the purchase of land in England, and that his gift contravened the mortmain laws and was void. It is now argued that he testator was a domiciled Scotchman, and that he case decides that a bequest of money in a Scotch will directing the purchase of land in England for a charity is a void bequest. But the assumption that the testator had a Scotch domicile s not warranted by anything to be found in the eports. In the meagre history of his life there s much to suggest arguments for an English domicile, and the counsel for the Attorney-General, who was contending for the validity of the gifts, did not suggest any other domicile. The word "domicile" occurs only twice in the reports of the case. In one of them (2 Dow & Clark, 394) the reporter uses a casual expression to the effect that on leaving Cariacou the testator resumed his domicile in Montrose, an expression which Lord St. Leonards, writing many years afterwards, repeated. But the Scotch origin of the testator and his connection with Montrose were only used as arguments to show that he contemplated the purchase of land in Scotland, a conclusion which one of the reasons appended to the appellant's case urged the House to adopt, "even if he were domiciled in England." For some reason, doubtless a sufficient one, it was the common ground of argument that the will was governed from first to last by English law. There is not a trace in the reported statements, arguments, or judgments, that anybody asked what would be the effect of a will not governed by English law, which is the question now propounded to their Lordships. It is true that Mr. Justice Story ("Conflict of Laws," sect. 446) and Mr. Westlake ("Private International Law," sect. 165) both treat the decision as covering the case of a foreign will. But, on examining the case, that appears to their Lordships to be a misapprehension of the point really decided. So far as they know, the present question is wholly untouched by authority. The Attorney-General dwelt on the amount of land which might be brought into mortmain if such bequests as these were allowed to take effect. Such considerations can hardly influence the construction of a statute, except so far as they may appear to have been present to the minds of its framers. Their Lordships can hardly suppose that anyone would feel alarm at the idea of foreigners giving large sums of money to English purposes; and if it be true that this is the first case of its kind to come into court, the experience of a century and a half tends to prove the futility of any such alarm. But, however that may be, their Lordships must construe the words of the statute according to their plain meaning, and leave it to the Legislature to enact further prohibitions, if found expedient. The result is that their Lordships will humbly advise her Majesty to discharge the order of the full court, except so far as it deals with the costs of the appeal, and to restore the order of A'Beckett, J. It has seemed right to both the courts below that the costs of all parties to the litigation should be paid out of the testator's estate, those of the plaintiffs, who are the executors, being taxed as between solicitor and client. Their Lordships have been asked to follow the same course in disposing of the costs of this appeal, and the residuary legatees raise no objection. Their Lordships will order accordingly.

Solicitors for the appellants, *Speechly, Mumford, Landon*, and *Rodgers*.

Solicitors for the residuary legatees (respondents), *Anderson* and *Sons*.

Solicitors for the executors (respondents), *Phelps, Sidgwick*, and *Biddle*.

Supreme Court of Judicature.

COURT OF APPEAL.

Thursday, Aug. 2.

(Before LINDLEY, LOPES, and DAVEY, L.JJ.)

Re PARKER; MORGAN *v.* HILL. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Principal and surety—Co-sureties—Contribution—Bankruptcy of one co surety—Payment of whole debt and assignment thereof to other co-surety—Proof for whole debt—Mercantile Law Amendment Act 1856 (19 & 20 *Vict. c.* 97), *s.* 5.

A surety who has paid off the whole debt and taken an assignment thereof from the creditor is entitled to prove in the bankruptcy of his co-surety for the full amount of the debt, but cannot receive more by way of dividends than the proportion of the whole debt which his co-surety is bound to contribute.

One of three co-sureties executed a deed of assignment in favour of his creditors. The principal debtor, a company, went into liquidation, and the creditor sent in a claim against the estate of the bankrupt surety. The two other co-sureties paid off the principal creditor, and took an assignment of the whole debt and the benefit of the creditor's claim against the bankrupt co-surety.

Held, that the solvent co-sureties were entitled to prove against the estate of the bankrupt co-surety for the whole amount of the debt, but not to receive dividends amounting to more than the proportion of the whole debt for which the bankrupt co-surety was liable, namely one-third.

Decision of Kekewich, J. (ante, *p.* 327) *affirmed.*

Ex parte Stokes (*De G.* 618) *followed.*

APPEAL from Kekewich, J.

Three persons became liable as sureties for a debt. The principal debtor, a company, afterwards went into liquidation.

One of the co-sureties, J. C. Parker, executed a

(*a*) Reported by W. C. BISS, Esq., Barrister-at-Law.

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deed of assignment in favour of his creditors, and the principal creditor sent in a claim for the full amount due to him on the debt for which Parker was co-surety. The two solvent sureties paid the debt, and the debt and all securities for it, and the benefit of all claims against the estate of Parker, were assigned to them by the creditor. They then claimed to prove against the estate of Parker for the full amount of the debt paid by them, and to receive a dividend on the whole of that sum, but admitted that the amount actually received by them ought not to exceed one-third of the total amount of the principal debt, that being the amount for which Parker was liable, as between the three co-sureties.

Kekewich, J. held that their claim could be maintained, and from this decision the trustee for Parker's creditors appealed.

T. B. Napier for the appellant.—The co-surety is only liable to pay one-third of the whole debt, and therefore only a proof for that sum can be admitted:

Ex parte Snowdon, 44 L. T. Rep. 830; 17 Ch. Div. 44;
Wolmerhausen v. *Gullick*, 68 L. T. Rep. 753: (1893) 2 Ch. 514;
Re Sir J. J. Ennis; Coles v. *Peyton*, 69 L. T. Rep. 738; (1893) 3 Ch. 238;
Mercantile Law Amendment Act 1856 (19 & 20 Vict. c. 97), s. 5.

His liability cannot be increased by the fact that he is insolvent. If this decision is correct, the respondents will receive a larger dividend than the other creditors. *Ex parte Stokes* (De G. 618), which is relied on by the respondents, is inconsistent with *Ex parte Snowdon* (*ubi sup.*).

Hadley, for the respondents, referred to

Ex parte Stokes (*ubi sup.*);
Re M'Myn, 55 L. T. Rep. 834; 33 Ch. Div. 575.

LINDLEY, L.J.—This is an appeal from a decision of Kekewich, J., and if the point were new and not covered by the case of *Ex parte Stokes* (*ubi sup.*), decided in 1848, I should have thought it worthy of consideration now. I think, however, we should be disturbing the rule which has been long established if we were to allow the appeal. [His Lordship then referred to the facts.] What, then, are the rights of these two sureties against the estate of the third surety, which is being administered under the provisions of the deed I have mentioned? They say they are entitled to the benefit of the proof of the principal creditor for the principal sum, although they admit they are only entitled to receive dividends to the amount of one-third of the amount of the whole claim. The question turns on sect. 5 of the Mercantile Law Amendment Act 1856, which, after enacting that a surety paying a debt shall be entitled to have assigned to him the security held by the creditor and to stand in the place of the creditor, provides that "no co-surety, co-contractor, or co-debtor shall be entitled to recover from any other co-surety, co-contractor, or co-debtor by the means aforesaid more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable." If the matter were *res nova* it might be more consistent with justice to accede to Mr. Napier's contention, and hold that, as the sureties were only entitled to recover one-third of the debt each, they were only entitled to prove for one-third. But since 1848 a different rule has prevailed, and I think therefore the order appealed from is right, and that the two co-sureties must be allowed to prove for the whole debt and obtain the dividend on it, but they must not receive as dividends out of the estate more than the total amount for which Parker was liable.

LOPES, L.J.—I am of the same opinion. I think the decision of Kekewich, J. was right, and that the case is governed by authority.

DAVEY, L.J.—I am of the same opinion. In 1805 Lord Eldon said, in *Ex parte Rushworth* (10 Ves. 409, 416): "It is clear where a person has a demand upon a bill or a bond against several persons, and no part of that demand has been paid before the bankruptcy by any of them, he may prove against each; and the circumstance that one is a surety, the other the principal, or a co-surety, as between themselves, does not give a right to stop the holder receiving dividends until he has received 20*s.* in the pound." The right of creditors is to prove against the estate for the full amount of the debt. In the present case two of the three sureties paid off the whole debt, and they are entitled to all the rights and remedies which the creditor had for the recovery of the debt. One of those remedies was to prove under this deed. They are entitled to the benefit of that, but only to the extent of recouping themselves the proper proportion of the debt, and they only claim to receive dividends to the amount for which that surety was liable. That is in accordance with the practice, and it seems to me to be the logical result of sect. 5 of the Mercantile Law Amendment Act 1856, together with the authorities and the practice in bankruptcy. As to what would have been the result if the principal creditor had put in no claim and these two sureties had claimed to prove under the creditors' deed in the first instance in their own right, I express no opinion, but I think it quite possible that their rights would have been different. But under the circumstances of this case I think the order was right, and that the appeal must be dismissed.

Solicitors for the appellant, *Sharpe, Parker, and Co.*, agents for *Miller, Stevens, and Sons*, Norwich.

Solicitors for the respondents, *Oldman, Clabburn and Co.*, agents for *D. Havers*, Norwich.

Aug. 3 and 4.

(Before LINDLEY, LOPES, and DAVEY, L.JJ.)

Re PICKARD; ELMSLEY *v.* MITCHELL. (a)

APPEAL FROM THE CHANCERY DIVISION.

Mortmain — Corporation — Debenture stock — Charge on revenue of landed and other property —Interest in land—Mortmain and Charitable Uses Act 1888 (51 & 52 *Vict. c.* 42).

Corporation debenture stock was by the Act under which it was created charged on the borough fund, borough rate, the waterworks and gas-works undertakings, and improvement rates, and "the revenues of all landed and other property vested in or belonging to the corporation."

Held (affirming the decision of North, J., 70 *L. T. Rep.* 395), *that there was only a general charge*

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

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on the general revenue of the corporation, and not a mortgage or assignment of the rents or any specific property, and therefore no interest in land was created within the Mortmain and Charitable Uses Act 1888.

THIS was an originating summons taken out to obtain a decision of certain questions arising under the will of Hannah Pickard, who died on the 29th Jan. 1891, but before the passing of the Mortmain and Charitable Uses Act 1891 (54 & 55 Vict. c. 73).

The testatrix gave her residuary estate to certain charities. It comprised some Leeds Corporation Debenture Stock, and it was contended that the certificates were so framed as to confer on the holder an interest in land within the Mortmain and Charitable Uses Act 1888, and therefore the gift of the stock to the charities was void.

The stock in question was issued under the Leeds Improvement Act 1877, which provides (sect. 67) that

The stock created and issued shall be a charge upon the borough fund, borough rate, the waterworks and gasworks undertakings, and the improvement rates, and the revenues of all landed and other property vested in or belonging to the corporation respectively derived therefrom, and any other revenue which may be acquired by them, but such stock shall be distributable, transmissible, and transferable as, and in other respects have the incidents of, personal estate.

Certificates of the stock were issued under the seal of the corporation, the conditions of issue being indorsed thereon, the second of which was in these terms:

The security for the stock and the due payment of the interest thereon is the borough fund and borough rates, the waterworks and gasworks undertakings, the improvement rates, and the revenues respectively derived therefrom, and from all landed and other property vested in or belonging to the corporation, and any other revenues which may be acquired by them. A further security for the redemption of the stock is a sinking fund, which is established and invested under Government supervision.

The Municipal Corporation Act 1882, s. 139, provides:

The rents and profits of all corporate lands, and the interest, dividends, and annual proceeds of all money, dues, chattels, and valuable securities belonging or payable to a municipal corporation, or to any member or officer thereof in his corporate capacity . . . shall go to the borough fund.

The summons was heard by North, J., who held (70 L. T. Rep. 395) that the stock was pure personalty.

From this decision the testatrix's next of kin appealed.

Byrne, Q.C. and *H. M. Humphry*, for the appellant.—The debentures follow the words of charge in the Leeds Improvement Act, and the holders could by means of a receiver intercept the rents of the land belonging to the corporation before they go into the borough fund. The debentures therefore give an interest in land within the Mortmain Act:

House v. *Chapman*, 4 Ves. 542;
Thornton v. *Kempson*, Kay, 592;
Brook v. *Badley*, 16 L. T. Rep. 762; L. Rep. 3 Ch. App. 672;
Re Watts; Cornford v. *Elliott*, 53 L. T. Rep. 426; 29 Ch. Div. 947;
Chandler v. *Howell*. 35 L. T. Rep. 592; 4 Ch. Div. 651;
Re David; Buckley v. *Royal National Lifeboat Institution*. 62 L. T. Rep. 141; 43 Ch. Div. 27;
Driver v. *Broad*, 68 L. T. Rep. 579; 69 L. T. Rep. 169; (1893) 1 Q. B. 539, 744.

[LOPES, L.J. referred to *Re Hollon; Forbes* v. *Hardcastle*. 69 L. T. Rep. 425.] *Finch* v. *Squire* (10 Ves. 40) is a distinct authority in favour of the appellants. Though it was commented on in *Attree* v. *Hawe* (38 L. T. Rep. 733; 9 Ch. Div. 337) and *Re Harris; Jacson* v. *Governors of Queen Anne's Bounty* (43 L. T. Rep. 116; 15 Ch. Div. 561) it has never been expressly overruled, and is good law. In *Payne* v. *Esdaile* (59 L. T. Rep. 568, 572; 13 App. Cas. 613, 628) it was referred to by Lord Herschell without any suggestion that its authority had been shaken. Besides, *Re Harris* (*ubi sup.*) is quite consistent with and distinguishable from *Finch* v. *Squire*. In *Attree* v. *Hawe* (*ubi sup.*) the charge was on the net profits of the undertaking. In *Ashworth* v. *Munn* (43 L. T. Rep. 553; 15 Ch. Div. 363) it was pointed out that the question is not whether the testator or legatee could get possession of any land, but whether he had an interest in or a charge on land.

Cozens-Hardy, Q.C. and *Warrington* for the charities.—Under the Municipal Corporations Act 1882 (45 & 46 Vict. c. 50), ss. 139, 140, these rents must go into the borough fund. No holder of the stock could enforce any claim against the land. By the Local Loans Act 1875 (38 & 39 Vict. c. 83, s. 6) it is provided that, where corporation debenture stock is a charge upon property other than the local rates, and it is intended that the property should be sold for raising the money, a declaration shall be made by the local authority at the time of the issue of the stock, and that was not done here. Although *Finch* v. *Squire* (*ubi sup.*) has never been expressly overruled, the decision cannot be considered as law after what was said by Bacon, V.C. in *Attree* v. *Hawe* (*ubi sup.*) and Jessel, M.R. in *Re Harris*; *Jacson* v. *Governors of Queen Anne's Bounty* (*ubi sup.*). The possession of land is merely incidental to the undertaking of the corporation, and these stockholders are interested only in the profits of the undertaking and not in the land. The case of *Finch* v. *Squire* was decided on the ground that it was governed by *Knapp* v. *Williams* (4 Ves. 430, n.), where it was held that a mortgage of turnpike tolls was an interest in land within the statute. But *Finch* v. *Squire* was a mortgage of poor rates and county rates, and there is a great difference between the two cases. If a receiver were appointed of the tolls he could go to the toll-house and actually take them. He could not collect the rates. These debentures are not a charge on any particular rate, or the rents, but on the whole of the undertaking of the corporation. The rents, together with the rates, profits on the gas and water works, &c., go into the borough fund, out of which the necessary expenses of the corporation, such as the cost of the police, are paid. A debenture which creates a charge on the profits of an undertaking does not create an interest in land, although that undertaking includes rents:

Attree v. *Hawe* (*ubi sup.*);
Re Watts; Cornford v. *Elliott* (*ubi sup.*);
Re Christmas; Martin v. *Lacon*, 55 L. T. Rep. 197; 33 Ch. Div. 332;

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Re Yerbury's Estate; Ker v. *Dent*, 62 L. T. Rep. 55;
Re Parker; Wignall v. *Park*, 64 L. T. Rep. 257; (1891) 1 Ch. 682;
Re Hollon; Forbes v. *Hardcastle* (*ubi sup.*);
Re Thompson; Bedford v. *Teal*, 63 L. T. Rep. 471; 45 Ch. Div. 161;
Re Holmes; Holmes v. *Holmes*, 63 L. T. Rep. 477.

A gift of arrears of rent does not give an interest in land:

Edwards v. *Hall*, 6 De G. M. & G. 74.

A receiver of these rents could not touch them until they were in arrear. A rate is not an interest in land. It is merely a contribution to certain expenses the amount of which is measured by the amount of land. If the rates are not paid the public authority has only a right to seize the chattels on the land. Therefore a mortgage of rates does not create an interest in land:

Jervis v. *Lawrence*, 47 L. T. Rep. 428; 22 Ch. Div. 202.

In *Re David; Buckley* v. *Royal National Lifeboat Institution* (*ubi sup.*), it was held that the mortgages created an interest in land, as they expressly charged on a proportionate part of certain bridge tolls. No receiver would be allowed to stop the working of a great city like Leeds. He would only be entitled to the surplus after the payment of the necessary expenses, such as the cost of the police. A receiver could only apply to the borough treasurer, he could not apply for the rents to the tenants of the corporation. The cases of *Ashton* v. *Lord Langdale* (4 De G. & Sm. 402) and *Thornton* v. *Kempson* (*ubi sup.*) are overruled by *Attree* v. *Hawe* (*ubi sup.*).

Byrne, Q.C. in reply.—*Re Thompson; Bedford* v. *Teal* (*ubi sup.*) does not apply, for in that case there was only a charge on the borough fund, while here there is an express charge on the rents. In *Edwards* v. *Hall* (6 De G. M. & G. 74) it was held that the gift to the charity was good because it was a gift of rents only which had already accrued. In *Re Parker; Wignall* v. *Park* (*ubi sup.*), the mortgage was a mortgage of the undertaking. *Jervis* v. *Lawrence* (*ubi sup.*) proceeded on the ground that *Finch* v. *Squire* (*ubi sup.*) was overruled, and therefore its authority is doubtful. *Re Yerbury's Estate; Ker* v. *Dent* (*ubi sup.*), was wrongly decided. A municipal corporation has no undertaking in the proper sense of that word.

Swinfen Eady, Q.C. and *Peterson* for the trustees.

LINDLEY, L.J.—The question which arises is, whether the certificate of certain Leeds Corporation debenture stock is so framed as to confer upon the holder of it an interest in land within the Mortmain and Charitable Uses Act 1888, which has consolidated the laws relating to mortmain and charitable trusts, and in some respects amended them. It is significant that sect. 4 of that Act omits the words "charge or incumbrance," which occur in sect. 3 of the Mortmain Act (9 Geo. 2, c. 36), and the definition clause, sect. 10, sub-sect. 3, defines "land" as including "any estate or interest in land." Whether that omission was intentional or not, one need not pause to consider; but it looks as if there was some desire on the part of the Legislature to exclude from the effect of the Act of Geo. 2 certain classes of securities which by the decisions at all events have been held to be outside it; although possibly they were within the words. However, I pass that over, and I do not make that any part of the ground of the decision at which I have arrived. But I notice it because I think it is not altogether unimportant. Now, what this debenture stock is must be ascertained of course from the terms of the certificate. The certificate is under the seal of the Corporation of Leeds, and states that the holder is entitled to a certain sum of money bearing interest at 3½ per cent. Then, upon the back of the certificate is this clause: [His Lordship then read the condition indorsed on the certificate, and set out above, and continued:] Now, this certificate, in form, does not purport to create any charge. It is a statement of a fact—a statement of the law applicable to such stock—that the security is so and so. There is no mortgage, in terms, of any specific property; there is no assignment of anything, and there is no charge upon anything except such a charge as is implied in the language which I have read. These certificates are a charge, but they are a charge by virtue of the section in the Act of Parliament under the authority of which they are issued. Now, the section of the Act of Parliament which makes them a charge is the 67th section of the Leeds Improvement Act 1877. Power is given by sect. 65 of that Act to borrow certain sums of money for certain purposes. [His Lordship then read the section and continued:] Then sect. 67 confers the power to issue debenture stock. The important part of the section is as follows: [His Lordship read the portion of the section set out above and continued:] Now that Act shows exactly what this is a charge upon, and when you read the Act which creates the charge you look in vain for a specific mortgage or specific assignment of any particular property, or any particular rents of any particular property, or anything of the sort. It is a general charge upon what is, in substance, the property of the corporation; and it is very significant that neither in the certificate nor in the charging section is there a word about rents; it is revenue. What is charged is "the borough fund, borough rate, the waterworks and gasworks undertakings, and the improvement rates, and the revenues of all landed and other property." The word "revenues," is, I think, a very significant expression, and prevents the holder of this debenture from saying: "I am the assignee or mortgagee of rents in the ordinary sense of that expression of any particular land." That it is not a charge upon any particular land is further shown, I think, by sect. 82, which runs thus: "When any land, rents, or property is or are sold, demised, or otherwise disposed of by the corporation, the same shall in the hands of any person or body corporate to whom the same shall have been sold be absolutely free from all" claims and charges in respect of any stock issued under that Act. That shows that it is not the intention to create a specific mortgage or specific security upon any particular parcel of land. That being the true effect of this certificate, the question arises whether it creates such an interest in land as is within the Mortmain Act or the Act of 1888. When we come to look at the authorities, they are not in a very satisfactory state. But it appears to me, having looked at them with some care, that all those which are really material may be classified and brought under two heads. First of all,

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here is the class beginning with *Knapp* v. *Williams* (*ubi sup.*), followed by *Finch* v. *Squire* (*ubi sup.*). *Thornton* v. *Kempson* (*ubi sup.*), and *Re David* (*ubi sup.*), in which the debenture mortgaged or assigned a particular portion of certain tolls and rates. In those cases the decisions are tolerably, if not quite, uniform, that securities of that class are interests in land within the meaning of the old Act of Geo. 2. Whether they are interests in land within the new Act of 1888 is, perhaps, a little more doubtful. I say "a little more doubtful," because of the omission from that Act of the words "charge or incumbrance." It is unnecessary to decide that. We are asked to overrule those cases. When we find a series of decisions running down from the time of Sir William Grant, we should be very cautious and very slow to overrule them. But, in point of fact, the question is not now of much practical importance, because the Legislature has, by the Mortmain and Charitable Uses Act 1891, put this matter right; and it is quite plain that, under that Act, such a security as this would not be an interest in land at all; that is obvious. But this case is not under that Act; it is under the old *régime*. Therefore, as we are not bound to review that line of cases, the less we say about them the better. This is not within that group of cases at all. Now, the other group of cases is distinguished from that to which I have already alluded by including what may be shortly termed charges on the undertaking, charges on the income of a going corporation or going concern; whether it is a railway corporation, or whether it is a municipal corporation, for this purpose appears to me not to be material. The substance of it is, that there is no definite mortgage, or assignment of any specific property, but a general charge on the income and property of the corporation. This case appears to me to fall within that group of cases upon the true construction of this certificate, and of the Act of Parliament under the authority of which it was issued. That group may be said to start with *Attree* v. *Hawe* (*ubi sup.*), which, notwithstanding the comments made upon it, and the qualifications put upon it, in the partnership case of *Ashworth* v. *Munn* (*ubi sup.*), appears to me still to stand as regards what are called debenture securities, or property of that description. That case has been followed in, amongst other cases, *Re Parker* (*ubi sup.*) and *Re Yerbury's Estate* (*ubi sup.*), and to a certain extent also in *Re Thompson* (*ubi sup.*) and *Re Holmes* (*ubi sup.*). They all fall within the group which I am now considering—cases of a general charge on the revenue or income of property of a going corporation or undertaking. Well, now the decisions in that group are uniform: they are all in one way. They do not involve an interest in land within the meaning of the old statute of Geo. 2, still less within the meaning of the present Act of 1888; and, if I am right in that, there is an end of the case. I am satisfied, upon the true construction of this Act of Parliament, that this case falls within the group to which I have last alluded, and not within the group of which *Re David* (*ubi sup.*) is the latest illustration. Under these circumstances, I think that the decision of the learned judge below was right, and that the appeal must be dismissed.

LOPES, L.J.—This is a charge which is created under sect. 67 of the Leeds Improvement Act 1877, and the certificates have been issued in accordance with that section. The words indorsed upon the certificate are these: [His Lordship read them, and continued:] Now, it seems to me that the all-important point in this case is, what is the true construction of those words authorised by the charging section and contained in that indorsement? It is material to observe that there is no mortgage of any specific property; there is no charge on any specific property; there is no assignment of any specific property. I should read the words indorsed in this way: that the certificate is to be a security to the holder of it in respect of all the revenue of the corporation, from whatever source derived—all the income of the corporation, from whatever source derived. It is a mortgage of the undertaking generally—a charge on the undertakings of the city of Leeds generally. Well, then, does it create an "interest in land" within the Act of 1888? Now, I agree with what has been said by Lindley, L.J. It appears to me that at any rate it is a matter worthy of consideration that in the Act of 1888 (which governs this case) the words which have been used in the previous Act, namely, "charge or incumbrance," are omitted. I cannot but think that these words are omitted for some very good reason, for it is not merely a consolidation Act—it is "an Act to consolidate and amend." And, if that is so, that confirms the conclusion at which we have arrived. Putting the case very shortly, and adopting the construction of this document which I have already stated, this document appears to me to be in the same position as an ordinary railway debenture, and to be governed by cases such as *Re Parker* (*ubi sup.*), *Re Yerbury's Estate* (*ubi sup.*), and *Re Thompson* (*ubi sup.*). Now, the decision of this case is not so important as it might have been had it not been for the Act of 1891, because, if it were under that Act, it is perfectly clear and beyond contest that this certificate could not have been held to be an interest in land under that Act. In my opinion, therefore, the decision of the learned judge below was right, and this certificate ought to be considered as pure personalty.

DAVEY, L.J.—A great many cases have been referred to by the learned counsel who argued this case on both sides—and properly referred to—and in the course of the argument we have had an opportunity of reading through and considering the cases which have been cited. It is a little difficult at first sight to reconcile all the cases upon this subject, but I think it may be said that there are two classes of cases—two categories of cases—into which the various decisions relating to the securities given by these great mercantile or industrial or municipal corporations fall. First, there is a class of cases in which there is, according to the true construction of the instrument, a general charge on all the general revenues or fruits of an undertaking; of this category or class of cases *Attree* v. *Hawe* (*ubi sup.*) may be taken as the type. There are subsequent cases following in the same line which it is unnecessary to enumerate. It is said that in that case James, L.J. went too far in his judgment, and I think it does appear that in a subsequent case of *Ashworth* v. *Munn* (*ubi sup.*) he corrected one or two expressions which he had used in the course of the judgment

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in that case; but his correction of those expressions does not, in my opinion, affect the decision which the court came to, and that decision I take it to be this: that where you have a charge on the general revenue or fruits derived from an undertaking or going concern, a charge of that description does not confer an interest in land within the meaning of what is called the Mortmain Act, notwithstanding that the general revenue may be wholly or partially derived from the beneficial use of land. The second category or class of cases is where, according to the true construction of the instrument, the court holds that it contains a charge on some specific and particular property, whether that property be the rents of land, or tolls of a particular description, or other species of property. In a case of that kind, if any of those specific subjects of the charge savour of the realty, then the court has held that the security is within the Act. Of this category or class of cases *Re David* (*ubi sup.*), before this court, may be taken as a type; and other cases were cited which are to be referred to the same category. I think that this distinction, if it is borne in mind, will be found to reconcile and put into their proper places the numerous decisions which have been referred to on this point. I lay aside cases like *Ashworth* v. *Munn* (*ubi sup.*) which have been referred to, because those do not relate to the securities of a corporation of this description. *Ashworth* v. *Munn* (*ubi sup.*) related to the interest of a partner in a common law partnership as to which different considerations arise, and I only mention that case because it was cited, and some weight was attached to it in the course of the argument. If what I have said be sound, it is apparent that the real question in this case must be the construction of the particular instrument which we have before us. Now, the charge in this case is not contained in the certificate itself. It is only what it purports to be—a certificate that the holder is entitled to so much debenture stock created under certain Acts. The charge is contained in sect. 67 of the Leeds Improvement Act 1877, and it is there stated that the debenture stock "shall be a charge upon the borough fund, borough rate, the waterworks, and gasworks undertakings, and the improvement rates, and the revenues of all landed and other property vested in or belonging to the corporation respectively derived therefrom, and any other revenue which may be acquired by them." Well, it is obvious that those words sweep in the whole revenue of the corporation. The expression "rents of land" is not used; and, although the point made may seem a fine one, in my opinion that is an important distinction from other cases which have been cited. I think the revenue derived from their landed and other property, and from all other sources, points rather to the revenue in the hands of the corporation than to the rates payable by the tenants for the specific use of the property, and I paraphrase those words as meaning the general revenue of the corporation from every source, including their borough fund, their waterworks and gasworks undertakings, their improvement rates, their landed property and revenue of every description. Well, if that is the meaning of the words, it appears to me that, in substance, this charge is exactly equivalent to the charge which the debenture in *Gardner* v. *The London, Chatham, and Dover Railway Company* (15 L. T. Rep. 552; L. Rep. 2 Ch. App. 201) was held to give, namely, a charge on the fruits of the going concern or undertaking; and, if so, I think we ought to give the same construction to this debenture stock as was given to the debentures in *Attree* v. *Hawe* (*ubi sup.*), and which has been unquestioned in subsequent cases, and hold that a charge of that description, if a general charge on the fruits or revenue of the undertaking, does not confer an interest in land within the meaning of the Mortmain Act, although part of that revenue may be derived from the beneficial use of land. And I will add that this construction is to the same effect as the construction given to the instrument before Chitty, J. in the case of *Re Yerbury's Estate* (*ubi sup.*). It is, in effect, saying that, in substance—whatever the words the parties have used—this instrument is a general charge of the revenue with a perfectly useless, and worse than useless—a mischievous—enumeration of particulars. And it is also in accordance with the way in which Turner, L.J. and Lord Cairns construed the debenture in the form in the Companies Clauses Act in the case of *Gardner* v. *The London, Chatham, and Dover Railway Company* (*ubi sup.*). They, in substance, said this: Whatever may be the words used, it is a charge only on the fruits of the undertaking. But Mr. Byrne says there is no undertaking in this case. True it is that the corporation carry on particular undertakings, such as gasworks and waterworks; "but," says he, "you cannot speak of the general undertaking of a municipal corporation." But that seems to be an idle distinction. I can draw no sound distinction for this purpose between the position of a municipal corporation and that of a great railway company. The municipal corporation is a great going concern, if I may use that phrase. It is a corporation endowed by the Legislature with property which it is under an obligation to use and apply for public purposes; and it is just as much within the contemplation of the Legislature that it should be a going concern for the benefit of the inhabitants of Leeds and the neighbourhood as it was within the contemplation of the Legislature that the London, Chatham, and Dover Railway Company should be a going concern for the purpose of conveying persons between Dover and London. Taking this view of this case, it is unnecessary for us to express any decided opinion upon the point which was much argued before us—whether the case of *Finch* v. *Squire* (*ubi sup.*), before Sir William Grant, has or has not been overruled, or, if it has not been overruled, ought to be overruled. In the view which I have expressed of this case I do not think that that question arises, because *Finch* v. *Squire* (*ubi sup.*) must be regarded as a case in the second category to which I referred, namely, that in which there was a specific charge on specific property. But, as the point has been mentioned, I will just say this—that the reasoning of Sir William Grant in *Finch* v. *Squire* seems to be of rather a refined character, and probably *Finch* v. *Squire* would not be decided as it was at the present day. On the other hand, I think it is scarcely right to say it was overruled by *Attree* v. *Hawe* (*ubi sup.*), because, in my opinion, the decision in *Attree* v. *Hawe* does not touch cases of the class represented by *Finch* v. *Squire*. For the reasons I have

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pressed I agree that this appeal ought to be dismissed.

Solicitors: *Torr, Gribble, Oddie,* and *Sinclair,* agents for *Stewart, Son,* and *Chalker,* Wakefield; *Watersons, Snow, Bloxam,* and *Kinder,* agents for *Gibb* and *Co.,* Leeds; *Pitman* and *Sons,* agents for *Emsley, Son,* and *Smith,* Leeds.

Thursday, Aug. 9.

(Before LINDLEY, LOPES, and DAVEY, L.JJ.)

Re DANIELL'S SETTLED ESTATES. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Lease—Covenant to spend substantial amount in repairs—Building lease—Sanction of the court to lease—Ordinary repairs—Settled Land Act 1882, *s.* 2, *sub-sect.* 10 (*iii.*)—*Sect.* 8, *sub-sect.* 1; *sect.* 63—*Settled Land Act* 1884, *s.* 7.

A lease in which the lessee covenants to spend a substantial amount in executing repairs to the property is a building lease within sect. 8, *sub-sect.* 1, *of the Settled Land Act* 1882.

But where a tenant for life had a large income, the Court refused to sanction such a lease for thirty years, on the ground that the repairs were such as a landlord usually did for his tenant, and that it would be improperly relieving the tenant for life of the cost of doing them.

THIS was a summons taken out by the tenant for life under a settlement asking for leave to grant a lease of a house in Holborn comprised in the settlement to Mr. J. R. Dick for the term of thirty years at a rent of 350*l.* for five years, and 382*l.* afterwards, the lessee covenanting that, besides keeping the house in repair, he would "execute and within three calendar months from the commencement of the said term complete to the satisfaction of the lessor, at an expense of not less than 200*l.*, the repairs and improvements to the demised premises specified in the schedule hereto."

The repairs mentioned in the schedule were:

Reinstate all broken and defective slates to roof with new; make good the filleting in Portland cement; thoroughly examine and repair when necessary the gutters and other leadwork; take down and rebuild chimney stacks, as necessary, and re-set chimney-pots; repair dormer, and renew door; rake out and re-point the entire joints of brickwork of external walls, including party walls, chimney stacks, and copings, when the joints are in any way defective, and re-set part of coping; examine and reinstate any cracked joints of down pipes and leads; renew step to front door; examine and leave in complete order all water service; properly prepare and stop and paint with two coats of oil colour the whole of the wood, iron, cement work and other works usually and now painted; strip, prepare, and paper walls, and wash, stop, and whiten ceilings; provide and fix a new baluster and re-fix handrail: take out the whole of the back sashes and frames and those to the third and fourth floors front, and provide and fix new of suitable equality.

A surveyor made an affidavit that the rents mentioned in the provisional agreement were the best rents that could be obtained, having regard to the fact that the proposed lessee intended to spend a sum of not less than 200*l.* upon the premises.

North, J., in chambers, refused to sanction the lease, and the tenant for life appealed.

Howard Wright for the appellant.—The lease contains a covenant to spend a substantial sum in repairs to the house, and therefore it is a building lease within the Settled Land Act 1882, s. 2, sub-sect. 10 (iii.), and s. 8, sub-sect. 1. It is necessary to obtain the sanction of the court to the granting of the lease under the Settled Land Act 1884, s. 7, as there is a trust for sale, and therefore sect. 63 of the Act of 1882 applies.

H. Fellows for the trustees of the settlement.

LINDLEY, L.J.—I am of opinion that the court has jurisdiction, under the Settled Land Act 1882, to sanction the proposed lease. Sect. 8, sub-sect. 1, of that Act provides: "Every building lease shall be made partly in consideration of the lessee, or some person by whose direction the lease is granted, or some other person, having erected or agreeing to erect buildings new or additional, or having improved or repaired, or agreeing to improve or repair, buildings, or having executed, or agreeing to execute, on the land leased an improvement authorised by this Act for or in connection with building purposes." It would be putting a narrow construction on that section to say that that did not include a lease which provides that the lessee shall spend a sum of money on repairs to the building leased. I am not disposed to think that our powers are so constrained that we have not power to sanction such a lease. But the court has a discretion, and we are asked to sanction a lease for thirty years, that is nine years beyond the ordinary term, in order that the tenant may be induced to lay out 200*l.* in repairs, and so relieve the tenant for life from the expense of doing them. They are the ordinary repairs required by a house. If we sanction this lease no tenant for life will in future spend any money in repairing the settled property. Here the tenant for life has a large income, and if we sanctioned this lease I think we should be improperly relieving her from paying for these repairs out of her income. The sum to be spent is small, and the repairs are too unsubstantial.

LOPES, L.J.—I am also of opinion that the court has jurisdiction to sanction such a lease as this in a case where a substantial amount is to be laid out in repairs to the house. But I think we ought not to do so in this case. We must consider in each case what repairs are to be done. In this case I think they are unsubstantial, and are such as a landlord has to do in every case where a house falls into his hands. Here the tenant for life has a substantial income, and she may fairly be called on to pay for them out of it.

DAVEY, L.J.—I am of the same opinion.

Solicitors: *Freshfields* and *Williams; Rogers* and *Whately.*

(*a*) Reported by W. C. BISS, Esq., Barrister-at-Law.

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Wednesday, Nov. 7.

(Before Lord ESHER, M.R., and RIGBY, L.J.)

RENDELL *v.* GRUNDY. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice — Examination of judgment debtor—Conduct money—Refusal to answer questions—Writ of attachment—Copies of affidavits not served on respondent—Waiver of objection—Rules of the Supreme Court, Order XXXVII., r. 9; Order XLII., r. 32; Order LII., r. 4.

A judgment debtor who attends to be examined as to his means to satisfy the judgment is not entitled, under Order XXXVII., r. 9, to conduct money as a witness, but is entitled to a reasonable allowance for expenses.

An order giving leave to issue a writ of attachment may, under some circumstances, be made, though copies of the affidavits to be used in support of the application have not been served upon the respondent.

THIS was an appeal by the defendant from an order of Wright, J., at chambers, giving leave to issue a writ of attachment against the defendant.

The plaintiff recovered judgment for 78*l.* and costs against the defendant, in an action to recover the amount of a solicitor's bill of costs.

The judgment was not satisfied, and the plaintiff obtained an order for the examination of the judgment debtor as to his means of satisfying the judgment, under Order XLII., r. 32.

The debtor was a surveyor living at Lewisham, and, upon attending before a master to be examined under the order, he refused to answer any questions until he was paid a guinea for conduct money.

According to the usual scale for witnesses, a surveyor is entitled to a guinea, and the lowest allowance is 3*s.* 6*d.*

The master held that the debtor was entitled only to the expenses of travelling from Lewisham, and of returning, and fixed the amount at 1*s.* 4*d.*

The debtor refused to answer, and the plaintiff applied at chambers for leave to issue a writ of attachment against him. Copies of the affidavits, in support of the application, were not served upon the plaintiff with the summons, or at any time before the hearing of the application. Upon the hearing of the application, Wright, J. adjourned the hearing in order that the debtor might have an opportunity of reading the affidavits and answering them; the debtor did not object to this being done. At the adjourned hearing the debtor stated that there was nothing in the affidavits which he desired to answer, and Wright, J. made an order, giving leave to issue the writ of attachment.

The debtor appealed.

George Wallace, for the appellant.—Under Order XXXVII., r. 9, the debtor was entitled to the like conduct money as a witness would be entitled to on attendance at a trial. In this rule the words are, "any person required to attend for the purpose of being examined;" and they clearly apply to the case of a debtor attending under Order XLII., r. 32. Before that rule was made, a debtor, in such a case, was entitled to conduct money:

Protector Endowment Compay v. *Whitlam*, 36 L. T. Rep. 467.

The proper allowance, according to the scale, is one guinea for a surveyor, and the lowest allowance is three shillings and sixpence. Even if the debtor is not entitled to be paid as being a surveyor, he is entitled at least to three and sixpence. The debtor, therefore, was justified in refusing to answer, and the order giving leave to issue a writ of attachment ought not to have been made. Secondly, inasmuch as copies of the affidavits were not served upon the debtor as required by Order LII., r. 4, the application ought to have been dismissed. This objection was not waived by the appellant:

Taylor v. *Roe*, 68 L. T. Rep. 213.

J. D. Crawford for the respondent.—Order XXXVII., r. 9, applies only to a person who appears as a witness, and not a debtor who attends to be examined under Order XLII., r. 32. The scale for witnesses, therefore, does not apply. A debtor is entitled only to a reasonable sum for travelling expenses as conduct money, and the master properly fixed the amount in this case. As to the objection that copies of the affidavits were not served upon the debtor, that objection was waived by the conduct of the debtor. He attended, and the affidavits were shown to him, and he assented to an adjournment in order that he might read and answer them if necessary; and then he attended at the adjourned hearing. He could not then complain that he had in any way been prejudiced.

George Wallace replied.

Lord ESHER, M.R.—This appeal is brought because it is said that there was no power to order the issue of the writ of attachment, upon technical grounds. The judgment debtor is a surveyor, and the plaintiff got judgment against him for 78*l.* and costs. The debtor was summoned to appear before a master for examination as to his means to satisfy the judgment debt, under Order XLII., r. 32. He attended before the master on several occasions, and upon the last occasion he said he was entitled to be paid a guinea for conduct money, he being a surveyor, though he was attending upon his own business and not to give evidence for anyone else; he refused to answer any questions until he was so paid. The plaintiff said he was only entitled to be paid a reasonable sum for expenses as conduct money, and the master undertook to decide what was a reasonable amount. The master held that it was reasonable to pay only the expenses of travelling to the courts, and fixed the amount at 1*s.* 4*d.* The debtor says that he is entitled as of right to a larger sum, under Order XXXVII., r. 9. That contention is wrong because that rule does not apply to the case of a judgment debtor who attends to be examined under Order XLII., r. 32; he is only entitled to a reasonable sum for conduct money. The master was the proper person to determine what was a reasonable sum, and it is not for this court to determine that question. That objection, therefore, fails. The next objection is that the debtor ought to have been given copies of the affidavits when he was served with the summons, upon the application for leave to issue the writ of attachment. I think that he was so entitled. For what purpose? To enable him to answer them. What happened in this case? The application was adjourned in order to enable the debtor to read

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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the affidavits, and the debtor accepted that arrangement and attended the next day, saying that there was nothing which he wished to answer. What injury, then, of any kind was done to him? None at all. Under the circumstances of this case, though perhaps the debtor was entitled to have copies of the affidavits along with the summons, I think that he, having acquiesced in the adjournment, cannot afterwards raise that objection. The appeal, therefore, fails and must be dismissed. I wish to add that, if Kekewich, J., in *Taylor* v. *Roe* (68 L. T. Rep. 213), did lay it down that, whatever may happen, the mere fact that copies of the affidavits have not been served with the summons, will prevent the issue of a writ of attachment. I cannot agree with that rule.

Rigby, L.J.—I concur for the same reasons.

Appeal dismissed.

Solicitor for the appellant, *H. S. Bridge.*

Solicitors for the respondent, *Church, Rendell, Todd,* and *Co.*

Friday, Nov. 9.

(Before Lord Esher, M.R., Lopes and Rigby, L.JJ.)

Re Nordenfelt; *Ex parte* Maxim Nordenfelt Guns and Ammunition Company. (*a*)

APPEAL IN BANKRUPTCY.

Bankruptcy—Bankruptcy petition—Right to present—Debtor having dwelling-house in England—Bankruptcy Act 1883 (46 & 47 *Vict. c.* 52), *s.* 6, *sub-sect.* 1 (*d*).

The debtor was the lessee of a house in England in which he had lived for some years, but more than a year before the presentation of the bankruptcy petition he had ceased to live there, and had given up all intention of living there. The debtor continued to be the lessee, and the house remained unlet and unoccupied for a short time within the year, when it was sold by the debtor.

Held (dismissing the appeal) that the debtor had not had a dwelling-house in England within a year before the date of the presentation of the petition, within the meaning of sect. 6, *sub-sect.* 1, *of the Bankruptcy Act* 1883

Appeal of the petitioning creditors against an order of Mr. Registrar Brougham dismissing a bankruptcy petition.

The appellants presented a petition in bankruptcy against the debtor. The debtor was not domiciled in England, and had not ordinarily resided in England within a year before the date of the presentation of the petition; but it was said that he had had a dwelling-house in England within the year.

The Bankruptcy Act 1883 (46 & 47 Vict. c. 52) provides:

Sect. 6, sub-sect. 1. A creditor shall not be entitled to present a bankruptcy petition against a creditor unless: (*d*) the debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England.

Upon the hearing of the petition, it appeared that the debtor had for some years resided in England in a house of which he was the lessee. More than a year before the date of the petition, the debtor had removed his wife and servants to Paris, sold part of his furniture, and ceased to live in the house, which was advertised to be let or sold. The house remained empty and unlet, and the debtor did not dispose of the lease until less than a year before the date of the petition.

The registrar found that the debtor had abandoned this house as his residence, and had given up all intention of living there more than a year before the date of the petition; but that he might have returned to live there within the year if he had so wished. The registrar thereupon dismissed the petition.

The petitioning creditors appealed.

Jelf, Q.C. and *F. Cooper Willis* for the appellants.—The debtor was the owner of this house, which had admittedly been his dwelling-house. He continued to be the owner of the house until some time within the year before the date of the petition; the house was not let to or occupied by anyone else; the debtor might have returned to live there at any moment if he had so wished. That house, therefore, was his dwelling-house in England within the meaning of the Act.

H. Reed, Q.C. and *H. Wace,* for the respondent, were not heard.

Lord Esher, M.R.—In this case I do not intend to define what may be a man's dwelling-house, but am only going to say what is not a dwelling-house. If it is true to say that, when a man is the owner of a house but has given it up and abandoned it as his residence, then that house ceases to be his dwelling-house, this appeal must fail. The registrar has found upon the evidence that such is the case here. I think that under such circumstances the house ceases to be the dwelling-house of the man who is the owner. The decision of the registrar, therefore, was right, and the appeal must be dismissed.

Lopes, L.J.—In this case I should have come to the same conclusion upon the facts as the registrar did, that the debtor had not a dwelling-house in England, because he had abandoned and given up the house as his dwelling-house. I think that the registrar was right in dismissing the petition.

Rigby, L.J.—I am of the same opinion. The debtor had had a dwelling-house in England and might have again made the same house his dwelling-house if he had so wished. He had, however, sold or packed up all his furniture, and it is clear that he had abandoned this house as his dwelling-house more than a year before the petition was presented. I think the registrar was right in holding that the debtor had not a dwelling-house in England within the year.

Appeal dismissed.

Solicitors for the appellants, *Wilson, Bristows,* and *Carpmael.*

Solicitors for the respondent, *Munns* and *Longden.*

(*a*) Reported by J. H. Williams, Esq., Barrister-at-Law.

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HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

July 26, *Aug.* 1 *and* 11.

(Before CHITTY, J.)

KEEN *v.* DENNY. (*a*)

Advowson — Right of presentation — Turns of presentation in rotation—Exchange of benefice —Usurpation of turn.

By a deed-poll made in Aug. 1871 *it was provided that the perpetual right of patronage of and of nominating a minister to a certain new church should upon the due consecration thereof be vested in and exercised, for the first and second turns by trustees represented by the defendants, and for the third turn by trustees represented by the plaintiffs, and that so on for ever thereafter the patronage should be exercised by the trustees respectively alternately. In* 1871 *the defendants nominated W. to the benefice. In* 1878 *W. resigned the benefice for the purpose of carrying out an exchange of benefices with S., and the defendants at the request of the exchanging parties nominated S. to the benefice and he was duly licensed thereto. In* 1886 *S. exchanged benefices with H., and the defendants at the request of the exchanging parties presented H. to the benefice. In* 1891 *H. resigned the benefice, and the defendants presented M., who was instituted and inducted thereto. No notice of the several nominations or presentations of S., H., and M. was given to the trustees represented by the plaintiffs. M. died in Jan.* 1894 *and both the plaintiffs and the defendants claimed to be entitled to present a minister to the benefice on this vacancy.*

Held, that the exchanges must be reckoned as turns of presentation; that the presentation by the defendants of H. was wrongful, and that the defendants had usurped the third turn, but that this did not give the plaintiffs a right to usurp the defendants' turn, or entitle the plaintiffs to require the defendants to give up their turn; and that the defendants were entitled to present on the vacancy by the death of M.

BY a deed-poll dated the 30th Aug. 1871, under the hand and seal of the Bishop of Rochester, Robert Tooth, the patron, and the Rev. Arthur Tooth, the incumbent of St. James', Hatcham, in pursuance of the provisions in that behalf contained in 8 & 9 Vict. c. 70, intituled "An Act for the futher amendment of the Church Building Acts," and in 11 & 12 Vict. c. 37, intituled "An Act to amend the law relative to the assignment of ecclesiastical districts," such bishop, patron, and incumbent thereby respectively agreed and declared mutually the one with and to the others of them and to all other persons whomsoever that the perpetual right of patronage of and of nominating a minister to a certain new church, afterwards known as the church of All Saints, Hatcham Park, should upon the due consecration of the said church be vested in and exercised by the persons thereinafter mentioned; that was to say, for the first and second turns after such consecration by certain named persons as trustees for certain subscribers towards the building of the church, and who were represented by the defendants; and for the third turn after such consecration by certain other named persons as trustees for the Haberdashers' Company who had given the site, and which other named persons were represented by the plaintiffs, "and so on for ever thereafter the said patronage shall be exercised by the said trustees respectively alternately as aforesaid; that is to say, every two turns by the said first-mentioned trustees, their heirs and assigns, and every third turn by the said last-mentioned trustees, their heirs and assigns."

In 1871 the defendants nominated the Rev. Edward Wynne to the benefice. In 1878 the Rev. E. Wynne exchanged the benefice for that of Maningham, Bradford, held by the Rev. Robert Gardner Smith, and for the purpose of such exchange resigned the benefice, and the defendants, at the request of the exchanging parties, nominated the Rev. R. G. Smith to the benefice, and he was duly licensed thereto. In 1886 the Rev. R. G. Smith exchanged the benefice for the Rectory of Wadingham, Lincolnshire, then held by the Rev. Walter Lancelot Holland, and the defendants, at the request of the exchanging parties, presented that clergyman to the benefice, and he was instituted and inducted thereto. In 1891 the Rev. W. L. Holland resigned the benefice, and the defendants presented the Rev. John Bousted Mylius, and he was instituted and inducted thereto. The several nominations or presentations of the Rev. E. Wynne, the Rev. R. G. Smith, the Rev. W. L. Holland, and the Rev. J. B. Mylius, were made without the concurrence or consent of or any previous notice to the persons for the time being constituting the body of trustees represented by the plaintiffs. On the 11th Jan. 1894 the Rev. J. B. Mylius died. On the 14th March 1894 the plaintiffs presented the Rev. Sydney Powell Townend to the benefice. On the 27th March 1894 the defendants presented the Rev. Ernest Scott Fardell to the same benefice. Neither of those two clergymen had yet been instituted or inducted thereto, and the Bishop of Rochester declined to institute or direct the induction of either until it was determined in whom the right of presentation was vested. The question submitted for the opinion of the court was, whether the plaintiffs, as the body of trustees in the deed-poll secondly mentioned, or the defendants, as the body of trustees in the deed-poll first mentioned, were entitled to nominate or present a minister to the benefice on the present vacancy thereof.

Sir *Walter Phillimore*, Q.C. and *A. Whitaker*, for the plaintiffs, contended that the presentations on the two exchanges ought not to be counted as turns, and consequently the present vacancy was the third turn, which belonged to the plaintiffs; but even if the exchanges were turns, they ought not to be reckoned, as it was the duty of the defendants to give the plaintiffs notice before the presentations were made, and further that, if they were to be reckoned so as to make this the fifth turn, the defendants having usurped the third turn, were bound to give up this turn to the plaintiffs. They referred to

Barker v. *Bishop of London*, Willes, 659:
Thrale v. *Bishop of Lincoln*, H. Blackstone, 376:
Birch v. *Bishop of Lichfield*, 3 Bos. & Pull. 444:
Richards v. *The Earl of Macclesfield*, 7 Sim. 257:
Grocers' Company v. The Archbishop of Canterbury, 3 Wilson, 214;
Phillimore's Ecclesiastical Law, pp. 407, 409.

(*a*) Reported by G. WELBY KING, Esq., Barrister-at-Law.

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F. H. L. Errington, for the defendants, argued that the exchanges counted as turns, making this the fifth turn which belonged to the defendants, and that the plaintiffs could not take this turn by way of retaliation for the defendants having usurped their turn. He cited

Downes v. *Craig*, 9 M. & W. 166;
Basset v. *Gee*, 2 Cro. Eliz. 790;
Vin. Abr. tit. "Presentation," K. (*a*) 9, and I. (*a*) 2 and 3;
Leak v. *The Bishop of Coventry*, 2 Cro. Eliz. 811;
Bishop of London v. *Mercers' Company*, Fitzg. 247; 2 Strange, 925.

Sir *Walter Phillimore*, Q.C., in reply, referred to

Robinson v. *Marquis of Bristol*, 11 C. B. 208.

Aug. 11.— CHITTY, J.—The deed of 1871 whereby the advowson or perpetual right of patronage stands limited is clear. The first and second turns go to the trustees now represented by the defendants; the third to the trustees now represented by the plaintiffs; the fourth and fifth to the defendants; the sixth to the plaintiffs; and so on for ever in this fixed and prescribed order throughout the cycle. Nothing turns on the fact that the persons entitled to the turns are trustees; the question is simply one of common law right, unaffected by any equity as between the contending parties. The facts are not in dispute. [His Lordship here stated the facts, and, after observing that the exchanges were carried out in the usual way by presentation of the patron, continued:] On these facts it is argued for the plaintiffs that the presentations on the two exchanges ought not to be counted, and consequently that this is the third turn and that the right of presentation is with the plaintiffs. If the presentations on the exchanges are to be reckoned, this is not the third, but the fifth turn. In my opinion they must be reckoned. It seems to me impossible to sever the form from the substance on an exchange. Each clerk resigns, and the patrons of the two livings present to the respective vacancies. Each patron acts of his own free will in the matter; he is under no obligation to present the new clerk: he has the right to refuse; and if he does so, the exchange cannot take place. No authority was cited, nor, so far as I am aware, exists for excluding from the computation of the turns a presentation on an exchange. On an exchange the outgoing and the incoming clerks stand in law in the relation of predecessor and successor. This relation is well illustrated by *Downes* v. *Craig* (*ubi sup.*), where it was decided that on an exchange the incoming clerk as successor was entitled to maintain an action for dilapidations against the outgoing clerk as predecessor, just as in the case of succession on death. The case of an incumbent being promoted to a bishopric was relied on by the plaintiffs' counsel as analogous, but it has no bearing. In that case the right to fill the vacancy falls to the Crown by virtue of the Royal prerogative; and where, as among coparceners or the like, the right of presentation devolves, in turns the exercise of the prerogative right is not counted and does not disturb the settled order of the turns: (see *The Grocers' Company* v. *Archbishop of Canterbury, ubi sup.*) The reason is, that *actus legis nemini facit injuriam* (see Co. Lit. 379 a). The Crown's action being lawful, it is not allowed to operate to the injury of the person entitled to the next turn, and consequently it is not reckoned as between private persons entitled in turns. The result thus far, then, is that the third turn, which of right belonged to the plaintiffs, was exercised by the defendants. This being so, the third presentation by them was wrongful; but it is now too late to recall what was done; the remedy of the plaintiffs was lost after the expiration of the time within which an action in the nature of a *quare impedit* could have been brought. From this it follows that the defendants were, in the language of the old lawyers, usurpers; they usurped the third turn. Now, as between coparceners entitled to present in turns, it is clear that the effect of the usurpation by a stranger, or one claiming, but wrongfully claiming, under the coparceners is not to alter the order of the turns, but to deprive the particular coparcener entitled to the turn of her right to present. For this proposition it is sufficient to cite *Richards* v. *Earl of Macclesfield* (*ubi sup.*), and Vin. Abr., tit. "Presentation," K. c., pl. 4 and 5, where it is stated that, "if two coparceners make partition to present by turn, the one may usurp in the turn of the other, but such usurpation does not bind her upon whom the usurpation is at her next turn, but that she may present." The usurpation supplies the turn on the particular avoidance, and leaves the order of the turns otherwise unaffected. Now, neither on principle nor authority can I find myself justified in drawing any distinction between usurpation by a stranger and usurpation by a person party to a deed, or claiming under a party to a deed, limiting the turns. In both cases alike the usurper must be deemed to know the rights, and that he himself is acting wrongly. The person wronged, who has lost his only and peculiar remedy (by writ of *quare impedit*) by lapse of time, cannot requite himself by usurping against his wrongdoer by way of retaliation. The point is very neatly and forcibly put by Chambre, J. in *Birch* v. *The Bishop of Lichfield* (*ubi sup.*), where he says: "If the plaintiff did usurp upon the defendant, still I think we could hardly say that the defendant may now usurp upon the plaintiff by way of retaliation." The decision in that case turned upon the plea, which the court held to be too loose and uncertain, on the point whether the plaintiff had presented to the turn by usurpation or by agreement between him and the person whose turn it was to present. In his judgment Lord Alvanley said that, supposing the plaintiff to have usurped upon the defendant, he did not wish to give any opinion what operation that usurpation had upon the turn then in dispute, though, as then advised, he thought that, inasmuch as it was the defendant's fault for permitting such usurpation, he must suffer for his own negligence. This dictum is adverse to the plaintiff's contention. But, although the old books teem with authorities on the subject of usurpations, the plaintiffs' counsel, whose industry has been indefatigable, have not been able to produce any authority justifying the distinction attempted to be drawn between usurpation by a total stranger and by a person privy in title. On principle I can find no sufficient ground for the distinction. The presentations of Wynne, Smith, Holland, and Mylius were all made without the concurrence or consent of, or any previous notice.

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to, the trustees now represented by the plaintiffs. The plaintiffs' counsel, whose ingenious argument left no point untouched, relied on this circumstance, and contended that the exchange presentations ought not, as between the plaintiffs and the defendants to be reckoned, because, as they urged, it was the duty of the defendants to give the plaintiffs notice before the presentations were made. But they were unable to produce any authority for the proposition that as between persons entitled to present in turns there exists any such duty to give notice of the vacancy. They relied on the case of a resignation and the bishop's duty to give notice to the patron before collating. But this case stands on its own footing, and does not supply an analogy which can be acted upon. It was said that there was no negligence because there was no knowledge. But, as I understand the term "negligence" as it occurs in Lord Alvanley's judgment and the other authorities cited at the bar, it means merely omission to present, or, in other words, missing the turn. In Vin. Abr. tit. "Presentation" K. (*a*) pl. 7, it is stated that "where one loses his turn by lapse this shall stand for his turn, and at the next avoidance the other shall have his turn again." The induction of the incumbent which follows on presentation, whether on an exchange or otherwise, is an open, notorious, and public act —notice, in fact, to the world, and of which the patron is bound to take cognizance at his own peril; after the expiration of the six months allowed by law for the *quare impedit*, the patron is bound and cannot disturb the incumbent. I have dealt with the main arguments presented for the plaintiffs. As to the suggestion that some doctrine of estoppel or of equity applies, it is sufficient to say that, in my opinion, there is no room for the application of any such doctrine. It was said that natural justice required that where one had usurped the turn of another, the usurper ought to give up his next turn, or that the person against whom the usurpation was made ought to be remitted to the usurper's next turn or allowed to stand in the usurper's shoes. But I am not at liberty to apply any supposed principle of natural justice to a case of real property like an advowson, governed as it is by strict technical rules of law. The action is dismissed. Inasmuch, however, as the defendants or their predecessors were not only usurpers, but the strength of their case depends on their usurpation, I consider that I may properly exercise my discretion by declining to give them any costs.

Solicitors: *O. C. T. Eagleton; Nisbet* and *Daw.*

Wednesday, Oct. 31.

(Before ROMER, J.)

Re GODFREY; THORNE-GEORGE *v.* GODFREY. (*a*)

Married woman—Restraint on anticipation—Payment of costs of unsuccessful action out of income of life estate—Married Women's Property Act 1893 (56 & 57 *Vict. c.* 63), *s.* 2.

In April 1893 *a married woman, entitled to a life interest in certain trust funds and restrained from anticipating, brought an action against her trustees, alleging serious breaches of trust. At the trial she withdrew the charges, and submitted to a judgment under which she was ordered to pay the costs of the action as between solicitor and client, leave being given to her to raise the amount by mortgage of her life interest. The taxed costs amounted to* 208*l.*, *and were not paid. Her income was* 160*l. a year.*

Held, that sect. 2 *of the Married Women's Property Act* 1893 *was applicable to a pending action; and that one-half of the income of the married woman must be applied yearly by the trustees towards the payment of the taxed costs, until the whole sum was repaid.*

MOTION.

This was a motion on the part of the defendants in the action for an order that the sum of 208*l.* 13*s.* 6*d.*, being the taxed costs of the action, and also the costs of the application, might be paid out of the income of the plaintiff under a certain will and settlement. The plaintiff was entitled to a life interest in settled funds, and she was subject to a restraint on anticipation. The action was tried before Romer, J., on the 11th June 1894, and is reported in 71 L. T. Rep. 86, where the facts are shortly stated. In that action judgment was given for the defendants with costs to be taxed as between solicitor and client, and the plaintiff was to be at liberty, notwithstanding the restraint on anticipation, to raise a sum by mortgage of her life interest sufficient to pay the defendant's costs. Liberty was given to apply to Romer, J. under sect. 2 of the Married Women's Property Act 1893, if the costs were not paid within one month after certificate.

On the 7th Aug. 1894 the taxing master made his certificate for 208*l.* 13*s.* 6*d.* Several applications were made to the plaintiff and her solicitors, but the costs were not paid. The income of the plaintiff derived from the trust funds was about 160*l.* per annum. The action had been commenced on the 13th April 1893, before the passing of the Married Women's Property Act 1893.

J. F. Popham now applied as above for an order under sect. 2 of the Married Women's Property Act 1893, for the payment of the costs out of the income.—That section enacted that: "In any action or proceeding now or hereafter instituted by a woman, or by a next friend on her behalf, the court before which such action or proceeding is pending, shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver, and the sale of the property or otherwise as may be just."

Mrs. Thorne-George, the plaintiff, appeared in person.—I am willing to obey the order of the court, but the defendants, as trustees of the will and settlement, have stopped the whole of my income. Further, the action was begun before the Married Women's Property Act of 1893, which is not retrospective, and there is no jurisdiction to make the order asked for. [ROMER, J. referred to sect. 2 of the Married Women's Property Act 1893 as giving the jurisdiction.] May I not then raise the sum required by mortgage of my life interest?

ROMER, J.—The costs of doing that will be very heavy, and the way proposed is the cheapest.

(*a*) Reported by G. MACAN, Esq., Barrister-at-Law.

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I do not think it right to stop the whole of the income, as the lady must be maintained. It will be sufficient if the defendants retain one-half of the income, that is, 80*l.* a year. There will, therefore, be an order that these costs be paid out of one-half of the income until the whole sum is paid. It is a case clearly where the Act should be applied. It is a case where a lady institutes an action against trustees, alleging breaches of trust, and claiming that the trust funds should be replaced; and there was not a shadow of ground for it. It is also clear to my mind that the Act of 1893 does apply to an action which is pending, as well as to an action instituted afterwards, as sect. 2 says, "in any action or proceeding now or hereafter instituted." That being so, I make the order which I have mentioned. Under the former order the lady is still at liberty to raise the money by mortgage if she pleases.

Solicitor for the applicants, *O. Vernede.*
Solicitor for the plaintiff, *A. L. Armitage.*

QUEEN'S BENCH DIVISION.

Friday, Oct. 26.

(Before MATHEW and CHARLES, JJ.)

CHAPLIN *v.* DALY; ONION, Claimant. (*a*)

Deed of arrangement—Registration—Affidavit—Secured creditors—Omission of names from schedule to debtor's affidavit—Deeds of Arrangement Act 1887 (50 *&* 51 *Vict. c.* 57), *ss.* 4, 6, 19.

By sect. 6, *sub-sect.* 1 *of the Deeds of Arrangement Act* 1887, *on the registration of a deed of arrangement there shall be filed an affidavit of the debtor stating* (inter alia) *the names and addresses of his creditors.*

Held, that it was not necessary to set out in the schedule to the debtor's affidavit the names and addresses of those creditors whose debts were secured, and that an omission to do so did not render the registration bad.

APPEAL of the plaintiff from the judgment of the judge of the Lambeth County Court on the trial of an interpleader issue.

The plaintiff recovered judgment against the defendant on the 21st March 1894. On the 30th May he attempted to issue execution thereon, but was met by a deed of assignment of the defendant's property to the claimant in trust for the benefit of the defendant's creditors, executed by the defendant on the 25th May and registered on the 31st May.

By sect. 5 of the Deeds of Arrangement Act 1887, a deed of arrangement shall be void unless it has been registered within seven days of execution.

Sect. 6.—(1.) The registration of a deed of arrangement under this Act shall be effected in the following manner: A true copy of the deed and of every schedule or inventory thereto annexed or therein referred to shall be presented to and filed with the registrar within seven clear days after the execution of the said deed (in like manner as a bill of sale given by way of security for the payment of money is now required to be filed), together with an affidavit verifying the time of execution and containing a description of the residence and occupation of the debtor, and of the place or places where his business is carried on, and an affidavit by the debtor stating the total estimated amount of property and liabilities included under the deed, the total amount of composition (if any) payable thereunder, and the names and addresses of his creditors.

The affidavit of the defendant filed with the deed stated that the total estimated amount of his liabilities included under the deed was 1581*l.* 13*s.* 3*d.*, and that the net amount of his liabilities included under the deed, after deducting 1300*l.*, which was the amount covered by securities held by his creditors, was 281*l.* 13*s.* 3*d.*

The 5th paragraph of the affidavit was as follows:

The names of my creditors with their addresses, and the amount of debt due or to be claimed by each of such creditors are contained in and shown by the schedule to this affidavit.

In the schedule to his affidavit the defendant had not set out the names of all his creditors, but only the names of those whose debts were unsecured.

By rule 3 of the rules made under the Deeds of Arrangement Act 1887, the affidavit is required to be in the form given in the appendix to the rules. In the form given the schedule to the affidavit is divided into three columns, headed respectively "names of creditors," "addresses," "amount of debt due to or claimed by each creditor after deduction of value of securities held by the creditor."

Frank Mellor, for the plaintiff, contended that sect. 6 required that the names of all the creditors, both secured and unsecured, should be set out in the schedule, and that, that section not having been complied with, there had not been a registration as provided for by the Act; that the deed of assignment was therefore void, and the defendant's goods were not protected by it from being taken in execution. He referred to

Re Batten; Ex parte Milne, 60 L. T. Rep. 271; 22 Q. B. Div. 685;
Crewe v. *Cummins*, 59 L. T. Rep. 886; 21 Q. B. Div. 420.

A. Powell, for the claimant, was not called upon.

MATHEW, J.—After a careful consideration of the sections of the statute in question, I have come to the conclusion that this appeal must be dismissed. It appears to me that the form of affidavit given in the rules has been followed, for that form does not require the names of fully-secured creditors to be given. Sect. 4, sub-sect. (2) of the Act says that a deed of arrangement to which the Act applies shall include instruments made in respect of the affairs of a debtor "for the benefit of his creditors generally." On turning to the definition clause I find that the expression "creditors generally" includes "all creditors who may assent or take the benefit of a deed of arrangement." Now, in this case who are the persons assenting to or taking the benefit of this deed of arrangement? The answer is, the unsecured creditors. They, and they only, are concerned with the deed, and in my opinion theirs are the only names required in the schedule to the affidavit. The result is, therefore, that the registration of this deed was good, and the appeal must be dismissed.

CHARLES, J.—I am of the same opinion. Sect. 6, sub-sect. 1, of the Act must be read in

(*a*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

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conjunction with sect. 4 and sect. 19, the interpretation clause. If the Act is so read it is clear the names of the creditors mentioned in the section as to registration must be the names of those creditors only who are taking the benefit of the deed of arrangement.

Appeal dismissed.

Solicitors: for the plaintiff, *Norris* and *Son*; for the defendant, *A. H. Williams.*

Friday, Oct. 26.

(Before MATHEW and CHARLES JJ.)

LAVER *v.* BOTHAM AND SONS; GUARDIANS OF THE POOR OF THE CHESTERFIELD UNION. Claimants. (*a*)

Poor law—Relief—Property of deceased pauper—Claims of guardians for reimbursement—Executor—Right to retain amount of debt out of estate.

Sect. 16 *of* 12 *&* 13 *Vict. c.* 103, *provides that "in the event of the death of any pauper having in his possession or belonging to him any money or property, the guardians of the union or parish wherein such pauper shall die may reimburse themselves the expenses incurred by them in and about the burial of such pauper, and in and about the maintenance of such pauper at any time during the twelve months previous to the decease."*

Held, that the guardians are ordinary, and not preferential, creditors for the amount claimed by them against the estate of a deceased pauper.

S. G. was for several years prior to her death in receipt of outdoor relief from the guardians of the C. Union. The plaintiff was the executor appointed by her will, and after her death directed that her property, consisting of some furniture, should be sold. The plaintiff was a creditor of S. G. in an amount exceeding the proceeds of the sale of the furniture. The guardians of the C. Union claimed to be entitled to so much of the proceeds as would re-imburse them for the maintenance of S. G. during the twelve months previous to her death.

Held, that the guardians having no greater right than ordinary creditors, the plaintiff, as executor, was entitled to repay his own debt out of the proceeds of the sale.

APPEAL of the plaintiff from the judgment of the judge of the County Court of Yorkshire, holden at Sheffield, on the trial of an interpleader issue.

The plaintiff was the executor appointed under the will of one Sarah Goodall. At the time of her death and for some years previously Goodall had been in receipt of relief from the guardians of the poor of the Chesterfield Union.

The only property left by Goodall consisted of certain furniture which, by order of the plaintiff was sold by the defendants, a firm of auctioneers, and realized 24*l.* 12*s.* 8*d.*, and the balance, after deducting the defendants' charges as auctioneers, and rent owing by the deceased, was 20*l.* 6*s.* 2*d.* being the amount sued for in this action. The guardians claimed to be entitled to 16*l.* 18*s.* of this sum, as the amount paid by them in relief to the deceased during the twelve months immediately preceding her death. The plaintiff alleged that the deceased was indebted to him for moneys and necessaries supplied by him to her at her request, in a sum considerably in excess of the sum sued for in the action, and he also claimed 6*l.* 10*s.* for the deceased's funeral expenses.

The defendants paid into court the sum of 10*l.* 7*s.* 6*d.* (being the 16*l.* 18*s.* claimed by the guardians, less the defendants' taxed costs of the action), and an interpleader issue was directed to try the question whether the plaintiff or the guardians were entitled to the said sum of 10*l.* 7*s.* 6*d.*

At the trial of the issue the County Court judge gave judgment for the guardians.

The plaintiff appealed.

12 & 13 Vict. c. 103.

Sect. 16. And be it enacted, that where any pauper shall have in his possession or belonging to him any money or valuable security for money, the guardians of the union or parish within which such pauper is chargeable may take and appropriate so much of such money or the produce of such security, or recover the same as a debt before any local court, as will reimburse the said guardians for the amount expended by them, whether in behalf of the common fund or of any parish in the relief of such pauper, during the period of twelve months prior to such taking and appropriation, or prior to such proceeding for the recovery thereof (as the case may be), and in the event of the death of any pauper having in his possession or belonging to him any money or property, the guardians of the union or parish wherein such pauper shall die may reimburse themselves the expenses incurred by them in and about the burial of such pauper, and in and about the maintenance of such pauper at any time during the twelve months previous to the decease.

Brooke Little for the plaintiff.—The decision of the County Court judge was wrong. The claim of the guardians is made under the second part of sect. 16, the language of which is "may reimburse themselves." That gives the guardians no greater right than an ordinary creditor.

A. Glen for the guardians.—The object of the statute is, that persons capable of maintaining themselves should not look to the parish for support, and a liberal construction ought to be placed upon the statute: (per Kelly, C. B. in *Guardians of West Ham* v. *Ovens* 27 L. T. Rep. 616; L. Rep. 8 Ex. 37.) If the contention of the plaintiff were to prevail the object of the statute would be defeated; for, unless the guardians can seize the property of the deceased pauper, they will not in a case such as the present be able to reimburse themselves at all. He also referred to

Re Newbegin's Estate; Eggleton v. *Newbegin*, 57 L. T. Rep. 390; 36 Ch. Div. 477.

MATHEW, J.—I am of opinion that this appeal must be allowed. The facts of the case are as follows: The pauper had for more than a year before her death been in receipt of relief from the guardians of the Chesterfield Union. At her death she left a small property, and by her will she appointed the plaintiff to be her executor, he being her creditor for an amount larger than the whole of her property. The guardians gave notice of a claim under sect. 16 of the Poor Law Amendment Act 1849, and it was arranged between the parties that the property should be sold, and that by means of an interpleader issue in the County Court the question of the ownership of the property should be determined. The case for the guardians was simple. They said that under the section they had a preferential claim to the proceeds, and that the right of the executor

(*a*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

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and the other creditors was deferred until the claim of the guardians had been satisfied. To my mind that would have been an extraordinary result for the Legislature to have arrived at, and on turning to the statute I do not find that any authority is given by it to the guardians to seize the effects of a deceased pauper. Nor is there anything in the statute to show that the guardians are more than ordinary creditors, or that they have any greater rights than ordinary creditors against such effects. Sect. 16 provides "that where any pauper shall have in his possession or belonging to him any money or valuable security for money, the guardians of the union or parish within which such pauper is chargeable may take and appropriate so much of such money or the produce of such security or recover the same as a debt before any local court as will reimburse the said guardians for the amount expended by them, whether on behalf of the common fund or of any parish in the relief of such pauper during the period of twelve months prior to such taking and appropriation, or prior to such proceeding for the recovery thereof (as the case may be)." That is the earlier part of the section. There is nothing there to indicate any intention on the part of the Legislature to treat the guardians as other than ordinary creditors with the alternative remedy of taking and appropriating any money or valuable security for money which any pauper may have in his possession or belonging to him. Then comes the second part of the section which provides that in the event of the death of any pauper having in his possession or belonging to him any money or property, the guardians of the union or parish wherein such pauper shall die may reimburse themselves the expenses incurred by them in and about the burial of such pauper, and in and about the maintenance of such pauper at any time during the twelve months previous to the decease. The words "in manner aforesaid," which the County Court judge thought ought to be read into this part of the section, are not there, nor do I see any reason for inserting them. In my judgment the guardians are mere ordinary creditors applying to be reimbursed, and there is nothing in the section to take away the right either of the executor or of any other creditor. On any other construction of the section the creditors of the pauper other than the guardians would have to bear the cost of the maintenance of the pauper for the last year of his life, and this I think could not have been the intention of the Legislature.

CHARLES, J.—I am of the same opinion. I do not think that the section bears the construction which the guardians contend ought to be placed upon it. It seems to me that the learned County Court judge overlooked the fact that the remedy of taking and appropriating the property given by the earlier part of the section is an alternative remedy. If under that part of the section the guardians elect to recover the amount expended by them as a debt, it does not follow that because the section goes on to say that in the alternative they may take and appropriate the property of the pauper, the guardians are placed in a better position than ordinary creditors. There are no words in the second part of the section which embody the earlier words of the first part of the section which give the guardians the right to take and appropriate the property. The County Court judge appears to have read the section as if under the first part the guardians have only the power to take, but he altogether omitted to take into consideration the alternative remedy of recovering as a debt. The County Court judge then reads into the second part of the section after the words "reimburse themselves" the words "in manner aforesaid." In my opinion that is not the proper mode of construing the section. There is nothing in the second part to constitute the guardians more than ordinary creditors or to take away the right of the executor to retain his own debt, I think therefore that the appeal must be allowed.

Solicitors: for the plaintiff, *Steadman Van Praagh, Sims*, and *Co.*, for *Muir Wilson*, Sheffield; for the claimants, *Stevens* and *Parkes*, for *Jones* and *Middleton*.

Oct. 27 and 29.

(Before MATHEW and CHARLES, JJ.)

TAYLOR *v.* THE QUEEN. (*a*)

Criminal law—Obtaining goods by false pretences —Receiving—Indictment.

Two prisoners, Farrell and Taylor, were charged in an indictment which contained four counts, of which the first and second counts charged Farrell with obtaining goods by false pretences, the alleged false pretences being set out in the usual form. The third and fourth counts charged that Taylor unlawfully received the goods, unlawfully, knowingly, and designedly obtained by false pretences. The false pretences by which it was alleged that Farrell obtained the goods were not set out in the third and fourth counts,

Upon a writ of error it was contended on behalf of Taylor that the indictment was insufficient, as it did not state in the third and fourth counts what the false pretences were by means of which it was alleged that the goods had been obtained.

Held, that the indictment was good and sufficiently set forth the charge against Taylor.

THIS was a writ of error upon a judgment of the Recorder of Portsmouth upon an indictment for obtaining goods by false pretences and for receiving the goods so obtained.

The indictment charged: in the first count,

That Augustus Farrell, on the 29th day of Nov. 1893, unlawfully, knowingly, and designedly, did falsely pretend to Joshua Clarke, that he, the said Augustus Farrell, then was a servant of one George Farrell, of East-street, Portsea (the said George Farrell then and long before being well known to the said Joshua Clarke, and a customer of George William Peel, his master, in his business and way of trade as a butcher), and that the said Augustus Farrell was then sent by the said George Farrell to the said Joshua Clarke for two hundredweight of beef, twelve pounds of beef suet, two legs of mutton, two shoulders of mutton, and two bull kidneys, by means of which said false pretences the said Augustus Farrell did then unlawfully obtain from the said Joshua Clarke two hundred and twenty-seven pounds of beef, twelve pounds of beef suet, forty-one pounds of mutton, and two and a quarter pounds of ox kidneys, the property of the said George Walter Peel, with intent to defraud; whereas in truth and in fact the said Augustus Farrell was not then the servant of the said George Farrell and the said Augustus Farrell was not then sent by the said George Farrell to the said

(*a*) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

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Joshua Clarke for the said beef, suet, mutton, or kidneys, or for any beef, suet, mutton, or kidneys whatsoever, as he the said Augustus Farrell well knew at the time when he did so falsely pretend as aforesaid against the form of the statute, &c.

The second count was similar to the first count, but alleged that the false pretences were made to George Walter Peel.

The third count charged,

That George Taylor afterwards, on the said 29th day of Nov. 1893, two hundred and twenty-seven pounds of beef, twelve pounds of suet, forty-one pounds of mutton, and two and a quarter pounds of ox kidneys, of the goods and chattels of the said George Walter Peel, then lately before unlawfully, knowingly, and designedly obtained from the said Joshua Clarke by false pretences unlawfully did receive and have, he the said George Taylor, at the time when he so received the said beef, mutton, suet, and kidneys as aforesaid, then well knowing the same to have been unlawfully, knowingly, and designedly obtained from the said Joshua Clarke by false pretences against the form of the statute, &c.

The fourth count was similar to the third count, but alleged that the goods had been obtained from George Walter Peel.

To this indictment Augustus Farrell pleaded not guilty, and George Taylor demurred on the ground that it did not sufficiently state the charge against him. The Recorder overruled the demurrer, and directed that a plea of not guilty should be entered on behalf of Taylor. The prisoners were then tried, convicted, and sentenced upon the indictment.

The record having been formally made up, the defendant, George Taylor, assigned as error:

1. That in the third and fourth counts of the indictment against the said George Taylor the false pretences are not set out by means of which it is alleged that the articles of food therein mentioned were unlawfully obtained.

2. That the false pretences by means of which it is in the said third and fourth counts alleged that the said articles of food were unlawfully obtained are not in the said counts stated to be those by means of which Augustus Farrell is in the first and second counts of the said indictment alleged to have obtained the said articles of food.

3. That the indictment and proceedings aforesaid and matters therein contained are not sufficient in law to warrant the said judgment so given against the said George Taylor, or to convict him of the misdemeanors aforesaid, or any or either of them.

The 24 & 25 Vict. c. 96 provides:

Sect. 95. Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, converting, or disposing whereof is made a misdemeanor by this Act, knowing the same to have been unlawfully stolen, taken, obtained, converted, or disposed of, shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the person guilty of the principal misdemeanor shall or shall not have been previously convicted thereof, or shall not be amenable to justice.

C. W. Matthews and *Stephenson* for the prisoner.—It is submitted that this indictment was bad, because it did not set out in the third and fourth counts the false pretences by which the goods had been obtained. There is nothing to connect the third and fourth counts with the first and second counts. There must be something to identify the false pretences in the third and fourth counts with those alleged in the first and second counts. It has been held that the false pretences must be set out in counts against a receiver:

R. v. *Hill*, Russell on Crimes, 4th ed. p. 554.

That view was also taken in *Reg.* v. *Goldsmith* (12 Cox C. C. 479; L. Rep. 2 C. C. R. 74.

Temple Cooke and *Warry* for the Crown.—The indictment follows the words of the statute. The gist of the offence is the guilty knowledge that the goods had been obtained by fraud. The only point decided in *Reg.* v. *Goldsmith* (*ubi sup.*) was that if there was any defect in the indictment it was cured by the verdict. The point now raised was not fully argued in *Reg.* v. *Hill* (*ubi sup.*). *R.* v. *Wilson* (2 Moody C. C. 52) decides that it must be alleged that the goods were obtained by false pretences, and that it is not sufficient to say that they have been unlawfully obtained. It has also been decided that in an indictment for conspiracy to obtain money by false pretences it is not necessary to set out the false pretences:

R. v. *Gill*, 2 B. & Ald. 204.

Stephenson in reply.—The gist of the offence is not the receiving, but the fact that the goods had been obtained by false pretences, therefore the false pretences must be set out.

Mathew, J.—I am of opinion that our judgment must be for the Crown. The indictment is for receiving goods knowing them to have been obtained by false pretences, and it follows the exact words of the statute. The indictment was demurred to upon the ground that the particular false pretences should have been set out in the receiving counts. The demurrer was overruled, and from that decision the present proceedings have been brought. It is clear that this form of indictment was adopted soon after the statute was passed, and has been in use for many years. The gist of the offence is clearly set out, namely, that the prisoner unlawfully received the goods with the knowledge that they had been obtained by false pretences. Our attention has been called to the dicta of several judges upon this question. In 1851 Mr. Greaves, Q.C., who was sitting as a commissioner at the Gloucester Assizes, called the attention of Patteson and Talfourd, JJ. to a case *R.* v. *Hill* (Russell on Crimes, 4th edit. p. 554) in which a person was indicted for receiving goods which he knew had been obtained by false pretences, which false pretences were not set out in the indictment. The judges expressed the opinion that the count was bad, and that the false pretences should have been set out, but it does not appear that the point was argued before them. Another dictum is that of Bramwell, B. in *Reg.* v. *Goldsmith* (12 Cox C. C. 479; L. Rep. 2 C. C. R. 74), but that is of a most guarded character. That case went to trial and a conviction followed, and it was held that, if there had been any defect in the indictment, it was cured by the conviction. Bramwell, B. said that, if the objection had been taken on demurrer or motion to quash, he was not prepared to say that the count would have been good. We have to decide if it is necessary to set out the false pretences in this case where the gist of the offence was unlawfully receiving the goods with guilty knowledge of the false pretences by which they had been obtained. In *Rex* v. *Gill* (2 B. & Ald. 204) the charge was one of conspiracy to obtain large sums of money by means of false pretences, and the false pretences were not set out. Abbott, C.J. said: "The

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indictment appears to me sufficient. The gist of the offence is the conspiracy, and, although the nature of every offence must be laid with reasonable certainty, so as to apprise the defendant of the charge, yet I think it is sufficiently done by the present indictment." Bayley and Holroyd, JJ. delivered judgments to the same effect. It seems to me to be clear that it was not necessary to set out the false pretences.

Charles, J.—I agree with the judgment that has been delivered by Mathew, J. It seems to me that the third and fourth counts are both good, as they state with reasonable certainty the charge against the prisoner. The gist of the offence was receiving the goods unlawfully obtained by means of false pretences, well knowing that they had been so obtained. It is necessary to allege in the indictment all that must be proved in order that a conviction may be obtained, and in this indictment it is alleged that the goods were obtained by means of false pretences, and that the receiver knew that they had been so obtained. The case of *R.* v. *Wilson* (2 Moo. C. C. 52) is clearly distinguishable, for the indictment there did not allege that the goods had been obtained by false pretences, but only that they had been unlawfully obtained. I agree with the remarks made by Mathew, J. with reference to the case of *R.* v. *Hill* (Russell on Crimes, 4th edit. p. 554). In *Reg.* v. *Goldsmith* (12 Cox C. C. 479; L. Rep. 2 C. C. R. 74) the whole of the argument turned upon the question whether the alleged defect in the indictment was cured by the verdict. The defect was assumed for the purposes of the argument only, and there seems to me to be nothing in these cases which is binding on us or necessitates our holding that this indictment is bad. It conveys upon the face of it the allegation of all the ingredients of the offence charged.

Judgment for the Crown.

Solicitor for the prisoner, *A. W. Mills*, for *King*, Landport.

Solicitors for the Crown, *Ford* and *Ford*.

Monday, Oct. 29.

(Before Mathew and Charles, JJ.)

The Vestry of St. Mary, Islington (apps.) *v.* Cobbett and others (resps.). (*a*)

Metropolis—Expense of flagging footway—Owners of houses and lands abutting on street—Open space—Lease to vestry for a public garden—Metropolitan Open Spaces Act 1881 (44 & 45 *Vict. c.* 34)—*Metropolis Management Act* 1862 *Amendment Act* 1890 (53 & 54 *Vict. c.* 54), *s.* 1.

By sect. 1 *of the Metropolis Management Act* 1862 *Amendment Act* 1890 *the expense of flagging a footway is to be borne by the owners of the houses and the owners of the land bounding or abutting on the road or street in which such footway is situate.*

The respondents were the owners of several houses in a square, and the appellants had acquired the residue of a lease of the garden in the square, which had been laid out as a public garden for the benefit of the public, and over which the appellants administered control under the Metropolitan Open Spaces Act 1881.

Held, that the appellants, as owners of the garden, must contribute to the expense of flagging the footway of the street upon which the houses of the respondents and the garden abutted.

Case stated by justices. The following facts were either admitted by the respective parties or proved:

That the footways of Barnsbury-square, the roads leading through, which are streets within the meaning of the Metropolis Management Act 1855 and other Acts amending the same, were laid out at the passing of the Act of 1855, and had been since repaired by the appellants, but had not been flagged, or had been only partially flagged, and that such streets were situate in the parish of St. Mary, Islington, and within the jurisdiction of the appellants.

That the estimated expense of flagging the footways of the street had been duly determined by the appellants and apportioned amongst the owners of the houses and the owners of the land bounding and abutting on the square, omitting any apportionment in respect of the owners (if any) of the garden in the square hereinafter referred to; the amount apportioned in respect of the abuttal of the respondent's houses being 48*l.* 0*s.* 3*d.*, which amount had been duly demanded from the respondents, but had not been paid.

In the centre of the square is an open space or garden enclosed by iron railings, which previously to the 2nd May 1891 was used in common as an ornamental or pleasure ground by the occupiers of the houses bounding or abutting upon the said square. On the 2nd May 1891, the appellants, acting under or in pursuance of sect. 5 of the Metropolitan Open Spaces Act 1881, acquired the residue of a term of twenty-six years, commencing the 25th Dec. 1882, from the Earl of Meath, to whom a lease of the land had been assigned, to hold on behalf of the Metropolitan Public Gardens Association, and the appellants have, since the 2nd May 1891, held, and now hold, the residue of that term, and have since that date administered and now administer control over the open space or garden.

The respondents appeared by counsel, and contended that the apportionment of the estimated expense was bad in law, inasmuch as the appellants or other the owners had not thereby been charged with any proportion of the estimated cost of flagging the footways in respect of the open space or garden, as required by the decision in *The Vestry of Paddington* v. *North Metropolitan Railway* (1894) 1 Q. B. 633).

On behalf of the appellants it was contended that they held the open space or garden in trust for the enjoyment of the public, and therefore had no beneficial interest therein, and were not the owners thereof within the meaning of sect. 250 of 18 & 19 Vict. c. 120, and were therefore not liable to contribute towards the payment of the estimated expenses, and that there was no owner of the open space or garden within the meaning of the Act.

The justices were of opinion that there were owners of the open space or garden, within the meaning of the Metropolitan Management Act 1862 Amendment Act 1890, who were liable to contribute, and should therefore have been included in the apportionment made by the appel-

(*a*) Reported by W. H. Horsfall, Esq., Barrister-at-Law.

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lants, and that consequently the said apportionment was bad in law. They dismissed the summons.

Cunningham Glen (with him *Dickens*, Q.C.), for the appellants.—It is submitted that the decision of the magistrates was wrong. There are no owners of the open space within the meaning of the Metropolis Management Acts. The land cannot be let at a rack rent, as it is dedicated to the public. The case differs from that of a cemetery company who could make a profit out of their lands:

Vestry of St. Giles, Camberwell, v. *London Cemetery Company*, 70 L. T. Rep. 734; (1894) 1 Q. B. 699.

This open space is in the same position as a church is, and the persons in whom it is vested cannot be assessed for these expenses:

Angell v. *Vestry of Paddington*, L. Rep. 3 Q. B. 714; *Wright* v. *Ingle*, 54 L. T. Rep. 511; 16 Q. B. Div. 379.

In the case of the trustees of a school it was held that they were the "owners" because they were the persons who would receive the rack rent if the land and buildings were let:

Bowditch v. *Wakefield Local Board*, 25 L. T. Rep. 88; L. Rep. 6 Q. B. 567.

R. G. Glenn, for the respondents.—The expense of flagging is to be borne by the owners of the land on both sides of the street:

Vestry of Paddington v. *North Metropolitan Railway and Canal Company*, (1894) 1 Q. B. 633.

It is submitted that the appellants are the "owners" of the open space. At the expiration of the term for which they hold it, it will revert back to the freeholder. There is nothing in the Metropolis Open Spaces Act 1881 to relieve the appellants from their liability.

Glenn in reply.

Mathew, J.—I am of opinion in this case that our judgment must be for the respondents, for I think that it cannot be disputed that the vestry are the owners of the land in question within the meaning of the Metropolis Management Acts. It is clear from the wording of sect. 5 of the Metropolitan Open Spaces Act 1881 that it was contemplated that a vestry or district board might acquire only a limited estate in land which it was intended to open for public purposes. This land was at first appropriated to the use of the occupiers of the houses that were built round it, and no doubt that was taken into consideration when the rent of the houses was fixed. But there was some value left in the land after it had been so dedicated to the use of the adjoining houses, and we find from the case that the Earl of Meath obtained a lease of it, so that he would then be the owner of it within the meaning of the Act, for if he had let it he would have been entitled to the rack rent. A public body acquiring a lease of the land would be in the same position as the Earl of Meath, unless the Metropolitan Open Spaces Act 1881 altered their position. I can see nothing in that Act to alter their position. There are cases which shew that if land is made *extra commercium* it is not liable to pay a proportion of the expenses for flagging the footways adjoining thereto, but this land is not made *extra commercium*, but is held for a limited term, at the expiration of which the original owner may resume possession of it. In *Bowditch* v. *Wakefield Local Board* (25 L. T. Rep. 88; L. Rep. 6 Q. B. 567) it was contended that the appellant, who was a trustee to whom land had been conveyed to permit the premises erected thereon to be for ever used as a school for the education of poor children, was not the owner of the land, and that he could not be charged with a proportion of expenses such as those in the present case. But the court decided against that contention, and it seems to me that that decision is distinctly applicable to the present case. That case was followed in *Re Christchurch Inclosure Act* (71 L. T. Rep. 122; (1894) 3 Ch. 209), in which the court expressed a similar view upon a like question. Then it was contended that the present case was like that of a church, but I do not think so, for it is difficult to say to whom a church belongs; it is not a house within the meaning of the Act, and no person is the owner of it. I do not think that it is necessary to deal with the other cases which have been quoted to us. I think that the justices were right in the view which they took, and that the apportionment was bad, and must be quashed.

Charles, J.—I am of the same opinion. It has been attempted to show that the land in question was *extra commercium*, and that therefore the vestry could not be owners within the meaning of the Metropolitan Management Act 1862 Amendment Act 1890. But I fail to see how that phrase is applicable here, for the vestry holds the land upon a short lease, which is terminable upon the breach of the covenants contained in it. The observations of Bowen, L.J. in *Wright* v. *Ingle* (54 L. T. Rep. 511; 16 Q. B. Div. 379) refer to premises which are permanently *extra commercium*, and not to those which are only temporarily made so. I agree that the decision of the justices was correct.

Appeal dismissed.

Solicitor for the appellants, *William Lewis*.

Solicitors for the respondents, *Jordan* and *Davies*.

Tuesday, Oct. 30.

(Before Mathew and Charles, JJ.)

Reg. v. Kerswill and another. (a)

Justices—Summary Jurisdiction Act 1879 (42 & 43 *Vict. c.* 49), *s.* 6—*Town Police Clauses Act* 1847 (10 & 11 *Vict. c.* 89), *ss.* 66, 73—*Railways Clauses Consolidation Act* 1845 (8 & 9 *Vict. c.* 20)—*Bye-laws—Nonpayment of cab fare—Penalty—Order for payment—Form of order.*

The penalty imposed by the Town Police Clauses Act 1847 *and bye-laws made thereunder for the nonpayment of a cab fare is "a sum of money claimed to be due and is recoverable on complaint to a court of summary jurisdiction, and is to be deemed a civil debt" within the meaning of sect.* 6 *of the Summary Jurisdiction Act* 1879.

Therefore justices have no jurisdiction to make an order directing that a person who has not paid a cab fare should be imprisoned in default of the payment of the fare.

This was an order *nisi* calling upon certain justices of the peace for the borough of Torquay and William Bagwell to show cause why a writ of *certiorari* should not issue to remove into this court a certain record of conviction made on the

(a) Reported by W. H. Horsfall, Esq., Barrister-at-Law.

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18th June 1894, whereby James Augustine de Castro was convicted for that he, on the 14th June 1894, did unlawfully refuse to pay on demand to the said William Bagwell, then being the driver of a hackney carriage, the fare of four shillings allowed by the bye-laws of the Torquay Town Council, and why the said conviction when returned should not be quashed, on the ground that the proceedings being for the recovery of a civil debt, the justices had no jurisdiction to make an order not in accordance with ss. 6 and 35 of the Summary Jurisdiction Act 1879.

Sington, for the justices, showed cause.—It is submitted that the order of the justices was right in form. The bye-laws and the Town Police Clauses Act 1847, under which they are made, refer to the fare to be recovered as a penalty, and the Railways Clauses Consolidation Act 1845, which is incorporated with the former Act, provides that in default of payment and sufficient distress imprisonment may be ordered. The Summary Jurisdiction Act 1879, by sect. 5, limits the terms of imprisonment that may be imposed. The case is not within sect. 6, as there is no sum of money claimed to be due on complaint. [MATHEW, J.—The penalty is the amount of the fare.] It might be as much as 5*l.* under the bye-laws. This sum is not recoverable as a civil debt:

Reg. v. *Paget*, 45 L. T. Rep. 794; 8 Q. B. Div. 151.

The disobedience to a statutory enactment or bye-laws made thereunder is a criminal offence:

Mellor v. *Denham*, 40 L. T. Rep. 395; 5 Q. B. Div. 467;

Reg. v. *Whitchurch*, 45 L. T. Rep. 379: 7 Q. B. Div. 534.

A. B. Shaw, in support of the rule.—The only point is whether this case comes with in the provisions of sect. 6 of the Summary Jurisdiction Act 1879. It is true that there was an information in this case, but it was not necessary that there should be one, and it was not the description of information meant in that section. This was only a civil debt and cannot by proceedings like these be converted into an offence:

Reg. v. *Martin*, 19 L. T. Rep. 733; *sub nom. Reg.* v. *Master*, L. Rep. 4 Q. B. 285.

Sington, in reply, referred to

Reg. v. *Justices of Tynemouth*, 54 L. T. Rep. 386; 16 Q. B. Div. 647.

MATHEW, J.—I am of opinion that this rule must be made absolute. The original object with which these proceedings was instituted has no doubt been obtained, for the money claimed has been paid; but I am clear that the order as drawn up should be quashed. The defendant was charged with not having paid a cab fare, and upon receiving a summons to appear before the justices to answer the charge he sent the amount demanded to the clerk. But the justices proceeded, nevertheless, to hear the charge, and, there being no defence, they ordered him to pay the amount claimed and the costs; and the order went on to direct that the defendant should be imprisoned in default of payment. It is against the order made in that form that the defendant protests. The statutes relating to the question are very confusing, and it is difficult to ascertain what the Legislature intended to enact. The Town Police Clauses Act (10 & 11 Vict. c. 89) provides by sect. 56 that if any person refuse to pay on demand, to any proprietor or driver of any hackney carriage, the fare allowed by this or the special Act, or any bye-law made thereunder, such fare may, together with costs, be recovered before one justice as a penalty. That seems to me clearly to be a provision for the recovery of a civil debt, for the section provides that the person may apply to the justice for the recovery of nothing beyond the amount of the fare except the costs. It has been argued that because the word penalty is used that that makes it a criminal matter; but I do not think that that alters the character of the obligation. The Railway Clauses Consolidation Act 1845 is incorporated with this Act for the purpose of providing the procedure by which a penalty may be recovered, and that Act treats a penalty in the strict sense of the word, though the expression there used is "on complaint," and not "on information." But since then the Summary Jurisdiction Act 1879 has been passed, and sect. 5 of that Act provides that in cases of conviction and of non-payment of the money adjudged to be paid, and in default of the distress the person may be imprisoned for certain fixed periods therein mentioned. I think that section does not apply to a case in which justices make an order on the nonpayment of a cab fare. But the next section (sect. 6) seems to me to be clearly applicable to the debt in question, for it provides that where under any Act, whether past or future, a sum of money claimed to be due is recoverable on complaint to a court of summary jurisdiction, and not on information, such sum shall be deemed to be a civil debt, and if recovered before a court of summary jurisdiction shall be recovered in the manner in which a sum declared by this Act to be a civil debt recoverable summarily is recoverable under this Act, and not otherwise. It is extremely difficult to say why the words "and not on information" were inserted in that section; but I think that the draftsman intended to exclude those cases in which a sworn information is required by statute. I am of opinion, therefore, that our judgment must be that the order as drawn up must be quashed. I think that the provisions of the Summary Jurisdiction Act 1884 do not apply to the present case. That Act applies only to procedure under the Acts mentioned in the schedule thereto, and not to cases contemplated under sect. 6 of the Summary Jurisdiction Act 1879.

CHARLES, J.—I am of the same opinion. The money which it was sought to recover was clearly a civil debt, and although the Town Police Clauses Act 1847 says that it may be recoverable as a penalty that does not alter the character of it. The mode given for enforcing a debt does not make the nonpayment of it an offence: (*Reg.* v. *Master*, 19 L. T. Rep. 733; L. Rep. 4 Q. B. 285.) In order to find out how this money was recoverable it is necessary to turn to the Railways Clauses Consolidation Act 1845, which provides that it may be recovered on complaint before two justices, and that if the amount be not paid a distress may be levied, and in default of distress the person not paying may be imprisoned. But by the Summary Jurisdiction Act 1879 this is again altered, for by sect. 5 the period of imprisonment on conviction is limited, and by sect. 6 the sum recoverable is to be recovered as a civil debt. I am of opinion that this sum comes within the

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terms of sect. 6. The words "not on information" in that section present a difficulty, for in this case there was an information. But on reflection I do not think that those words apply to this case, although it is difficult to put a correct meaning upon them. It seems to me that those words were inserted to emphasise the fact that sect. 6 does not apply to criminal matters. Another difficulty is said to be created by the Summary Jurisdiction Act 1884, but that is cleared away when we find that that Act repealed so much of the Railways Clauses Consolidation Act 1845 as provided for the levying of a distress and imprisonment, and only leaves in force the early part of sect. 145 of that Act. I also think that sect. 5 of the Summary Jurisdiction Act 1879 does not apply to the present case. I agree therefore that this rule must be made absolute.

Rule absolute.

Solicitors for the justices, *Brownlow* and *Howe*, for *Lindop*, Torquay.

Solicitors for the applicant, *Rye* and *Eyre*.

Tuesday, Oct. 30.

(Before Mathew and Charles, JJ.)

Re The Herefordshire County Council and the Leominster Town Council. (a)

Local government—Borough with population under 10,000—*Separate commission of the peace—No separate court of quarter sessions—Clerk to borough justices—Payment of salary—Petty Sessions Act* 1849 (12 *&* 13 *Vict. c.* 18)—*Justices Clerks Act* 1877 (40 *&* 51 *Vict. c.* 43)—*Local Government Act* 1888 (51 *&* 52 *Vict. c.* 41), *s.* 84.

Where a borough with a population under 10,000 *has a separate commission of the peace but no separate court of quarter sessions, the salary of the clerk to the borough justices is payable by the county council for the county within which the borough is situate, and the fees received by such clerk are payable to the county fund.*

This was a case submitted for obtaining the decision of the High Court of Justice under the 29th section of the Local Government Act 1888 upon the following points:—1. Is the duty of paying all or any of the expenses of petty sessions held for the borough of Leominster (including therein the salary of the clerk of the justices for such borough) transferred to the County Council of Herefordshire by the Local Government Act 1888? 2. Are the fees received by the clerk of the justices of the borough of Leominster or any of them for business done in petty sessions or under the Summary Jurisdiction Acts to be paid by the clerk to the account of the borough fund of the borough of Leominster or of the county fund of the County Council of Herefordshire?

The Petty Sessions Act 1849 (12 & 13 Vict. c. 18) enacts:

Sect. 1. Every sitting and acting of justices of the peace or of a stipendiary magistrate in and for any city, borough, or town corporate, having a separate commission of the peace, or any part thereof within England and Wales, at any police-court or other place appointed in that behalf, shall be deemed a petty sessions of the peace, and the district for which the same shall be holden shall be deemed a petty sessional division within the meaning of any Acts of Parliament already made or hereafter to be made having relation to such petty sessions, or to any business to be transacted thereat.

The Justices' Clerks Act 1877 (40 & 41 Vict. c. 43) provides:

Sect. 5. In each petty sessional division there shall, after the 1st Feb. 1878, or any later date at which an order for the payment of a clerk by salary in lieu of fees comes into operation in the division, be only one salaried clerk in the division to perform the duties of clerk of petty sessions, clerk of special sessions, or clerk of any justice or justices of the peace.

Sect. 6. All penalties, costs, and sums which in pursuance of a conviction or order by a justice or justices of the peace, are paid to a clerk of a petty sessional division, or a clerk of special sessions, or a clerk of petty sessions, or a clerk of any justice or justices of the peace, and are not actually paid by him to the party or parties by law entitled thereto, other than the treasurer hereinafter mentioned, shall be paid to the treasurer of the county, riding, division, liberty, city, borough, or place for which such justice or justices acted.

The Municipal Corporations Act 1882 (45 & 46 Vict. c, 50) provides by sect. 140 and Sched. V. that the salary of the clerk to the justices shall be paid out of the borough fund.

The Local Government Act 1888 (51 & 52 Vict. c. 41) enacts:

Sect. 84. (1) The salaried clerk of every petty sessional division shall be from time to time appointed and removed as heretofore.

(2) The county council shall pay to the salaried clerks of the petty sessional divisions such salaries as may be fixed under the enactments relating to those clerks, and all fees and costs payable to such clerks which are not excluded in the fixing of their salaries shall be paid into the county fund, and in the enactments relating to such salaries and fees the standing joint committee shall be substituted for the quarter sessions justices and the local authority respectively.

Harrington for the County Council.—It is submitted that the salary of the clerk to the borough justices should be paid out of the borough fund. It was paid out of that fund before the passing of the Local Government Act 1888, and there is nothing in that Act which transfers the liability to the county council. The Justices' Clerks Act 1877 only deals with the clerks to the petty sessional divisions of the county. The Local Government Act 1888, by sect. 39, deals with boroughs with a population of less than 10,000, and does not transfer this liability to the county council. If the population were above that amount the case would be different, and would come under the provisions of sect. 36:

County Council of Cornwall v. *Town Council of Truro*, 70 L. T. Rep. 354.

Corner for the Town Council of Leominster.—The Justices Clerks Act 1877 deals with the clerks of all petty sessional divisions, and by the Petty Sessions Act 1849, s. 1, the sitting of justices in a borough is a petty sessions and the district for which they sit is a petty sessional division. By sect. 84 of the Local Government Act 1888 the county council are to pay the salaries of all clerks of petty sessional divisions, and there is no distinction between the cases of boroughs having a population of over 10,000 and of those that have under that amount, if there is no separate court of quarter sessions for the borough:

Ex parte County Council of Kent v. *Council of Dover*, 67 L. T. Rep. 421; (1891) 1 Q. B. 389.

(a) Reported by W. H. Horsfall, Esq., Barrister-at-Law.

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If the county council have to pay the salary of the clerk it is admitted that they are entitled to the fees received by him.

Mathew, J.—I have come to the conclusion that the county council are entitled to receive the fees taken by the clerk to the justices of the borough, but that they must at the same time pay his salary. The first enactment we have to deal with is 12 & 13 Vict. c. 18, which says in sect. 1 that every sitting and acting of justices of the peace in and for any city, borough, or town corporate having a separate commission of peace at any police court or other place appointed in that behalf shall be deemed a petty sessions of the place and the district for which the same shall be holden shall be deemed a petty sessional division. After that Act the Justices Clerks Act 1877 (40 & 41 Vict. c. 43) was passed, and it provides in sect. 5 that there shall be in each petty sessional division only one salaried clerk in the division to perform the duties of clerk of petty sessions, clerk of special sessions or clerk of any justice or justices of the peace. Then the Local Government 1888 (51 & 52 Vict. c. 41) enacts, by sect. 84 (2) that the county council shall pay to the salaried clerks of petty sessional divisions such salaries as may be fixed under the enactments relating to those clerks, and all fees and costs payable to such clerks which are not excluded in the fixing of their salaries shall be paid into the county fund, and in the enactments relating to such salaries and fees the standing joint committee shall be substituted for the quarter sessions, justices and the local authority respectively. That section was clearly intended to apply to all salaried clerks of petty sessional divisions, and that seems to me to dispose of this case. In so deciding we are following the decision in *County Council of Cornwall* v. *Town Council of Truro* (70 L. T. Rep. 354).

Charles, J.—I am of the same opinion. The case seems to me to be clear when we consider 12 & 13 Vict. c. 18, and the Local Government Act 1888 together. In the latter Act the term "salaried clerks" must have the meaning contended for by the borough of Leominster, and include the clerk to the borough justices.

Judgment for the Town Council of Leominster.

Solicitor: *Hunt*, for *Symonds* and *Son*, Hereford.

Friday, Nov. 2.

(Before Mathew and Charles, JJ.)

Scott (app.) v. Bould (resp.). (a)

Mine—Coal mines—Daily inspection of guides and conductors—Report—Entry in book—Coal Mines Regulation Act 1887 (50 *&* 51 *Vict. c.* 58), *s.* 49, *r.* 5.

It is provided by the Coal Mines Regulation Act 1887, *s.* 49, *r.* 5, *that a competent person, or competent persons, appointed by the owner, agent, or manager for the purpose, shall, once at least in every twenty-four hours, examine the state of the external parts of the machinery, the state of the guides and conductors in the shafts, and the state of the headgear, ropes, chains, and other similar appliances of the mine which are in actual use both above ground and below ground, and shall once at least in every week examine the state of the shafts by which persons ascend or descend; and shall make a true report of the result of such examination, and every such report shall be recorded without delay in a book to be kept at the mine for the purpose, and shall be signed by the person who made the inspection.*

Held, that the result of the daily examination of the guides and conductors must be entered in the book, as well as the result of the weekly examination of the shafts.

This was a case stated by the stipendiary magistrate for the Wolverhampton and South Staffordshire District for the purpose of obtaining the opinion of the High Court on questions of law which arose before him.

At a petty sessional court holden at Wolverhampton on the 4th July 1894, an information was preferred by the said William Beattie Scott (hereinafter called the appellant) against the said Joseph Bould (hereinafter called the respondent) under the Coal Mines Regulation Act 1887 (50 & 51 Vict. c. 58), s. 49, General Rule 5, charging that the respondent on the 18th June 1894, then being the owner of a certain colliery called or known by the name of the Moseley Hole Colliery, situate at Moseley Hole, near Wolverhampton, in the county of Stafford, the same being a coal mine, or colliery, within the true intent and meaning of 50 & 51 Vict. c. 58, the competent person appointed for that purpose did not record without delay, in the book kept at the said mine for that purpose, the result of his examination of the state of the guides and conductors in the shafts of the said mine.

The facts, as stated in the information, were proved or admitted.

The Coal Mines Regulations Act 1887 (50 & 51 Vict. c. 58) enacts:

Sect. 49. The following general rules shall be observed, so far as is reasonably practicable, in every mine:

Rule 5. A competent person, or competent persons, appointed by the owner, agent, or manager for the purpose, shall, once at least in every twenty-four hours, examine the state of the external parts of the machinery, the state of the guides and conductors in the shafts, and the state of the headgear, ropes, chains, and other similar appliances of the mine which are in actual use both above ground and below ground, and shall once at least in every week examine the state of the shafts by which persons ascend or descend; and shall make a true report of the result of such examination, and every such report shall be recorded without delay in a book to be kept at the mine for the purpose, and shall be signed by the person who made the inspection.

Upon the hearing and at the close of the appellant's case the respondent's solicitor contended that the information disclosed no offence under the rule, because the rule does not require any report whatever of the result of the examination referred to in the earlier part of the rule, which is to be made once at least in every twenty-four hours of "the external parts of the machinery, and the state of the guides and conductors, &c.," and that the rule only directs that the result of the weekly examination of the state of the shafts by which persons ascend or descend shall be recorded in the book kept for that purpose. That, in fact, no report or entry in the book was necessary on the examination which the rule directs in the earlier portion to be made once at least in every twenty-four hours.

(a) Reported by W. H. Horsfall, Esq., Barrister-at-Law.

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The magistrate upheld the contention of the respondent's solicitor.

H. Sutton for the appellant.—It is submitted that the decision of the magistrate was wrong. The latter part of the rule should be read as applying to both the daily and the weekly examination. The words "such examination" in the latter part of the rule refer to each examination equally, and not to the weekly examination of the shafts only. The object of the rule is to ensure that the examination takes place, and that the whole of the machinery, &c., of the mine is kept in a proper state of efficiency.

No one appeared for the respondent.

Mathew, J.—This case must be remitted back to the stipendiary magistrate with the expression of our opinion that the result of the daily examination of the state of the external parts of the machinery, the state of the guides and conductors &c., must be entered without delay in the book. I think that the correct way to read the rule is that suggested in the course of the argument, namely, that the words "and shall once, at least, in every week examine the state of the shafts by which persons ascend or descend" must be treated as if they were a parenthesis. The last paragraph in the rules applies to the first part of the rule as well as to the words I have just read. The words "such examination" apply to both the daily and the weekly examination. This appeal must, therefore, be allowed.

Charles, J.—I agree. *Appeal allowed.*

Solicitor for the appellant. *The Solicitor to the Treasury.*

Friday, Nov. 9.

(Before Charles and Collins, JJ.)

Reg. v. Rowe. (a)

Habeas corpus — *Attachment for contempt by disobeying writ—Service of original writ necessary.*

A writ of habeas corpus *can be properly served only by delivering the original writ itself to the person served, or to the principal person where there are more than one. If the original writ is not so served it is impossible for the person served, by appearing to the writ, and waiving its proper service, to obey the writ, and consequently he cannot disobey it, and so commit contempt of court.*

If the original writ has not been delivered to the principal of several persons served, the service of a copy is not a good service upon any of the others.

This was an application to make absolute a rule *nisi* for an attachment to issue against Samuel and Emma Rowe, for contempt of court, committed by them in disobeying a writ of *habeas corpus*, which commanded them to have before a judge in chambers at the Royal Courts of Justice, London, on a day named, the body of Edith Emma Norgrove, "being taken and detained under your custody as is said, together with the day and cause of her being taken and detained . . . to undergo and receive all and singular such matters and things as the said judge shall then and there consider of concerning her in this behalf; and have you there then this our writ."

On the 31st Oct. application was made *ex parte* to Day, J., for a writ of *habeas corpus* against the defendants. Day, J. refused to order the writ *ex parte*, and directed a summons. To this the defendants appeared and asked for time to make an affidavit; this was refused, and the writ was ordered to issue returnable on the 5th Nov. On that day the defendants appeared to the writ, and asked for further time to file an affidavit, and Day, J. gave them till the following day the 6th. On that day the defendants again appeared and asked for further time which the judge refused, but adjourned the case to the 7th. On that day the defendants made no appearance, but disappeared, taking the child Edith Norgrove with them. It appeared that the original writ had not been served upon either of the defendants, but a copy only upon each of them.

H. T. Kemp, showing cause against the rule, called attention to rules 239 and 241, and forms 178 and 179 of the Crown Office Rules 1886, the material parts of which are set out in the judgments. These rules show that the original writ itself must be served on one of the defendants.

Spearman in support of the rule.—The defendants have waived the service of the original writ by appearing and treating the writ as if properly served. He cited

Norton v. *Danvers*, 7 T. R. 375;
Holmes v. *Russell*, 9 Dowl. 487;
Hewitson v. *Fabre*, 58 L. T. Rep. 856; 21 Q. B. Div. 6.

In the last-named case the service of a writ upon a foreigner living abroad, instead of a notice having been held to be a nullity, Wills, J. said, "I do not say what might have happened if the defendant had appeared to the writ:"

Ex parte Alcock, 33 L. T. Rep. 532; 1 C. P. Div. 68.

There is a mere irregularity which can be amended by the court under Order LXX., r. 1, which by rule 303 of the Crown Office Rules, is made applicable to proceedings on the Crown side. At any rate the service of a copy of the writ is a good service as against the wife, Emma Rowe, and the rule should be made absolute against her.

Charles, J.—I think this rule must be discharged. This is an application for a writ of attachment to issue against the defendants for contempt in disobeying a writ of *habeas corpus* alleged to have been served upon them. Now rule 239 of the Crown Office Rules 1886, which have the authority of an Act of Parliament, says that the writ must be served personally upon the party to whom it is directed, and if it be directed to more than one person it must be delivered to such principal person, and copies served on each of the others. The form of the writ is given in form 176 attached to the rules, and in that form the Queen commands the defendant to have in the Queen's Bench Division the body of A. B. and so forth, and concludes with these words: "Have you there then this our writ." Then rule 241 says that the return to the writ shall contain a copy of all the causes of the prisoner's detinues endorsed on the writ, or on a schedule annexed to it. These then are the rules applicable to *habeas corpus*, and it is clear from them that the duty of

(a) Reported by G. H. Grant, Esq., Barrister-at-Law.

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the person served to return the writ cannot be performed unless the writ itself has been handed to him. That was not done in the present case, and now an application to attach these people for contempt is made to us based upon an affidavit containing an untrue (I do not say intentionally untrue) statement to the effect that the man Rowe had been served with the writ, and his wife also. They were in fact never served with the writ, but only with copies. Then it is said that, as Mr. and Mrs. Rowe appeared and took a course then which looked as if the proper preliminaries had been taken, they are estopped from denying the proper service of the writ, and we are referred to Order LXX., r. 1, of the Rules of the Supreme Court, which is made applicable by Crown Office Rule 303, to proceedings on the Crown side of the Queen's Bench Division. It is said that what was done here was a mere irregularity within the meaning of Order LXX.; that, having regard to the conduct of the parties, we ought to say that they have waived a proper service of the writ. Several authorities were cited to us in support of that, the principal one being *Ex parte Alcock* (33 L. T. Rep. 532; 1 C. P. Div. 68). In that case the court held that the defendant had waived personal service of a rule for an attachment which his previous conduct showed that he had received. That is quite a different case from this. In the case before us the contempt itself for which it is sought to commit the defendant has never been committed, because the writ which they are said to have disobeyed never was served upon them. I think we ought not to throw any doubt upon the necessity of strict compliance with these rules. Moreover I am wholly unable to say that the conduct of these parties before Day, J. amounts to a waiver of proper service if such a waiver could be made. Therefore this application fails, but, having regard to the conduct of the defendant, the rule will be discharged without costs.

Collins, J.—This matter is clear from the wording of the Crown Office Rules. It is an application to attach the defendants for contempt in not obeying an order of the court commanding them to make a return to a writ of *habeas corpus*. Now, if you allege contempt, you must prove that contempt has in fact been committed. Rule 241 requires that the return to the writ shall contain a copy of the causes of the prisoner's detinues indorsed on the writ. Now this is not merely a question whether the proper service of the writ has been waived: if it were, there might be something to be said on the analogy of the cases cited. But here the contempt itself is linked with the provision, demanding personal service of the writ. The writ requires a definite thing to be done, and it so happens that that thing cannot be done without service of the writ itself. Here it was never in the power of the person to obey the writ, for he never had it. As regards the wife it is said that at any rate service of a copy was a good service upon her. I think not. Unless there has been a proper service upon the principal person, there is no proper service upon anyone else by serving a copy. The rule must therefore be discharged.

Solicitors for the defendants, *Oldman, Clabburn. and Co.*

Solicitor for the Crown, *F. Needham.*

QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

Thursday, Oct. 25.

(Before Williams and Kennedy, JJ.)

Re Adamson; *Ex parte* Viney. (a)

Bankruptcy — Act of bankruptcy — Privity of petitioning creditor to deed of assignment by creditor.

The debtor executed a deed of composition providing for the payment of 15s. in the pound by instalments, and for the execution of a deed of assignment for the benefit of creditors in case of default in payment of instalments, and to this deed the petitioning creditors assented. The debtor made default, and executed a deed of assignment not in accordance with the terms of the deed of composition. The petitioning creditors dissented from the deed of assignment, and filed a petition, relying upon the execution of the deed of assignment as an act of bankruptcy.

Held, that, although the deed of assignment was not in accordance with the terms of the deed of composition, and did not bind the petitioning creditors, nevertheless they could not rely upon it as an act of bankruptcy, since its execution had been demanded by the trustee under the composition deed as agent for them, and for the other creditors who assented to that deed.

This was an appeal from a receiving order made by the registrar of the County Court of Barnet.

The debtor, who carried on business as a draper, at Finchley, got into difficulties early in 1894, his chief creditors being the Fore-street Warehouse Company, who were the petitioning creditors in this case, and Messrs. Spencer, Turner, and Boldero.

Upon the 6th April the debtor held a meeting of his creditors and offered a composition of 15s. in the pound, and upon the 13th April a second meeting was held, when the creditors resolved to accept the composition offered, payable by instalments at three, six, nine, and twelve months. Upon the 23rd May a deed of composition was executed in accordance with the above resolution, and was signed and assented to by the manager of the Fore-street Warehouse Company on their behalf.

This deed contained the following clause:

4. The debtor hereby covenants with the trustee, and by way of separate covenant with the creditors and each and every of them, that in case at any time two of the instalments shall be behind and unpaid, he, the debtor, will within ten days after being called upon so to do by the trustee, make and execute an assignment of all his property and effects to the trustee for the equal benefit of creditors.

The debtor gave bills for the instalments payable under the deed of composition, but failed to meet any of them, and upon the 24th July within ten days after being called upon so to do by the trustee, executed an assignment to the trustee for the benefit of the creditors.

This assignment excepted the leaseholds and other onerous property, provided for the payment of the accountant's and solicitor's costs in priority, and for the payment of creditors for amounts under 10*l.*, who dissented from the assignment, in full.

A meeting of the committee of inspection under

(a) Reported by Walter B. Yates, Esq., Barrister-at-Law

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this deed was held upon the 24th July, when the manager of the Fore-street Warehouse Company, who was present, objected to the deed, refused to sign or assent to it, and advised the debtor to file his own petition.

Upon the 31st July the Fore-street Warehouse Company filed a petition against the debtor relying upon the execution of the deed of assignment as an act of bankruptcy.

The registrar made a receiving order.

The trustee under the deed appealed.

Reed, Q.C. and *C. B. Marriott* for the appellant.—The petitioning creditors were privy to the deed of assignment, and it is a matter of common knowledge that persons privy to a deed of assignment cannot rely upon it as an act of bankruptcy:

Ex parte Stray, L. Rep. 2 Ch. 374;
Re Michael, 8 Morr. 305.

The petitioning creditors here allege that the deed of assignment is not in accordance with clause 4 of the deed of composition, because it provides for the payment of dissenting creditors under 10*l.* in full, which, they say, is not "for the equal benefit of creditors." We submit that this is a usual and proper provision, and in accordance with the deed of composition, and that the petitioning creditors having signed the composition deed, are privy to the deed of assignment which has been executed in accordance with the provisions of the former deed. [They were stopped by the Court.]

Bigham, Q.C. and *Carrington*, for the respondents.—We submit that, for three reasons, this is not the deed contemplated by the deed of composition. We say first, that it does not convey all the property, for it excepts leaseholds, which in this case are valuable, not onerous, property. [WILLIAMS, J.—There is nothing in that point.] Secondly, we say, that it is not for the equal benefit of creditors since it provides for the payment of creditors for amounts under 10*l.*, who dissent in full, thus giving an inducement to all such creditors to dissent. Thirdly, we say, that the stipulation for the payment of the accountant's and solicitor's costs in priority is nowhere contemplated by the deed of composition.

Reed, Q.C. in reply.—All such deeds provide for the exception of leaseholds. The clause providing for the payment of dissenting creditors under 10*l.* in full is usual in the drapers' trade. [WILLIAMS, J.—Is it so usual that creditors who assented to the deed of composition must have been taken to contemplate it?] The evidence is that it is usual in this trade. If the debtor did not arrange to pay the costs before divesting himself of his estate, the creditors would be responsible for them, therefore they are rightly deducted from the trust estate. This deed of assignment is such a one as must have been contemplated by the creditors who assented to the deed of composition.

Bigham, Q.C. further heard.—We never contemplated such a deed as this. The creditors under 10*l.* may form the bulk of the creditors, and why should they be preferred? I am not aware that the clause providing for their payment in full is a common one. The clause providing for the payment of costs in priority cannot have been in the contemplation of those who assented to the deed of composition:

Ex parte Marshall, 1 M. D. & De G. 575;
Ex parte Halliwell, 3 M. & A. 538.

Reed, Q.C. replied.

WILLIAMS, J.—In my judgment no receiving order should have been made. The question is not whether this deed binds the petitioning creditors or no. Though it may not be so far in accordance with the deed of composition as to bind them, they may yet not be entitled to treat it as an act of bankruptcy. This distinction may be found in *Ex parte Stray*. For the purposes of my judgment I will assume that it is not in accordance with the deed of composition; but even if that is so, yet, if the petitioning creditors did invite the debtor to execute it as and for a deed made in pursuance of the deed of composition, they cannot rely upon it as an act of bankruptcy. If the petitioning creditors had taken this deed to the debtor and called upon him to execute it, it could not have been argued that they were entitled to rely upon it as an act of bankruptcy. Here the evidence does not go so far as that, yet it does seem to me that the petitioning creditors did what amounts to assenting to this deed. Clause 4 of the deed of composition makes the trustee the agent of all the creditors to demand the execution of the deed of assignment, therefore his demand is equivalent to a demand by each and every creditor. For this reason, whether this deed is in accordance with the deed of composition or not, no creditor who assented to that deed can rely upon this as an act of bankruptcy since its execution was demanded by the trustee as agent for the creditors. I think myself that it was not in accordance with the deed of composition. There is nothing in the points as to its not assigning all the property, and providing for the payment of costs in priority; but I doubt whether the provision for the payment of dissenting creditors under 10*l.* in full is in accordance with the deed of composition. It cannot be supposed that the creditors contemplated a provision so directly opposed to the terms of the deed of composition. I therefore doubt whether the deed binds the Fore-street Warehouse Company; but, whether it does or no, they cannot rely upon it as an act of bankruptcy, because they invited its execution by the mouth of the trustee.

KENNEDY, J. concurred.

Solicitors for the appellant, *Crouch, Edwards*, and *Heron*.

Solicitors for the respondent, *Ashurst, Morris*, and *Crisp*.

Thursday, Oct. 25.

(Before WILLIAMS and KENNEDY, JJ.)

Re KING AND BEESLEY; *Ex parte* KING AND BEESLEY. (*a*)

Bankruptcy—Petitioning creditor's debt—Merger of debt in judgment—Bankruptcy Act 1883 (46 & 47 *Vict. c.* 52), *s.* 7 (2), (3).

By sect. 7 (2) *of the Bankruptcy Act* 1883—"*At the hearing the court shall require proof of the debt of the petitioning creditor.* . . ."

(*a*) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

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By sect. 7 (3), "*If the court is not satisfied with the proof of the petitioning creditor's debt . . . the court may dismiss the petition.*

The petitioning creditor had founded his petition chiefly upon a judgment upon which a receiving order had been made from which the debtors appealed.

Held, that there was no provision in the Bankruptcy Act 1883 *which altered the old common law of bankruptcy, that a debt though merged in a higher security, such as a judgment, was still a good petitioning creditor's debt.*

THIS was an appeal from a receiving order made by the registrar of the Birmingham County Court.

The debtors who carried on business as jewellers, executed a deed of assignment for the benefit of their creditors, upon the 20th April 1894. Upon the 27th April, Homer, the petitioning creditor, obtained a judgment against them for 64*l.*, upon a dishonoured bill of exchange. Upon the 28th April Homer filed a petition against the debtors, setting forth that they were indebted to him in the sum of 77*l.*, being 13*l.* for goods sold and delivered, and 64*l.* upon the judgment, and alleging as an act of bankruptcy the execution of the deed of assignment on the 20th April.

At the hearing of the petition it was objected that the petitioning creditor had not proved a sufficient debt, for that the debt alleged in a petition must be the same as the debt existing at the date of the act of bankruptcy alleged, and in this case it had been changed by the judgment. The registrar made a receiving order.

The debtors appealed.

Muir Mackenzie for the appellants.—In this case no good petitioning creditor's debt has been proved; the debt alleged in the petition did not exist at the date of the act of bankruptcy, and the debt existing at the date of the act of bankruptcy had been changed by the judgment, and did not exist at the date of the petition:

Ex parte Hayward, 24 L. T. Rep. 782; L. Rep. 6 Ch. 546;
Ex parte Sadler; Re Whelan, 39 L. T. Rep. 361.

The debt proved at the hearing must be one which is recoverable by action:

Ex parte Sturt, 41 L. J. 12, Bank.;
King v. *Hoare*, 13 M. & W. 494.

A judgment could formerly be always pleaded in bar:

Florence v. *Jennings*, 2 C. B. N. S. 454;
Ex parte Charles, 14 East, 197; 15 Vesey, 256.

These authorities show that a debt created by a judgment extinguishes the debt upon which the judgment was obtained. I contend that a debt merged in a higher security will not support a petition when such merger has taken place since the act of bankruptcy alleged. [WILLIAMS, J. referred to *Ex parte Griffiths; Re Mostyn*, 3 De G. M. & G. 174; and *Ambrose* v. *Clendon*, 2 Sh. 1042.] I say that those cases are not law since the Bankruptcy Act 1883. By sect. 7 (2) the petitioning creditor must prove that the debt he swears to existed at the date of the act of bankruptcy. The creditor's proper course in this case was to issue a bankruptcy notice, and if that had not been complied with he would have an act of bankruptcy upon which he could have founded his petition.

Yate Lee for the respondent.—The creditor did not care to wait to issue a bankruptcy notice, as he wished to make the bankruptcy relate back to the deed of assignment. The Bankruptcy Act 1883 has made no change in the old law. He cited

Bryant v. *Withers*, 2 Rose, 8; 2 M. & S. 123.

Muir Mackenzie replied.

WILLIAMS, J.—This appeal must be dismissed. I do not agree with the contention that the debt here is a judgment debt extinguishing the original debt. The judgment has not extinguished the debt for the purpose of supporting the petition. The authorities are conclusive against such a contention: (*Ex parte Griffiths; Re Mostyn; Bryant* v. *Withers*.) I do not consider that the law has been altered, and I say that this debt was in existence both at the time of the act of bankruptcy, and at the time of the hearing of the petition. The petitioning creditor is entitled to treat the judgment as conclusive *primâ facie* evidence of the debt. *Ex parte Charles* only holds that a verdict for damages will not support a petition where judgment has not yet been signed.

KENNEDY, J.—I concur. For some purposes debts are held to be merged in judgments or other remedies of a higher nature, but bankruptcy procedure is not one of those purposes. A judgment was allowed as a plea in bar in the common law courts on the ground that the court had already adjudicated upon the matter: (*Smith* v. *Nicolls*, 5 Bing. N. C. 208.)

Appeal dismissed.

Solicitors for the appellants, *T. A. Dennison* and *Co.*, for *Plant*, Dudley.

Solicitor for the respondent, *R. M. Kerr*, Halifax.

Oct. 29 *and* 30.

(Before WILLIAMS and KENNEDY, JJ.)

Re PAINTER; *Ex parte* PAINTER. (*a*)

Bankruptcy — Annulment of adjudication — Debtor's petition—Abuse of process of court.

By sect. 93 *of the Bankruptcy Act* 1849, "*Any trader liable to become bankrupt may present a petition against himself: Provided always that, unless such trader shall . . . make it appear to the satisfaction of the court that his available estate is sufficient to pay his creditors five shillings in the pound . . . such petition shall be dismissed.*"

By sect. 86 *of the Bankruptcy Act* 1861, "*Any debtor may petition for adjudication of bankruptcy against himself, and the filing of such petition shall be an act of bankruptcy without any previous declaration of insolvency against such debtor.*"

The Bankruptcy Act 1869 *contained no provision enabling a debtor to present his own petition.*

By sect. 5 *of the Bankruptcy Act* 1883, "*If a debtor commits an act of bankruptcy, the court may on a bankruptcy petition being presented either by a creditor, or by the debtor, make an order, in this Act called a receiving order for the protection of the estate.*"

By sect. 8 (1), "*A debtor's petition shall allege that the debtor is unable to pay his debts, and the presentation thereof shall be deemed an act of*

(*a*) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

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bankruptcy without the previous filing by the debtor of any declaration of inability to pay his debts, and the court shall thereupon make an order."

By sect. 35 (1), "*Where in the opinion of the court the debtor ought not to have been adjudged bankrupt . . . the court may, on the application of any person interested, by order, annul the adjudication.*"

By sect. 7 (1) *of the Police Act* 1890, "*Every assignment of and charge on a grant shall, except so far as made for the benefit of the family of the pensioner, be void, and on the bankruptcy of the pensioner the grant shall not pass to any trustee or other person on behalf of creditors.*"

The presentation by a debtor of his own petition with a view to his own benefit is not an abuse of the process of the court, and an adjudication made thereon ought not to be annulled.

THIS was an appeal by the debtor from an order made by Sir Burford Hancock, sitting as deputy County Court judge at Birmingham, annulling his adjudication.

The debtor had retired from the police in 1891, with a pension of 1*l.* 13*s.* 4*d.* per week, which (by sect. 7 (1) of the Police Act 1890) could not be assigned except for the benefit of his family, and would not pass to the trustee in his bankruptcy.

In 1893 Blizzard, the respondent in this appeal, obtained a judgment against him for 294*l.* 0*s.* 11*d.*, damages for slander and costs, and upon the 17th Nov. obtained an order, under a judgment summons, against the debtor to pay 3*l.* within fourteen days, and 2*l.* per month thereafter. The debtor made no payments under the order, and filed his own petition upon the 29th Jan. 1894, setting forth his debts as follows:

	£	s.	d.
Judgment creditor	294	0	11
Solicitors' bill	35	0	0
Tailor's bill	5	0	0
Loan from wife	20	0	0
Total	354	0	11

Against assets 11*l.* 6*s.* 2*d.* A receiving order was made, and upon the 7th Feb. the debtor was adjudged bankrupt.

Upon the 16th April, Blizzard applied to have the adjudication annulled, and his application was granted by the deputy judge upon the grounds that he did not believe in the reality of the debts other than the judgment creditor's, and that the debtor was abusing the process of the court in filing his petition when he had only one creditor, whose pressure he thus hoped to avoid.

The debtor appealed.

J. G. Pritchett and *Evans Austin* for the appellant.—The court has no power to annul this adjudication; it can only annul when the adjudication ought not to have been made, or the debts have been paid in full. This adjudication ought to have been made, for when a debtor files his petition the Act says that the court "shall" make a receiving order. There is nothing in the Act to prevent a debtor with only one creditor from filing his petition:

Re Gyll, 59 L. T. Rep. 778;
Re Hester, 60 L. T. Rep. 943; 22 Q. B. Div. 632:
Re Bullen, 5 Morr. 273.

The respondent here only wishes to annul the adjudication in order that he may issue judgment summonses against the debtor whenever he draws his pension.

Muir Mackenzie for the respondent.—The court is not obliged to make a receiving order upon a debtor's petition where he is abusing the process of the court:

Re Bond, 58 L. T. Rep. 887; 21 Q. B. Div. 17.

Under the Act of 1849 a debtor could not be adjudicated bankrupt unless he was able to pay his creditors 5*s.* in the pound, and, although that restriction was removed by the Act of 1861, it was decided under the latter Act that his adjudication was bad if he was held to be abusing the process of the court. I say that this case ought to be held an abuse of the process; the debtor is only filing his petition to prevent the judgment creditor from issuing judgment summonses, which he cannot do if the debtor is adjudicated bankrupt:

Re Nuthall, 64 L. T. Rep. 241; 8 Morr. 106.

No order should be made upon a petition which is for the sole benefit of the debtor:

Re Russell, 32 L. T. Rep. 4; L. Rep. 10 Ch. 255;
Ex parte Staff, 23 L. T. Rep. 40; 20 Eq. 775:
Ex parte Hewitt, 6 L. T. Rep. 730; 31 L. J. 83, Bank.

[WILLIAMS, J.—*Re Ensby* (14 L. T. Rep. 692) and *Ex parte Norton* (3 Deacon, 642) are against you.] I take *Ex parte Norton* with *Re Gaitskell* (46 Ch. Div. 410).

J. G. Pritchett replied.

WILLIAMS, J.—This is a case of very great importance; but I think that we ought to differ from the learned deputy judge. This was an application to annul an adjudication upon the ground that it ought not to have been made. Under the Act of 1883 the debtor is entitled to present his own petition, and the Act says that the court "shall" make an order thereon. The different Bankruptcy Acts have varied as to the measures of relief they have afforded to debtors; but, from an early period, the Legislature has recognised the interest the State has in relieving a debtor from the burden of his debts. It is undesirable that a citizen should be so pressed with debt as to be unable to perform his duties as a citizen. As early as 1849 provision was made for a debtor presenting his own petition, subject, however, to the limitation that he must be able to pay his creditors 5*s.* in the pound. The Act of 1861 allowed him this privilege without conditions. The Act of 1869 did not continue this privilege; but the Act of 1883 reverted almost in terms to the Act of 1861. We have now to say whether we can place any limitations upon the words of the present Act. It would seem to me that the words themselves do not contain any limitation whatever. It has been urged that the court has an inherent power to prevent any abuse of its process, and that the word "shall" in sect. 8 of the Act of 1883 does not take away this power. I assume here that the court has this power, so that what we have to consider is whether there has been an abuse of the process. I have no doubt but that the debtor's motive in this case was to get rid of the pressure put upon him by the judgment creditor; but I doubt whether this was such an abuse that he ought not to have been adjudicated bankrupt. For myself, I should have felt inclined to agree with the deputy judge; but upon considering that by the Act of 1849 condi-

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tions were imposed which prevented the debtor from filing his petition for his own sole benefit, and, remembering that those conditions do not re-appear in the present Act, I can but come to the conclusion that the Legislature deliberately rejected them. I am strengthened in this view by the judgments of Knight Bruce and Turner. L.JJ. in *Ex parte Hewitt*, where they evidently were reluctant to apply sect. 86 of the Act of 1861 to a case where the petition was for the benefit of the debtor alone; but felt that there was great difficulty in the way of deciding such a petition to be bad. I therefore conclude that the court is not justified in refusing a receiving order or adjudication merely because the debtor has no assets, nor because he has no assets and an inalienable pension, nor because being in that position he has presented a petition with the express view of preventing the issue of judgment summonses against him. I am materially assisted in this conclusion by considering the severe provisions of the present Acts with regard to discharge.

KENNEDY, J.—There is no authority for the contention that a debtor may not present a petition with the object of protecting himself. I do not agree with the view that the benefit of the debtor is foreign to the purposes of the Bankruptcy Acts. No doubt the interest of creditors and of commerce are among the objects of those Acts; but so also is the interest of the debtors. The deputy judge was wrong in his decision upon that question: and it was not proved before him that the debts other than the judgment creditor's, did not exist.

Appeal allowed.

Solicitors: for the appellant, *Weekes* and *Co.*; for the respondent, *Fallowes* and *Cochrane*.

Tuesday, Oct. 30.

(Before WILLIAMS and KENNEDY, JJ.)

Re ISAACSON; *Ex parte* MASON. (*a*)

Bankruptcy — Bill of sale — Assignment of hire agreement and chattel let thereby—Registration —Bills of Sale Act 1878 (41 & 42 *Vict. c.* 31), *s.* 8.

The bankrupt had given a creditor, as security, a document purporting to assign a piano and the hire agreement whereby the same was let. The document was unregistered.

Held, that so far as it purported to assign the hire agreement, it was not subject to the Bills of Sale Act, and to that extent was not void as against the trustee in bankruptcy for want of registration.

THIS was an appeal by the trustee in the bankruptcy against a decision of his Honour Judge Owen in the County Court of Newport (Mon.), that an assignment of a hire agreement and of a piano which was let thereby was not void, so far as concerned the hire agreement, for want of registration.

The respondent was a piano manufacturer, and the bankrupt a dealer in musical instruments which he let under hire agreements. The bankrupt had bought a piano from the respondent, which he let under a hire agreement. He then gave the respondent, as security for the price of the piano, a document which purported to assign the piano and the hire agreement by which it was let. The document was not registered under the Bills of Sale Act 1878.

The trustee in bankruptcy applied to have it declared void as against him; but the County Court judge decided that it was a good assignment of the hire agreement, as the latter was a *chose in action* and not a chattel.

The trustee appealed.

Moulton, Q.C. (*F. C. Willis* with him) for the appellant.—I contend that the assignment of the agreement is inseparable from the assignment of the piano, and that this document cannot be upheld as to one part when it is void as to the other. By the terms of the hire agreement the property in the piano remains in the lessor who is therein described as "the owner" until all the instalments are paid. Therefore the assignment of the agreement is really an assignment of the piano for the assignee is in the place of "the owner." [WILLIAMS, J.—But the lessor has only a special property in the chattel; the general property is in the lessee. I think the piano is the chattel of the lessee or purchaser.] I submit that the agreement clearly makes the piano the property of "the owner" or lessor, and that this assignment is really a bill of sale of a chattel. He cited

Ex parte Rawlings, 60 L. T. Rep. 157; 22 Q. B. Div. 193.

Reed, Q.C. (*Johnston Watson* with him), for the respondent.—The property in a chattel let under a hire agreement is in the hirer or lessee:

Lee v. *Butler*, (1893) 2 Q. B. 318;
Helby v. *Matthews*, (1894) 2 Q. B. 262.

If the piano had been assigned without the hire agreement the assignee would only have had a right of action against the hirer. I submit that the words assigning the piano are really inoperative, because it was not the property of the assignor, and that this document is nothing but an assignment of a *chose in action*:

Ex parte Rawlings.

[WILLIAMS, J.—I do not agree to that; I do see words in this document which assign the property in the chattel.] Then I contend that there are two separable assignments here, one of the piano, and the other of the rights under the hire agreement, the chief of which is to receive instalments of a higher value than the price of the piano:

Re Burdett; Ex parte Byrne, 58 L. T. Rep. 708; 20 Q. B. Div. 310.

And the latter assignment being of a *chose in action* is not void for want of registration.

Moulton, Q.C., in reply.—This is merely an assignment of a chattel fettered by a contract, and should have been registered as a bill of sale.

WILLIAMS, J.—This appeal must be dismissed. There seems to have been some confusion as to the points intended to be argued here. I thought the respondent intended to argue that this document was nothing more than an assignment of the rights under the hire agreement. I could not have assented to that. Not only in form but in substance there is more than an assignment of rights; it assigns the property in the piano as well, and if the applicant had asked us to declare the assignment void as to the piano he would have been entitled to succeed. The respondent

(*a*) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

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does not ask us to hold that this document does not cover the assignment of the piano, the title to that vests in the trustee. He asks us to find that there are two separate assignments here, and that the latter one is valid. I have come to the conclusion, after considering the exposition of the effect of *Re Burdett; Ex parte Byrne*, given by Esher, M.R., in his judgment in *Cochrane* v. *Entwistle* (62 L. T. Rep. 852; 25 Q. B. Div. 116), that we ought not to declare this document void if the assignment of the rights under the hire agreement can be severed from the assignment of the piano. I do not think that the authorities are quite clear, and there is much to be said in favour of the total invalidity of the document. I am, however, not prepared to differ from the learned County Court judge.

KENNEDY, J. concurred.

Solicitors: for the appellant, *Sugden*; for the respondent, *W. Maskell.*

Monday, Nov. 19.

(Before WILLIAMS, J.)

Re CATFORD; *Ex parte* CARR *v.* FORD. (*a*)

Bankruptcy—Custom of Bristol—Warehouseman's lien—General lien on all deposited goods for all charges due.

There is a custom in the city of Bristol that a warehouse keeper is entitled to a general lien on all goods warehoused with him which are the property of the depositor, for all warehouse rent, labourage, and other charges, in connection with such goods or with any other goods warehoused by the same person either before or after.

THIS was a motion by the trustee in bankruptcy of the debtor for an order directing Messrs. Ford and Canning, the respondents, warehousemen at Bristol, to deliver up certain goods upon payment of the charges in respect of the same.

The bankrupts were a sugar merchants at Bristol, and had deposited in the respondent's warehouse certain goods. At the time of the bankruptcy there were due in respect of these specific goods certain charges, and also charges due under the bankrupt's general account.

The respondents claimed to retain the goods as against the trustee in bankruptcy to meet both the charges on the specific goods, and also for the charges due on the general account by reason of an alleged custom of the port of Bristol.

The custom according to the affidavit of Messrs. Ford and Canning, the respondents, was as follows:

2. For over twenty years past the undisputed legal usage and custom of trade in Bristol has been that warehouse keepers should be entitled to a general lien over all goods warehoused with them for all warehouse rent, labourage, and other charges incurred or becoming payable in connection with such goods, or with any other goods warehoused by the same individual either before or after.

3. I and my firm have in many cases asserted our right to such general lien, and it has never been disputed, but has always been acquiesced in and allowed by the person whose interest it was to dispute it. We have frequently asserted this general lien against trustees in bankruptcy, and against the owners of goods warehoused with us, and even if in the first instance it has been disputed, it has always been ultimately submitted to and allowed in our favour.

There were nine or ten other affidavits to the same effect, and three affidavits denying the existence of such a custom.

Robson, Q.C. and *F. C. Willis* for the trustee in bankruptcy.—The custom is not proved, and in any case is bad as first of all it is unreasonable; it asserts a general lien over all goods deposited by an individual in his own name, whether his own goods or those of anyone else. The result would be that if a factor deposited goods in transit they would become under lien for all money due from him:

Leuckhart v. *Cooper*, 3 B. N. C. 99.

The law leans against general lien, especially when confined to a particular locality. Next, the custom is too wide; it extends not only to charges on goods warehoused, but also to charges on goods which have never entered the warehouse, such as goods *ex* ship and charges paid for haulage and freight. Then, lastly, the custom is a purely local one.

Whinney for the respondents Ford and Canning.—The custom is not unreasonable; we merely claim a general lien over all the depositors' own goods to meet his general liability, and a particular lien on all goods deposited to meet the charges on those specific goods. In *Re Witt; Ex parte Shubrook* (34 L. T. Rep. 785; 2 Ch. Div. 489) James, L.J. said, p. 491: "A man has goods in his possession which he has received in the ordinary course of trading, and he is asked to deliver them up, and at the same time he has a claim against the person who asks him to deliver them up. I think he has a perfect right to keep them. Under the Judicature Acts I think if an action were brought for the goods in trover or detinue, by means of a counter-claim the whole matter might be settled in one action. I certainly think this law as to lien is a very proper one; it has been settled for a great many years, and I do not see why we should endeavour to limit the effect of the decision." In *Ex parte Ludlow* (W. N. 1879, p. 65) a custom was proved as existing in the city of Bristol that "wine merchants who are also warehousemen or bonded cellar keepers have a general lien upon the goods of a customer lying in their cellars for the amount of their general account against such customer, whether such goods are paid for or not." This custom is not set up to cover the goods of other persons; but it does include the whole general account of the depositor.

F. C. Willis in reply.

WILLIAMS, J.—This was a motion by the trustee in bankruptcy of Catford and Co. against the respondents for the delivery up of certain goods. The respondents claimed to retain the goods by reason of an alleged custom of the port of Bristol, by which warehousemen have a general lien over all goods warehoused with them for all warehouse rent, labourage, and other charges incurred or becoming payable in connection with such goods, or with any other goods warehoused by the same individual either before or after, and they said that at the time these goods were deposited there was due to the warehousemen from the depositor, a sum of money in respect of these or other goods, and that, as this money had not been paid, the

(*a*) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

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warehousemen were entitled to hold these goods under the general lien until the debt was discharged. I have not the slightest doubt as to the existence of the custom; such a custom is proved by the evidence, and I cannot conceive stronger evidence than that adduced before me. It seems to me that no one could have dealt with these warehousemen without having cognizance of the existence of this custom. Now, it was said that such a custom was unreasonable, because it asserted a general lien over all goods deposited by a person in his own name, whether they were his own goods or not. In my judgment, however, the words of the affidavits do not mean that at all, and when one reads the cross-examination it is plain that those who conducted it did not think so either. There is no pretence for saying that the custom is one under which there can be claimed a general lien over goods deposited other than those of the person depositing them. Then it was said the custom was bad, because it extended to too wide a class of debts; but in my opinion it clearly only applies to debts arising in respect of the warehousing of goods by the same person. No one says it applies only to rent for warehousing; there are other charges, and I see nothing unreasonable in extending the custom to the class of charges mentioned here. I agree with what James, L.J. said in the case of *Re Witt; Ex parte Shubrook*, The claim referred to here is one in the ordinary course of trade, and that is the only limit I wish to put on the class of goods. It was then objected that this was merely a local usage. I do not understand that objection; there are general liens which receive the sanction of the courts, and then become part of the law merchant and so of the common law. So that, in every case where a lien has to be proved in fact, it follows that it must be a local lien. All the decisions on the question show that customs are either local, or else have reference to a particular trade. I think the trustee in bankruptcy has failed, and this motion must be dismissed with costs.

Motion dismissed.

Solicitors for the applicant, *Wood, Bird*, and *Wood*.

Solicitors for the respondents, *Torr* and *Co.*, for *Osborne* and *Co.*, Bristol.

House of Lords.

June 26 and July 2.

(Before the LORD CHANCELLOR (Herschell), Lords ASHBOURNE and MACNAGHTEN.)

ASSESSMENT COMMITTEE OF DONCASTER UNION v. MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Rating—Rateable hereditament—River formed into a canal with new cuts and channels—Towing-path—Exclusive occupation—Ownership.

By virtue of certain private Acts of Parliament the respondents, and their predecessors in title, were empowered to scour, enlarge, and deepen a certain river, and to do other acts necessary for improving the navigation, and to make new channels by means of artificial cuts, and to set out towing-paths, and to keep them in repair.

Held, that the respondents were not rateable either in respect of the natural bed of the river, or of the towing paths, it not being shown that they had either the ownership or the exclusive occupation of such paths.

Judgment of the court below affirmed.

Rex v. Proprietors of Mersey and Irwell Navigation (9 *B. & C.* 95) *and* Badger v. South Yorkshire Railway Company (1 *E. & E.* 347) *approved.*

Bruce v. Willis (11 *A. & E.* 463) *distinguished.*

THIS was an appeal from a judgment of the Court of Appeal affirming in part, and reversing in part, a judgment of the Divisional Court (Lawrance and Collins, JJ.), reported in 69 L. T. Rep. 350, upon a special case.

The special case raised the question whether the railway company, who had acquired under different statutory powers the undertaking of the navigation of the river Dun, in Yorkshire, were liable to be rated to the relief of the poor in respect of their occupation both of the natural river-course and of the towing-path on the banks thereof. The company admitted that they were liable to be rated in respect of the artificial cuts, channels, and similar works, but denied their liability in respect of the natural river-course and towing-path over which they had only an easement.

The Divisional Court held that the company were not liable to be rated in respect of the natural river-course, but that they were liable in respect of the towing-path.

The Court of Appeal gave judgment in favour of the railway company on both points.

Balfour Browne, Q.C. and *F. Marshall*, Q.C., for the appellants, contended that both the natural channel of the river and the towing-path were rateable hereditaments. See

Bruce and Bath Navigation Company v. *Willis*, 11 A. & E. 463;
Metropolitan Railway Company v. *Fowler*, 69 L. T. Rep. 390; (1893) A. C. 416.

Under the local Acts, the respondents and their predecessors in title have more than a mere easement. [The LORD CHANCELLOR.—How is this towing-path different from a highway? What is there to take the soil out of the adjacent owner? It is for you to show an exclusive occupation sufficient to make it rateable.] See

R. v. *Mayor of London*, 4 T. R. 21;
Chelsea Waterworks v. *Bowley*, 17 Q. B. 358;
Badger v. *South Yorkshire Railway Company*, 1 E. & E. 347; 28 L. J. 118 Q. B.

[The LORD CHANCELLOR referred to *R.* v. *Mersey and Irwell Navigation Company* (9 B. & C. 95.) The Act in that case resembled the Act 12 Geo. 1, c. xxxviii., the earlier of the Acts in the present case, but here it has been modified by later Acts.

Sir *R. Webster*, Q.C. and *C. M. Atkinson*, who appeared for the respondents, were not called upon to address the House.

At the conclusion of the arguments for the appellants their Lordships took time to consider their judgment.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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July 2.—Their Lordships delivered judgment as follows:—

The LORD CHANCELLOR (Herschell).—My Lords: Two questions are raised by this appeal—first, whether the appellants are liable to be rated to the relief of the poor in respect of their occupation of a natural river course (the river Dun); secondly, whether they are so liable in respect of a towing path upon the banks thereof. By two private Acts passed in the reign of Geo. 1, power was given to the Company of Cutlers as to one part of the river Dun, and to the Corporation of Doncaster as to another part, to scour, enlarge, or deepen, the river Dun, and do other acts which were necessary for the purpose of improving the navigation of the river. They were also empowered to make certain new channels by means of artificial cuts. No question arises as to the rateability of these, the sole question having reference to the rateability of the respondents, in whom the rights, powers, and obligations of the Corporation of Doncaster and the Company of Cutlers are now vested, as regards the river Dun in respect of the natural bed of the river. The Court of King's Bench as long ago as the year 1829, in respect of the rivers Mersey and Irwell, which there was power to cleanse and improve in a similar manner to the river Dun, held (*Rex* v. *The Company of Proprietors of the Mersey and Irwell Navigation*, 9 B. & C. 95) that the Mersey and Irwell Navigation Company, in whom the powers and duties relating to those rivers were vested, were not liable in respect of the natural bed of the river — that they were not the occupiers of it, but were only possessed of an easement. That decision was followed in a variety of cases relating to persons having powers of improving the navigation of natural rivers similar to those which are possessed by the respondents in the present case, and were possessed by their predecessors, and I see no reason to doubt the correctness of those decisions. The Act which gave these powers of improving the river did not vest the natural bed of the river in the undertakers so as to make them occupiers of the same. The question with regard to the towing-path alongside the natural river is susceptible of more argument. The Act of the 12 Geo. 1, which empowered the Company of Cutlers to make the river Dun navigable, authorised them "to appoint and set out towing-paths, banks, and ways for towing, haling, and drawing boats and vessels." The case contains no finding with reference to the manner in which the predecessors in title of the present respondents obtained any of those towing paths. The statutes are set out which gave certain powers and authorities to them; but the transactions which vested in the respondents or their predecessors whatever rights they have to the towing-paths are not referred to in the case at all. One has, therefore, to say whether, on the facts which are disclosed, the respondents are shown to be the occupiers of these towing paths and therefore rateable. Now the construction of the words in the statute which I have just read—that the undertakers might appoint and set out towing-paths—came under the consideration of the courts; first of the Court of Queen's Bench, and then of the Exchequer Chamber, in the case of *Badger* v. *South Yorkshire Railway and River Dun Navigation Company* (28 L. J. 118, Q. B.) The question there raised was not a question as to rateability, but as to ownership; but it is nevertheless in point for the purpose for which your Lordships have to consider the construction of the section. Williams, J., in delivering the judgment of the Court of Exchequer Chamber said: "We think the statute of 12 Geo. 1, c. xxxviii. conferred no powers on the undertakers of the navigation to purchase the soil over which towing-paths are to be appointed and set out under the provisions of the Act, but only an easement necessary for the purpose of the undertaking." That is a clear and decisive expression of opinion which your Lordships would, of course, not lightly overrule. It is manifest that, if all that the undertakers obtained was this right of easement, they are not occupiers in respect of that, nor rateable. I see no reason to doubt that that decision was correct. I do not think the statute was intended to vest in the undertakers or to enable the undertakers to vest in themselves the ownership of these towing paths. That was not necessary for the purposes of the legislation which was enacted with a view to the improvement of the navigation. If the property were vested in them, it would follow that the owners of the adjoining lands would be cut off from their river frontage, and would have no right of passage for their cattle across this towing-path to the river—an access which they, of course, possessed before—and all that without any object at all, because it was not necessary for any essential part of the scheme that the ownership should vest in the undertakers. The truth is that these towing-paths were to be used in connection with the use of the natural bed of the river, improved no doubt by the undertakers. The undertakers had no more right to their use than any other member of the public. Everyone could use them in connection with the navigation of the river on paying certain tolls, and there was no greater use vested in the undertakers except this (if, indeed, it be an addition) that it was for them to repair these towing-paths and keep them in repair and in fit condition for use by the public. It seems to me, therefore, that they had over them no more than an easement, and that they were not vested in them as occupiers. Then it is said that as regards a portion of these paths the later Act 13 Geo. 1, c. xx., did empower the undertakers to purchase the lands. Well, that is by no means clear. The section is somewhat peculiarly drawn, and reliance is placed by the appellants upon this that they were to "make satisfaction for the same after the rate of twenty-five years purchase for such new lands as should be used as cuts or towing-paths for the use of the said navigation." This, it was said, showed that they were to purchase the towing-paths, because the "satisfaction" was to be twenty-five years purchase." I think that it by no means follows, because it will be observed that there is power and authority given to make these paths for "the boatmen and watermen passing or navigating in or upon the river Dun," "and to set up winches or any other engines in convenient places and by and with the same or by strength of men, horses, or beasts, going upon the said banks or lands near the said river, streams, cuts, or passage in convenient manner without hindrance, trouble, or interruption of any person or persons whatever to draw, hale, or tow up and down the said river, boats, barges, lighters, and other vessels making satisfaction

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for the same." Now it is to be observed that "the same" apparently governs not only the making of the towing-path, but the use of it in the manner described. That would be all insensible if they were to become purchasers of the towing-path because, of course, what they then make satisfaction or compensation for is the divesting the owner of his land and vesting it in the undertakers; they having then the absolute right to and power over the land, do not make any satisfaction to the owner for the use of it, inasmuch as it is no longer the prior owner's land, but is their land. Therefore, looking at the construction of that clause, it does not seem to me by any means clear that it did contemplate the purchase of the land or anything more than the purchase of certain rights in respect of the land by the undertakers. But, certainly, upon a clause of that sort, without any finding in the case that the land was purchased by the undertakers, and became vested in them as owners, and was occupied by them subsequently, it would be impossible to come to the conclusion merely upon a perusal of that section that the respondents became the owners or the occupiers of these parts of the towing-paths, the rights in respect of which were acquired under the later Act. It was said that although not owners they had exclusive occupation, and were therefore occupiers. I am unable to see that they had such exclusive occupation. There is nothing in the Acts, so far as I can see, that involves their having that exclusive occupation. There is no finding of fact in the case which shows their possession of it. The truth is that the towing-path having been once set out, their duty was to keep it in repair, but the rights in respect of it were rights exercised by the public, and the tolls which were paid to the undertakers by the persons passing along the natural bed of the river were, as far as appears, precisely the same whether the barges were propelled by sails, as they were sometimes, or whether the towing-path was made use of. The toll was a toll paid in respect of the navigation, and it appears to me that the undertakers had not in any true sense of the word the occupation of these towing-paths. Reliance was naturally placed upon the case of *Bruce* v. *Willis* (11 A. & E. 463), but in that case the conclusion arrived at was, upon the construction of that Act, that the ownership of the towing-paths actually vested in the undertakers. No doubt they, being owners of the land, and not having let it to anybody else, were presumably the occupiers—someone must occupy, and unless the owner has parted with the occupation to somebody else, he is regarded as the occupier. It is true that observations were made there by one or two of the learned judges to the effect that, even if they were not the owners, they were to be regarded as exclusively occupying; but I do not think that expressions of that sort can be regarded as of very great weight when we are dealing with a question of this description. At all events, so far as regards the facts which are found in this case in connection with the legislation set out in the case, I am unable to see that the respondents are, within the meaning of the Poor Law Acts, the occupiers of these towing paths. For these reasons I move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.

Lord ASHBOURNE.—My Lords: I concur.

Lord MACNAGHTEN.—My Lords: I am of the same opinion. I think the enactments bearing on the question were rightly construed in the case of *Badger* v. *The South Yorkshire Railway Company*. I do not think those enactments or any of them operated to vest in the undertakers, or their successors in title, the soil of the land required for towing-paths along the natural course of the river, or to give the undertakers or their successors such an occupation of those towing-paths as would make them rateable. As regards the natural course of the river, it is, I think, clear that the undertakers or their successors have only special powers required for the purpose of enabling them to improve and maintain the navigation and remove impediments. They are neither owners nor occupiers.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Van Sandau* and *Co.*, for *F. C. Nicholson*, Doncaster.

Solicitors for the respondents, *Cunliffes* and *Davenport*, for *R. Lingard-Monk*, Manchester.

July 30, 31, *and Aug.* 2, 14.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, ASHBOURNE, and MACNAGHTEN.)

LOVELL AND CHRISTMAS v. BEAUCHAMP BROTHERS. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Bankruptcy—Receiving order—Partnership firm—Infant partner—Amendment—Form of order—Bankruptcy Act 1883 (46 & 47 *Vict. c.* 52), *s.* 105, *sub-sect.* (3).

An infant may become a partner in a trading firm, but he does not become a debtor for goods supplied to the firm, and cannot be made subject to the bankruptcy laws in respect of any debt contracted by the firm. But he is not entitled to any share of the partnership assets till the debts of the firm are paid.

In a case in which judgment had been obtained and a receiving order made against a firm, in the partnership name, in which one of the partners was an infant:

Held, that a receiving order in that form could not stand, but that the judgment and bankruptcy proceedings might be amended by adding after the word "defendants" the words "other than the infant partner."

Judgment of the court below varied.

THIS was an appeal from a judgment of the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.). reported in 69 L. T. Rep. 646; (1894) 1 Q. B. 1, who had set aside a receiving order made by a registrar in bankruptcy against the respondents.

At the date of the petition the respondent, Gilbert Walter Beauchamp, an infant, was partner in the firm of Beauchamp Brothers, who carried on business as provision dealers in the Brompton-road, in the county of London. The appellants were provision merchants in West Smithfield, in the city of London, and on the 11th Sept. 1893 they presented the petition in question against

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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Beauchamp Brothers in respect of a judgment debt of 358*l.* for goods sold and delivered, and a receiving order was made by the registrar.

The respondent Gilbert Walter Beauchamp appealed, and before the Court of Appeal raised the point that the fact of his infancy rendered the whole proceedings in bankruptcy against him void. The Court of Appeal so held that, and they ordered the petition of the appellants to be dismissed with costs.

The facts are more fully set out in the judgment of the Lord Chancellor.

Finlay, Q.C., *Cooper Willis*, Q.C., and *Wedderburn*, for the appellants, argued that the judgment under Order XIV. was against the firm, but under Order XLVIII. A., r. 8 execution may issue against the separate estates of the partners, and also against the property of the partnership: (*Harris* v. *Beauchamp*, 69 L. T. Rep. 373; (1893) 2 Q. B. 534.) It is a question whether an infant can be made a bankrupt, because he cannot make a contract which is personally binding on him. But there is a valid judgment against the firm. [The LORD CHANCELLOR.—He is a judgment debtor, but you cannot enforce the judgment against his separate estate because of his infancy.] He has intervened at too early a stage on the question of the receiving order. See the Bankruptcy Act 1883, sects. 4, 111, and 115, and the Bankruptcy Rules of 1886 rr. 258-264, and Order XLVIII. A., rr. 1-8, of the Judicature Rules. The petition and notice must be in accordance with the terms of the judgment, and must be construed strictly: (*Re Howes*, 67 L. T. Rep. 213; (1892) 2 Q. B. 628.) See also

Ex parte Taylor, 8 De G. M. & G. 254;
Ex parte Liddel, 2 Rose Bank. Cas. 34;
Ex parte Adams, 1 V. & B. 494;
Ex parte Blain, 41 L. T. Rep. 46; 12 Ch. Div. 522;
Jackson v. *Litchfield*, 46 L. T. Rep. 518; 8 Q. B. Div. 474.

There is no magic in the word infant. Under the old law, if infancy was pleaded, the contract was held to be with the other partners. See

Whittingham v. *Hill*, Cro. Jac. 494.

Sir *H. James*, Q.C. and *A. Powell* for the respondents.—As to the old law, see *Ex parte Henderson* (4 Ves. 163) and *Ex parte Hardwicke* (6 Ves. 434). An infant cannot be made bankrupt, because he is not individually liable to the bankruptcy law. A receiving order against a firm must be against all the members of it individually: see *Western National Bank of New York* v. *Perez* (64 L. T. Rep. 543; (1891) 1 Q. B. 304), per Lindley, L.J.; *Worcester City and County Bank* v. *Firbank* (70 L. T. Rep. 443; (1894) 1 Q. B. 784), per Lord Esher, M.R.; *Ex parte Kibble* (32 L. T. Rep. 138; L. Rep. 10 Ch. 373). The receiving order must be against a person who has committed an act of bankruptcy, which is a personal act which an infant cannot do. The proceedings were wrong from the time when the appearance was entered by the infant partner. Infants have carried on trade at least from the time of the case cited from Croke, which is this case. The Infants' Relief Act of 1874 was passed to set all questions at rest. An infant is a privileged trader, incurring no liability. He may be a partner (see *Goode* v. *Harrison*, 5 B. & Ald. 147), but he cannot take property out of the firm till the creditors are satisfied, though he is not liable to them. The adult partners are liable, but the infant is not, and before the Judicature Acts judgment could not have been obtained against him in any way.

Finlay, Q.C. was heard in reply.

At the conclusion of the arguments their Lordships took time to consider their judgment.

Aug. 14.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell).—My Lords: I do not think there can be any doubt as to the substantial rights of the parties in this case. The form which the proceedings have taken gives rise to greater difficulty. The respondent Gilbert Walter Beauchamp, was a partner in the firm of Beauchamp Brothers. He was and is an infant. Goods which had been supplied upon the order of the firm by the appellants not having been paid for, an action was brought against the firm in the firm's name. An appearance was entered for Ralph Beauchamp and for Gilbert Walter Beauchamp, the infant, by his guardian *ad litem*. The plaintiffs having applied to sign judgment under Order XIV., it was objected that Gilbert Walter Beauchamp, being an infant, was not liable. An order was, however, made adjudging that the plaintiffs do recover against the defendants 358*l.* 8*s.* 10*d.*, and costs to be taxed. A judgment having been obtained in the same terms by Harris, another person who had supplied goods to the firm, and issued a writ against them, it was, on an appeal to the Divisional Court to set aside that order, ordered that the defendants' application be dismissed with costs. But it was also ordered that execution was not to issue against the separate property of Gilbert Walter Beauchamp, infant, or against his share, if any, of the partnership profits. The Court of Appeal refused to disturb the order thus made by the Divisional Court. On 7th Aug. 1893 the plaintiffs in the action served a bankruptcy notice on Beauchamp Brothers founded on the judgment, intimating that, if the requisitions of the notice were not complied with, an act of bankruptcy would be committed. The money not having been paid, Lovell and Christmas presented a petition for a receiving order in respect of the estate of Beauchamp Brothers. Upon this petition an order was made for the appointment of a receiver. This order was discharged by the Court of Appeal, upon the ground that one of the partners of Beauchamp Brothers being an infant the receiving order could not properly be made against the firm. The Court of Appeal granted leave to appeal to this House, but on the terms that the orders made by the Divisional Court and the Court of Appeal in *Harris* v. *Beauchamp* should be treated as made also in the action brought by the present appellants. I proceed now to state what I conceive to be the true position of the parties. I think it clear that there is nothing to prevent an infant trading or becoming partner with a trader, and that until his contract of partnership be disaffirmed he is a member of the trading firm. But it is equally clear that he cannot contract debts by such trading; although goods may be ordered for the firm he does not become a debtor in respect of them. The adult partner is, however, entitled to insist that the partnership assets shall be applied in payment of the liabilities of the partnership, and that until these are provided for no part of

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of them shall be received by the infant partner, and if the proper steps are taken this right of the adult partner can be made available for the benefit of the creditors. It is also clear that, even if there are circumstances under which an infant may be adjudicated bankrupt, or a receiving order may lawfully be obtained as a step towards such adjudication, he cannot be made subject to the bankrupt laws in respect of any debts contracted by the firm of which he is a partner. The plaintiffs were, no doubt, entitled to issue a writ against the firm in the firm's name. But it is to be observed that the order which sanctions such a proceeding provides (rule 5) "that persons sued as partners in the name of the firm shall appear individually in their own names." As soon as it appeared that a member of the firm was an infant, I do not think that it was proper to sign judgment against the firm. The Divisional Court appear to have taken the view that, inasmuch as one of the partners was an infant, the firm might be treated for the purposes of the action as consisting only of the other partner, but I do not think this is so. Although an infant he was a partner, and the firm name Beauchamp Brothers applied as much to him as to an adult partner. The Court of Appeal took the view that the judgment against the firm was good, and might be made available against the partnership property, though it would be ineffectual as against the infant partner. I have a difficulty in seeing how it can be supported. Although the judgment may be pronounced against the firm in the firm's name, it is in reality a judgment against all the persons who are in fact members of the firm; and it is because such a judgment exists that the right of execution follows. It cannot be regarded as a judgment merely against the assets of the firm. The right of execution, whatever it may be, arises from the fact that certain persons have been adjudged debtors. I have already said that, in my opinion, the infant could not be so adjudged. It is true that rule 8 of Order XLVIII. A., which sanctions, in a case of a judgment against a firm, execution against the property of the partnership, restricts any further execution except in specified cases without leave of the court or judge. But I do not think this affords warrant for a judgment against a firm including a person who, though a member of the firm, was not a debtor. It appears to me, therefore, that the judgment should either have been against Ralph Beauchamp alone or against the firm, excepting Gilbert Walter Beauchamp. I shall have to say something further on this point presently. If the judgment had been in either one or the other of these forms, a receiving order might no doubt have been obtained, upon the petition of Lovell and Christmas against Ralph Beauchamp, and in the proceedings in bankruptcy the partnership assets might have been made available for those who had given credit to the firm. The respondent insists that the bankruptcy proceedings were properly set aside, inasmuch as the receiving order against the firm would operate under rule 262 as if it were a receiving order made against each of the persons who, at the date of the order, was a partner in the firm, and therefore as a receiving order against him. I agree with the courts below in thinking that the receiving order in the form in which it was made by the registrar cannot stand. The question is, under those circumstances, what ought to be done? I am most unwilling, if it can be avoided, to deal with the receiving order in a manner which would liberate Ralph Beauchamp from its operation and render fresh bankruptcy proceedings necessary. If the judgment and receiving order stand as against him, he will certainly suffer no injustice; whilst if the receiving order be set aside absolutely and a fresh petition is thus rendered necessary, transactions which might be avoided under the present receiving order in the interests of creditors might become incapable of avoidance under a receiving order of a later date. I see no difficulty in amending the judgment by adding after the words "defendants" the words "other than Gilbert Walter Beauchamp." There is, I think, nothing irregular in a judgment against a firm in the firm's name excluding one of the partners. It may be, in many cases, of advantage to the plaintiff to obtain such a judgment where he fails to establish the liability of a member of the firm, inasmuch as the judgment would bind not only the partners who have appeared but also any dormant partners who have not appeared. This might be a reason for taking the judgment in that form rather than as a judgment against the known members of the firm who were liable for the debt. Supposing the judgment thus amended, I think the bankruptcy proceedings may be amended in conformity therewith by adding throughout after the words "Beauchamp Brothers" the words "other than Gilbert Walter Beauchamp." The Bankruptcy Act gives ample powers of amendment. By sect. 105, sub-sect. 3 the court may at any time "amend any written process or proceeding under this Act on such terms, if any, as it may think fit to impose." Instead, therefore, of setting aside the receiving order, I think the proper course will be to amend it in the manner which I have suggested. It will thus constitute as from its date a valid receiving order against Ralph Beauchamp, and I think the receiver appointed under that order should also be appointed receiver of the partnership assets for the purpose of protecting them for the benefit of the creditors. I think there should be no costs on either side of these proceedings. If any have been paid they should be repaid or allowed in account as against costs due from the other party.

Lord ASHBOURNE.—My Lords: I concur. It would be most unfortunate if the adult members of a partnership could evade liability because one of the partners was a minor. If this was laid down minors would be found in many partnerships. The powers of amendment referred to by my noble and learned friend on the woolsack enable a court to recognise adequately the position of the minor, without freeing any adult member of the partnership from any legal liability he may be under.

The LORD CHANCELLOR.—My Lords: My noble and learned friends Lord Watson and Lord Macnaghten, who are unable to be present to-day, desire me to say that they have read the judgment which I have pronounced and entirely concur in what I have said.

Order of the Court of Appeal in the action varied by ordering (instead of that the appeal be dismissed) that the judgment in the action be amended by adding, after the

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word "defendants," the words "other than Gilbert Walter Beauchamp;" that the proceedings in bankruptcy and the receiving order be amended by adding, after the words "Beauchamp Brothers," the words "other than Gilbert Walter Beauchamp;" that each party do pay their costs of the proceedings here and in the court below, save that the costs of the petitioning creditors shall be costs in the bankruptcy.

Solicitors for the appellants, *Godfrey* and *Webb*.

Solicitors for the respondents, *Harper* and *Battcock*.

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 5 and 6.

(Before the LORD CHANCELLOR (Herschell), LINDLEY and SMITH, L.JJ.)

Re RYMER; RYMER *v.* STANFIELD. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Will—Construction—Charitable gift—Particular charity—Charity ceasing to exist before testator's death—Cy-près—*Lapse.*

A testator, by his will made in Aug. 1883, *gave various charitable legacies, and amongst them one in the following terms: "To the rector for the time being of St. Thomas's Seminary for the Education of Priests in the diocese of Westminster, for the purposes of such seminary,* 5000*l.; and I direct that the said rector shall at his discretion make a settlement thereof by deed in the name of proper trustees, so as to make the same a permanent fund; and I direct that the candidates to be educated out of the income of this bequest shall be nominated from time to time by the rector for the time being of such seminary; and I request, but not as a condition of this bequest, that a yearly mass for the repose of my soul may be said at the said seminary in perpetuity, and that a yearly mass for the same object may be said during life by each of the priests who may have been educated wholly or in part in this foundation." The testator died in June* 1893. *At the date of the will there existed at Hammersmith a seminary for the education of Roman Catholic priests for the diocese of Westminster, known as St. Thomas's Seminary, having a rector and vice-rector, and a complete staff of professors and teachers. This seminary was closed in March* 1893, *and the buildings were sold, the students being removed to the seminary at Oscott, near Birmingham, which had a rector and a vice-rector, and a staff of professors and teachers of its own.*

Held, that St. Thomas's Seminary which existed at the date of the will had ceased to exist at the testator's death; that the bequest was not a general charitable gift, but a gift to a particular institution; and that the legacy was not to be applied cy-près, *but lapsed and fell into the residue.*

Decision of Chitty, J. (ante, *p.* 174) *affirmed.*

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

APPEAL by the Attorney-General from a decision of Chitty, J. (*ante*, p. 174).

Cozens-Hardy, Q.C. and *Ingle Joyce* (Sir R. T. *Reid*, A.-G. with them) for the appellant.—The legacy here should not be treated as having lapsed, but, being a gift for carrying out an object, it should be applied *cy-près*. If the words "for the purposes of such seminary" had not been inserted the case would not have been arguable, because it would have been simply a gift for the education of priests in the diocese of Westminster. The next words are inconsistent with what has gone before, and should therefore be disregarded. There is a difference between charitable gifts to a private and to a public institution. If the former ceases to exist the legacy altogether fails. But not so in the case of a public institution. And, notwithstanding that St. Thomas's Seminary ceased to exist in the testator's lifetime, his purpose still remains, and that purpose can be fulfilled by settling a scheme which will carry out the intentions of the testator *cy-près*. St. Thomas's Seminary is a mere name. There is nothing in that name which shows that the testator desired that the objects of his bounty should be educated at that particular seminary. The court should look into the gift and see what is the substantial object of the testator, and should give effect to that object so far as may be. The doctrine of *cy-près* as laid down by the old authorities applies here. St. Thomas's Seminary is not essential to the testator's gift. The main intention of the testator was to give a charitable legacy, namely, for the education of priests in the diocese of Westminster. The cases cited by Chitty, J. do not support the decision at which he has arrived. The authorities showing the view which the court takes concerning this class of gift are very numerous, and, arranged in chronological order, are as follows:

De Costa v. *De Paz* (1754), 2 Swans. 487, n.;
Moggridge v. *Thackwell* (1803), 7 Ves. 36;
Mills v. *Farmer* (1815), 1 Mer. 55, 722;
Loscombe v. *Wintringham* (1850), 13 Beav. 87:
Clark v. *Taylor* (1853), 1 Draw. 642;
Russell v. *Kellett* (1855), 3 Sm. & Giff. 264;
Re The Clergy Society (1856), 2 K. & J. 615;
Marsh v. *Attorney-General* (1860), 2 J. & H. 61:
Fisk v. *Attorney-General* (1867), 17 L. T. Rep. 27: L. Rep. 4 Eq. 521;
Re Maguire (1870), L. Rep. 9 Eq. 632;
Re Ovey; *Broadbent* v. *Barrow* (1885), 52 L. T. Rep. 849; 29 Ch. Div. 560;
Biscoe v. *Jackson* (1886), 55 L. T. Rep. 607: 35 Ch. Div. 460;
Re Slevin; *Slevin* v. *Hepburn* (1891), 64 L. T. Rep. 311; (1891) 2 Ch. 236, 242.

Levett, Q.C and *T. L. Wilkinson*, for the respondents, the executors of the will, were not called upon to argue.

P. S. Stokes for the respondent Cardinal Vaughan.

The LORD CHANCELLOR (Herschell).—In spite of the able argument which has been addressed to us by the learned counsel for the appellant, I entertain no doubt that the judgment of Chitty, J. in this case was right. The first step to be taken is to construe the will of the testator. By his will, subject to the after payment and satisfaction of certain legacies, he proceeds thus: "I give the following charitable legacies to the following institutions and persons: To the rector for the

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time being of St. Thomas's Seminary for the Education of Priests in the diocese of Westminster, for the purposes of such seminary, 5000*l.*; and I direct that the said rector shall at his discretion make a settlement thereof by deed in the names of proper trustees, so as to make the same a permanent fund; and I direct that the candidates to be educated out of the income of this bequest shall be nominated from time to time by the rector for the time being of such seminary; and I request, but not as a condition of this bequest, that a yearly mass for the repose of my soul may be said at the said seminary in perpetuity, and that a yearly mass for the same object may be said during life by each of the priests who may have been educated wholly or in part on this foundation." That bequest is followed by a number of other bequests—legacies of 2000*l.* each are given to certain persons for school and orphanage purposes, the bequest in each case being described as given for the purposes of that particular institution. Then follow legacies of 1000*l.* each, given to representatives of institutions having some of the same objects precisely as the previous gifts, the legacy being limited in the case of these particular institutions to 1000*l.* The contention on behalf of the appellant is, that from the gift now in question is to be inferred an intention on the part of the testator to benefit the priests by educating them quite apart from their education taking place in or in connection with this particular seminary; and that it is quite immaterial that the testator has designated that particular seminary, for the gift can be regarded as a charitable one, which must take effect even though that seminary should have ceased to exist at the time of the death of the testator. I am unable so to construe this bequest. I think in all these cases (and they may all be looked at for the purpose of throwing light on this bequest) the testator had in view particular institutions, and although their object may be the same he graduates his bounty towards them, showing that it was the education of the orphans at this institution, or that which he had in his mind, and not merely the education of orphans, if I may say so, at large. In the first place, I observe that he says, "I give the following charitable legacies to the following institutions and persons." The persons are named in connection with the institutions. There is no institution named except in connection with a person, and therefore he indicates at the outset that the legacy is to be a legacy to the institution, although he names the officers of the institution which is to take it. It seems to me, therefore, that we start with that indication. Then the testator mentions St. Thomas's Seminary, it is true, in conjunction with the words "for the education of priests in the diocese of Westminster." It is said that those are his own words, and not part of the title. But it would be obviously a piece of prudence to insert those words in order to make sure that the bequest should go to the St. Thomas's Seminary which he had in view, and not to any institution which might possibly have existed as St. Thomas's Seminary not having that object and being a different institution. But the gift is to be for the purposes of such seminary, and then it is to be observed that, although he does not make it a condition of the gift, he does couple it with the request that a yearly mass for the repose of his soul may be said at the said seminary. The whole is localised and connected with that institution, as distinctly, it seems to me, as a bequest could be. That is the construction which I put upon the language which the testator has used. Now there did exist such an institution as St. Thomas's Seminary, answering in every respect the description given. That institution was no longer in existence at the time of the death of the testator. The appellant's counsel contend that under those circumstances, and on the *cy-près* doctrine, the gift ought still to be treated as charitable and to be applied to some cognate purpose. In support of this contention—when once the construction has been arrived at which I have put upon the will—I have been unable to find that they have cited a single authority. They placed reliance upon the decision of Lord Eldon in *Moggridge* v. *Thackwell* (*ubi sup.*) and *Mills* v. *Farmer* (*ubi sup.*). The nature of those cases and the effect of the decisions are, I think, very well emphasised in a short passage in Lord Eldon's judgment in the latter case. He points out that giving property "to such persons as I shall name to be my executors," and appointing no executors, leaves that in the case of an individual a void gift. "But to give effect," he says, "to a bequest in favour of a charity, the court will in both instances supply the place of an executor and carry into effect that which in the case of individuals must have failed altogether. This distinction has proceeded partly perhaps on principles in the Roman law which we do not at this time perfectly comprehend, and partly, no doubt, on the religious notions which formerly obtained in this country according to which it fell to the ordinary's province to distribute in case of intestacy. A third principle which it is now too late to call in question is, that in all cases in which the testator has expressed an intention to give to charitable purposes, if that intention is declared absolutely, and nothing is left uncertain but the mode in which it is to be carried into effect, the intention will be carried into execution by this court, which will then supply the mode which alone was left deficient." That was the principle established in *Moggridge* v. *Thackwell* (*ubi sup.*), as well as in *Mills* v. *Farmer* (*ubi sup.*), and, of course, would cover a considerable class of cases. The testator has defined the general character of the charity which he has in view, but has left the objects to be specified by a particular individual who can no longer specify them. That is one illustration of it, but, of course, many might be given which all come within the language to which I have referred. Then reference is made to another class of cases, such as *De Costa* v. *De Paz* (*ubi sup.*), where there was a gift for a charitable purpose which the court held to be illegal, and to which therefore it could not give effect. In those cases, seeing that there was a charitable purpose, but one to which the courts could not give effect, the courts have applied the money, designed in their view for charity, upon the *cy-près* doctrine in some fashion, or, at all events, in some charitable fashion other than that designated by the testator. Of course, that is a class of cases which we need not further discuss in connection with the one now before the court. But then follow a series of cases of another description, although coming within the same principle, it may be said, as *Moggridge* v. *Thackwell*

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(*ubi sup.*) and *Mills* v. *Farmer* (*ubi sup.*). The first of those is *Loscombe* v. *Wintringham* (*ubi sup.*), where a bequest of 500*l.* was given for a society for the encouragement of servants in good conduct. No such society was known to evist, and we may take it that none did exist. The court there said that there was a charitable purpose, the machinery for carrying it into effect —the channel through which it should be carried into effect—has not been designated by the testator, but nevertheless the court will carry it into effect. That was also the view taken in the case of *Re The Clergy Society* (*ubi sup.*), which was a society named, but which might as well have been left unnamed, because there was no such society existing. So also in the case of *Re Maguire* (*ubi sup.*), where a church pastoral aid society in Ireland was mentioned, which was likewise a non-existing society. Those cases also form a class which has been established upon the same principles and considerations, I think, as guided the court in *Moggridge* v. *Thackwell* (*ubi sup.*) and *Mills* v. *Farmer* (*ubi sup.*) and that class of cases. But they do not seem to me to be cases at all governing the present, when once the construction has been put on the will which I have put on the will of this testator. One other case I may allude to in connection with the class of cases beginning with *Loscombe* v. *Wintringham* which I have just mentioned, and that is the case of *Biscoe* v. *Jackson* (*ubi sup.*). It seems to me that Cotton, L.J. and Lindley, L.J., in delivering their judgment in that case, so far from using language favouring the argument on behalf of the appellant in the present case, seemed to assume the case against the appellant upon the construction which I have put upon the will. They decided in favour of the bequest there on the ground that it was not a bequest to any particular institution, but a bequest for a purpose which, if it could not be carried out precisely in the way named, must be carried out as nearly as possible. Now I come to another class of cases within which the present case falls. The first of those is *Clark* v. *Taylor* (*ubi sup.*), where reliance was placed upon *Loscombe* v. *Wintringham* (*ubi sup.*), but the judge declined to decide the case in the same way as *Loscombe* v. *Wintringham* had been decided, because the Vice-Chancellor (Kindersley) regarded that case as distinguishable. He did not intend to impugn that case, as he said, in the slightest degree, but he regarded it as not governing the case then before him. The language which he uses (and there are few judges more careful in the use of their language or more accurate) is this: "There is a distinction well settled by the authorities. There is one class of cases in which there is a gift to charity generally, indicative of a general charitable purpose, and pointing out the mode of carrying it into effect. If that mode fails the court says the general purpose of charity shall be carried out. There is another class in which the testator shows an intention not of general charity, but to give to some particular institution, and if it fails because there is no such institution, the gift does not go to charity generally. That distinction is clearly recognised, and it cannot be said that, wherever a gift for any charitable purpose fails, it is nevertheless to go to charity. In many cases it is difficult to see to which particular class the case is to be referred, and this is to a certain extent one of such cases." Now there the Vice-Chancellor lays down the distinction in the clearest terms. It is said that in that case the facts show that the institution had not ceased to exist till after the death of the testator; that, therefore, the decision of the Vice-Chancellor must be read as referable to such a case; and that, if so, his decision has been overruled. I cannot think that any such point was raised in that case. It is true that on the statement of facts it would seem to have arisen, but then the statement of facts is now shown to be inaccurate. The report states that the testator died in Oct. 1840, and an examination of the record has shown that the testator did not die till Oct. 1846. It is true that Drewry's report states that the institution came to an end in Nov. 1846, which would have shown that it survived the testator by a month or part of a month. But it is just as likely that there has been some mistake in the date of the cessation of the institution as in the date of the death of the testator. At all events, it is to me inconceivable that, if such a point existed and it could have been argued in that case, that Mr. Wickens, who argued for the Crown, should not have made the point, and that there should be no allusion to it whatsoever in the judgment of the Vice-Chancellor. I therefore cannot regard the judgment of the Vice-Chancellor in *Clark* v. *Taylor* (*ubi sup.*) as otherwise than a decision upon the point which it purports to decide in the judgment, and as having no relation to the fact that the institution had survived the testator. That clearly was the view taken by Wood, V.C. in *Fisk* v. *Attorney-General* (*ubi sup.*). He had there a similar point before him. The institution was, I think, the Women's Benevolent Institution at Liverpool, and the institution had come to an end before the death of the testator. The Vice-Chancellor followed *Clark* v. *Taylor* (*ubi sup.*), and held that, having so come to an end, the gift failed altogether. I pass by *Russell* v. *Kellett* (*ubi sup.*), because on the facts of the case there may be some discussion as to how far the principle was properly applied. But the same principle was recognised by Stuart, V.C. in that case. It was afterwards recognised and followed in the case of *Re Ovey*; *Broadbent* v. *Barrow* (*ubi sup.*) by Pearson, J., and it seems to me that, in the case of *Re Slevin*; *Slevin* v. *Hepburn* (*ubi sup.*), in this court, not the slightest dissent was expressed from the view of Kindersley, V.C. in *Clark* v. *Taylor* (*ubi sup.*), but rather the contrary. In delivering the judgment of the court. Kay, L.J. says: "In the present case we think that the Attorney-General must succeed, not on the ground that there is a general charitable intention that the fund should be administered *cy-près*, even if the charity had failed in the testator's lifetime, but because, as the charity existed at the testator's death, this legacy became the property of that charity, and on it ceasing to exist its property falls to be administered by the Crown." So that, so far from throwing any doubt upon *Clark* v. *Taylor* (*ubi sup.*), it seems to me to recognise the distinction, and decides the case not on any ground inconsistent with *Clark* v. *Taylor* (*ubi sup.*), but exclusively on the ground that, the charity having survived the testator, the bequest had taken effect, and when the charity ceased to exist its property fell to the administration of the Crown. One case was referred to which was said to be somewhat an exception to those with which

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I have been dealing, viz., the case of the *Attorney-General* v. *Marsh* (*ubi sup.*), and at first sight it appeared to be so. It was a gift to the President of the Nautical School at Deal, and the Nautical School at Deal was not in existence at the time of the death of the testator. But rightly or wrongly, it is quite immaterial to inquire; the court there came to the conclusion on the true construction of the will that the money was given to the president of that school, not for the benefit of the school, but that education might be given to certain boys. It was said that the trust would have been perfectly discharged by educating the boys at Oxford and Cambridge or elsewhere than at the school. It therefore really forms no exception in the construction put on the will to the cases to which I have been alluding. I think I have now referred to every one of the cases which have been relied on by the learned counsel for the appellant. They seem to me to lead to the conclusion that this case does not come within the class of cases the first of which is *Clark* v. *Taylor* (*ubi sup.*), decided forty years ago, but which has been followed in numerous cases since; and that there is really no authority in any way conflicting with that series of decisions. Certainly on principle they seem to me to be sound, and I do not think it would be in accordance with sound principle, or that any prior decisions necessitate our holding that, where the conclusion is once arrived at that the main object of the testator or testatrix was to benefit a particular institution, that was of the essence of the bequest; and that if that institution has ceased to exist the charitable legacy ought still to be held as effectual, and the money to be applied by the court on the *cy-près* principle. For these reasons I think the appeal should be dismissed with costs.

LINDLEY, L.J.—I think the result at which Chitty, J. has arrived is right. I have attended to and followed the arguments both of Mr. Cozens-Hardy and of Mr. Ingle Joyce, and with a great many of those arguments I concur. I think with Mr. Joyce that it does not do to approach a will of this kind by a short cut by saying that there is a lapse, and that there is an end of the matter. It is begging the question whether there is a a lapse or not. The court must construe the will, and see what the real object of the language which it has to interpret is. I will not read the words of this gift again. I have read them very often, and studied them with care. I cannot arrive at the conclusion at which Mr. Ingle Joyce wants me to arrive, that this is in substance and in truth a bequest of 5000*l.* for the education of priests in the diocese of Westminster. I do not think it is. It is a gift of 5000*l.* to a particular seminary for the purposes thereof, and I do not think it is possible to get out of that. I think the context shows it—about the choice of candidates, and offer a prayer, and so on. If once you get that fact, then you come to ask yourself, "Does that seminary exist?" The answer here is, it does not. Then you arrive at the result that there is a lapse, and if there is a lapse, is there anything in the doctrine of *cy-près* to prevent the ordinary rule as to lapse from applying? I think not. When once you get the fact that there is a lapse, then it appears to me that all the authorities which are of any value tend to show that the residuary legatee takes the lapsed gift. We are asked, if the argument is pushed further, to overrule that doctrine which was the doctrine laid down by Kindersley, V.C. in the earliest case of *Clark* v. *Taylor* (*ubi sup.*), and also to overrule the doctrine of *Fisk* v. *Attorney-General* (*ubi sup.*). I think that the doctrine is perfectly right. There is always a difficulty in applying it, but when once you arrive at the fact that a gift to a particular seminary or institution, or whatever you may call it, is "for the purposes thereof," and for no other purpose, if when once you get to the cessation of that institution or seminary, or whatever it is, and so you are driven to arrive at the conclusion that there is a lapse, there is an end of it. That is in accordance with the law, and in accordance with all the cases that can be cited. I quite agree that in coming to that conclusion you have to consider whether the mode of obtaining the object is machinery or not, or whether the mode is not the substance of the gift. Here it appears to me the gift to the seminary is the substance of the whole thing. It is the object of the testator. I think that that is so plain from the language used that it covers the case. Those are the short grounds of my judgment. I do not comment upon the various decisions, because the Lord Chancellor has done that sufficiently.

SMITH, L.J.—It appears to me, in investigating whether Chitty, J.'s judgment is correct, the first point we must make up our mind upon is this: Whether he is right upon the construction he has placed on this bequest, because the construction he has placed on this bequest is this, that it was a gift to a particular institution for the purposes of that institution. That is the construction which he has placed on the bequest which is now under consideration. The Lord Chancellor and Lindley, L.J. have dealt with the question as to whether that is correct or not. I entirely agree with them. In my opinion that is a bequest to a particular institution for the purposes of that institution by the testator. When once that is arrived at the cases cited by Mr. Cozens-Hardy and Mr. Ingle Joyce seem to me to be tolerably plain. The difficulty in this case is to find out whether that is in reality the intention of the testator or not. Having got to that, then the authorities appear to me to be all one way. They begin with *Clark* v. *Taylor* (*ubi sup.*), as explained by the Lord Chancellor, and, as appears from the judgment of Kindersley, V.C., going on to *Fisk* v. *Attorney-General* (*ubi sup.*), decided by Wood, V.C., and then going on to the decision of Pearson, J. in *Re Ovey*; *Broadbent* v. *Barrow* (*ubi sup.*). I am not saying that *Re Ovey* (*ubi sup.*) is a decision exactly applicable, but one sees how the learned judge deals with the law relating to *cy-près* when considering a bequest like this. There is also the case of *Biscoe* v. *Jackson* (*ubi sup.*), where Cotton and Lindley, L.JJ. also deal with the principles of the law. It seems to me that from *Clark* v. *Taylor* (*ubi sup.*) down to the last of those cases the authorities are all in sequence upon this point. Therefore I am of opinion that Chitty, J., being right in the construction he put on the bequest, he is also right as to the law, and that, therefore, this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Hare* and *Co.*

Solicitors for the respondents, *Frank Richardson* and *Sadler*; *Witham, Lambert*, and *Roskell.*

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Nov. 6 and 7.

(Before the LORD CHANCELLOR (Herschell), LINDLEY and SMITH, L.JJ.)

Re THE MAPLIN SANDS. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Practice — Evidence — Documents produced by witness not party to proceedings—Putting in documents en bloc *or* seriatim—*Referee's report — Motion to vary for rejection of evidence — New trial, analogy of—Order XXXIX., r. 6.*

Where documents are produced by a witness who is not a party to the proceedings, the proper course is for an adjournment to be made to enable the parties to ascertain which of those documents are material. The parties are not entitled to put in the whole of the documents en bloc, *or to ask the witness to produce the documents* seriatim, *and question him thereon.*

Decision of Kekewich, J. (ante, *p.* 56) *affirmed.*

A PETITION was presented for payment out of court of purchase money paid in by the Crown, under the Artillery Ranges Act 1882, in respect of part of the Maplin Sands. There being numerous rival claimants to the fund, the matter was, by consent, referred to a special referee.

After a hearing extending over nine days, the referee held that the petitioners had established their claim to the fund, and reported accordingly.

During the hearing before the referee, a witness, not a party to the petition, was examined and cross-examined. In the course of his cross-examination by counsel for one of the respondents he was asked whether he had any letters in his possession relating to the Maplin Sands. Thereupon the witness offered to produce a mass of correspondence which counsel then proposed to call for *seriatim* and read before the referee, questioning the witness upon each. This the referee declined to allow, on the ground of the length of time such a course would occupy. Counsel then submitted that he was entitled to put in the correspondence *en bloc*, then have copies, and examine them at his leisure; but the referee disallowed this also.

The matter afterwards came before Kekewich, J. upon a motion to vary the referee's report, on the ground (*inter alia*) that he had improperly rejected the above-mentioned correspondence.

It was decided by Kekewich, J. (*ante*, p. 56), that the proposal to put in all the letters *en bloc* was entirely contrary to all practice and could not be allowed; that the proper course would have been to ask for an adjournment in order to look into the material documents; that the analogy of applications for new trials applied, the question being whether substantial wrong had been caused by the rejection of evidence, and that the production of the letters would have been useless and a waste of time, and that the report must stand.

From that decision the Guernsey Commercial Banking Company, who were parties to the proceedings, now appealed.

Haldane, Q.C. and *Henry Terrell* for the appellants.

Warmington, Q.C. and *Sheldon*, for the respondents, were not called upon to argue.

The LORD CHANCELLOR (Herschell).—I do not think that we can interfere with the decision of the learned judge in the court below. [His Lordship then dealt with one of the grounds upon which it was sought to vary the referee's report, and continued:] That disposes of that part of the case. But then it is said that the referee refused to admit certain evidence. The contention that the whole transaction has not been fully investigated because the referee refused to allow the documents in question to be put in *en bloc*, or to be gone through *seriatim*, cannot, in my opinion, be maintained. There is nothing to show that the documents which were rejected are material. It is all mere speculation. If it had been shown, or if there had been fair reason for supposing, that there was something material in the documents, it might have been right to grant an adjournment of the hearing, supposing an application had been made for an adjournment. But no application was made to the referee for that purpose. The referee cannot be kept waiting while counsel are trying to find out something material in the documents. I think that there is no such right: that the referee cannot be held to have failed in his duty by taking the course he did. I think there was nothing to lead to any other conclusion than that at which the referee arrived. [His Lordship then dealt with a further ground upon which it was sought to vary the referee's report, and continued:] On the whole, I think that the decision of Kekewich, J. was quite right, and that the appeal must be dismissed with costs.

LINDLEY and SMITH, L.JJ. delivered judgment to the same effect.

Appeal dismissed.

Solicitors for the appellants, *Lumley* and *Lumley*.

Solicitors for the respondents, *Fowler, Perks*, and *Co.*, agents for *Stamford* and *Metcalfe*, Bradford.

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

Wednesday, Nov. 7.

(Before the LORD CHANCELLOR (Herschell), LINDLEY and SMITH, L.JJ.)

Re THE SOUTH AMERICAN AND MEXICAN COMPANY LIMITED: *Ex parte* THE BANK OF ENGLAND. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Practice — Company — Winding-up — Estoppel — Judgment by consent—Res judicata.

Under an agreement the S. Company became liable to a bank for a debt of another company. The debt was repayable by instalments, and the first instalment was duly paid by the S. Company. The S. Company failed to pay the second instalment, and the bank thereupon brought an action against the company for the amount of such instalment. The S. Company denied the agreement to pay the debt, and counter-claimed for a return of the first instalment already paid by the company. At the trial of the action, before Kennedy, J., a compromise was arrived at, under which a judgment, by consent, was taken by the bank for the amount of the second instalment. The S. Company subsequently went into liquidation, and in the liquidation, the bank claimed to prove for the amount of the debt remaining unsatisfied on the basis of the agreement. The official receiver and liquidator rejected the proof. An application was thereupon made by the bank that the decision

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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of the official receiver and liquidator might be reversed, and that the proof of the bank might be admitted.

Held, that the judgment of Kennedy, J., although by consent, estopped the official receiver and liquidator from disputing that there was in existence an agreement binding on the S. Company to pay the debt; and that the proof of the bank must therefore be admitted.

Decision of Williams, J. (ante, *p.* 334) *affirmed.*

APPEAL by the official receiver and liquidator of the above-named company from a decision of Williams, J., sitting as an additional judge of the Chancery Division (*ante*, p. 334).

Moulton, Q.C. and *G P. C. Lawrence*, for the appellant, substantially repeated the arguments adduced by them in the court below.

Finlay, Q.C., *H. D. Greene*, Q.C., *Reginald Bray*, and *Howard Wright*, for the respondents the Bank of England, were not called upon to argue.

The LORD CHANCELLOR (Herschell).—I think that the judgment of the learned judge in the court below in this case was right. An action had been brought by the Bank of England against the company claiming a sum of 100,000*l.* as the second instalment of a larger claim—as a sum agreed to be paid by the defendants to the plaintiffs. Now, that was the action—an action for a second instalment due on an agreement between the plaintiffs and the defendants. There was a counter-claim to recover back the sum paid as the first instalment, alleging that the agreement was only inchoate, or that it was conditional, and that the condition had not been performed. The case was partly tried, and thereupon, by consent of the parties, an order was made that judgment should be entered for the plaintiffs on the claim for 100,000*l.* and costs, and the counter-claim was dismissed with costs. Now, it seems to me that a judgment for the plaintiffs on the claim is a judgment for them, not for a sum of 100,000*l.* at large—it is a judgment for them on a claim for 100,000*l.*, being part of a debt due, namely, the second instalment. Then it was further ordered that execution should be stayed, and that if within three weeks 60,000*l.* should be paid—20,000*l.* in cash and 40,000*l.* by a promissory note—and if the promissory note was duly paid, that 60,000*l.* should be taken in satisfaction of all claims; that is to say, all claims by the plaintiffs under the agreement. Then it was further ordered that, if the promissory note was not paid—and that was the event that happened—the plaintiffs should be at liberty to issue execution for the full amount of the judgment debt, and to enforce the payment of the further instalments claimed by them under the plaintiffs' agreement with the defendants. Although it is said that those words "under the agreement with the defendants" do not appear in the minute signed by counsel, at all events the words appear that they should be at liberty to enforce further instalments. Now, what is the meaning of that? It is said that, notwithstanding that agreement to give judgment for the claim, it was open to the defendants to make default in paying the 60,000*l.* and then to say, "As regards all but this one instalment for which you have got judgment, the matter is at large; you have got judgment as for an instalment of a debt in respect of which you sue, but we are to be at liberty now to say that there never was a debt at all; we cannot affect this 100,000*l.*, but we may dispute any liability to anything further." I do not think that that is the meaning fairly to be gathered from the settlement arrived at or the order of the judge. I do not think that the fair meaning was that they were to be at liberty afterwards to dispute the existence of any debt at all. It is to be observed that what they are to be at liberty to enforce is further instalments. What is the meaning of that? Instalments of that debt, the existence of which is recognised and which is the basis of the judgment—that debt in respect of which judgment is then given for the instalment then due. They say, "If we do not carry out our present arrangement with you, you are to be at liberty to enforce payment of these further instalments." They do not merely say, as it seems to me, "You are to be at liberty then to take proceedings for payment of those further instalments or claims, and we are to be at liberty to insist that there never was any debt, and there never ought to have been any judgment, and that therefore there are no instalments due." I do not think that that is the fair construction or the fair effect of an arrangement of this sort, where a judgment is given by consent. The truth is, a judgment by consent is intended to put a stop to litigation between the parties, just as much as a judgment is which results from the decision of the court after the matter has been fought out to the end. Very often the object of it is to stop litigation; and I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and to allow questions that were really involved in the action—questions which if decided against the party against whom judgment is given would show that there ought to be no judgment at all—to be fought over again after judgment has been agreed to in a subsequent action. I think, therefore, that the judgment of Williams, J. should be affirmed, and the appeal dismissed with costs.

LINDLEY, L.J.—I do not think that this case is arguable in a lawyer's sense of the expression. It is impossible to read that compromise without seeing that the necessary result of it is, and I believe the intention of the parties to it was, that the dispute between them should be brought to an end. I do not say that was all, because there was the money; but to say after that that it is competent to any person to re-open the litigation and dispute the validity of the claim is to say that which I think no lawyer could possibly for a moment assent to.

SMITH, L.J.—I agree. I have nothing to add.

Appeal dismissed.

Solicitors for the appellant, *Hollams, Son, Coward*, and *Hawkesley*.

Solicitors for the respondents, *Freshfields* and *Williams*.

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Nov. 3 and 9.

(Before LINDLEY and SMITH, L.JJ.)

TAYLOR v. THE MANCHESTER, SHEFFIELD, AND LINCOLNSHIRE RAILWAY COMPANY. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Railway passenger—Injury to—Negligence—Misfeasance—Liability of railway company—Action founded on contract or tort—Costs—County Courts Act 1888 (51 & 52 *Vict. c.* 43), *s.* 116.

Where a passenger contracts with a railway company by taking a ticket entitling him to be carried on a given journey, and he is injured thereon by a misfeasance for which the company are liable, an action brought by the passenger in the High Court of Justice is founded upon tort and not upon contract, within the meaning of sect. 116 *of the County Courts Act* 1888, *and he can recover his full costs if the verdict be for* 20*l. and not merely costs on the County Court scale.*

Bryant *v.* Herbert (39 *L. T. Rep.* 17; 3 *C. P. Div.* 389) *considered*

Alton *v.* The Midland Railway Company (19 *C. B. N. S.* 213) *distinguished.*

Decision of Wright, J. reversed.

THE plaintiff while entering a compartment of a railway carriage had his thumb crushed by a porter shutting the door of the carriage upon it. He accordingly brought an action in the High Court against the railway company for damages.

By his statement of claim the plaintiff alleged that he was a traveller for certain manufacturers; that on the 6th May 1894 he was a passenger on the defendants' railway, and was entering a compartment of a train at the defendants' station at Levenshulme, when a porter of the defendants negligently shut the door of the compartment upon and crushed the plaintiff's thumb; and that by the defendants' negligence the plaintiff suffered great pain, ahd was prevented from following his employment.

The plaintiff obtained a verdict for 20*l.* damages and judgment was entered in his favour for that amount and the costs of the action.

Upon the taxation of the plaintiff's costs the question arose whether this action was properly attributable to the defendants' breach of contract in not conveying the plaintiff safely to his destination, or to negligence apart from contract; in other words, whether the action ought to be regarded as "founded on tort" or "founded on on contract," within the meaning of sect. 116 of the County Courts Act 1888.

The master considered himself bound, by a decision of Wright, J. at chambers upon a similar point in 1891, to hold that the action was founded on contract, and he therefore only allowed the plaintiff costs on the County Court scale.

The matter then came before Wright, J. at chambers, who adhered to his previous decision and referred the matter to the Court of Appeal.

The appeal now came on to be heard.

Morton Smith for the appellant.—By sect. 116 of the County Courts Act 1888, with respect to any action brought in the High Court which could have been commenced in a County Court, if the action is founded on contract and the plaintiff recovers a sum of 20*l.* or upwards, but less than 50*l.*, he is only entitled to costs on the County Court scale; but this provision does not extend to actions founded on tort. In the present case the action was founded upon the tortious act of the railway company's servant, and arose independently of any contract. Consequently the appellant is entitled to his full costs, the verdict being for 20*l.*, and not merely to costs on the County Court scale. The exact point has never been previously raised before the Court of Appeal. But, in *Bryant* v. *Herbert* (39 L. T. Rep. 17; 3 C. P. Div. 389) the meaning of the phrases "action founded on contract" and "action founded on tort," in an earlier County Court Act, were discussed. The right which a passenger by railway has to be carried safely does not depend on his having made a contract, but on the fact of his being a passenger which casts a duty on the company to carry him safely:

Austin v. *The Great Western Railway Company*, 16 L. T. Rep. 320: L. Rep. 2 Q. B. 442: approving

Marshall v. *The York, Newcastle, and Berwick Railway Company*, 11 C. B. 655.

Where a railway company permits a passenger to travel by one of their trains they are bound to make proper provision for his safety, and are liable in damages if they fail to do so:

Foulkes v. *The Metropolitan District Railway Company*, 42 L. T. Rep. 345; 5 C. P. Div. 157.

C. A. Russell for the respondents.—I submit that the cause of action arose out of the contractual relation existing between the parties, as was decided by Wright, J. An action brought against a railway company as common carriers for damages for non-delivery of goods through the negligence of the defendants has been held to be an action founded on contract:

Fleming v. *The Manchester, Sheffield, and Lincolnshire Railway Company*, 39 L. T. Rep. 555: 4 Q. B. Div. 81.

That case was decided to be distinguishable from

Pontifex v. *The Midland Railway Company*, 37 L. T. Rep. 403; 3 Q. B. Div. 23.

In the case of *Tattan* v. *The Great Western Railway Company* (2 Ell. & Ell. 844) it was held that such an action was founded on tort; but that case was not approved by the Court of Appeal in *Fleming* v. *The Manchester, Sheffield, and Lincolnshire Railway Company* (*ubi sup.*). I say that this was an action founded on contract. It is quite immaterial whether the accident was caused by the negligence of the defendants' servant. The plaintiff had a contract with the defendants. [LINDLEY, L.J.—But is his cause of action founded on contract?] Yes. Practically this case is covered by

Alton v. *The Midland Railway Company*, 19 C. B. N. S. 213.

That case was decided in 1865, and has remained good law until the present day, and it was decided by a strong court; and that case establishes the proposition which I contend for here. [LINDLEY, L.J.—The line is very fine, and *Alton* v. *The Midland Railway Company* (*ubi sup.*) seems very much in your favour.] With the various decisions before them, the fact that the Legislature deliberately departed from the language used in previous statutes is very significant. As regards the case of *Austin* v. *The Great Western Railway Company* (*ubi sup.*) the company contracted to

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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carry safely, and the court based their judgment on that circumstance.

Morton Smith in reply.—*Marshall* v. *The York, Newcastle, and Berwick Railway Company* (*ubi sup.*) is the foundation of all the cases on this point. It was not disapproved of in *Alton's* case (*ubi sup.*), and it was cited in *Foulkes'* case (*ubi sup.*), which was long after *Alton's* case. But *Alton's* case was not cited in *Foulkes'* case. [LINDLEY, L.J.—It is odd that *Marshall's* case should be cited and not *Alton's* case. If your contention is right *Alton's* case cannot stand. It seems, however, very much in point, and I do not see how you can get over it.] The production of a ticket by a railway passenger merely shows that he is lawfully on the premises of the railway company. The mere fact of the plaintiff having a contract with the defendants does not deprive him of his right of action in tort. He has a cause of action whether he has a contract or not. Therefore it does not depend on contract, and cannot be said to be founded on contract.

Cur. adv. vult.

Nov. 9.—The following written judgments were delivered:—

LINDLEY, L.J.—This is an action brought in the High Court by the plaintiff, who was a passenger by the defendant company's railway. The action was brought to recover damages for an injury, that injury having been sustained by the negligence of the defendants' servant in slamming the door and jamming the plaintiff's hand. The plaintiff recovered a verdict for 20*l.*; and now comes the question about costs—whether he is entitled to his full costs or not. That depends upon sect. 116 of the County Courts Act 1888. That section runs thus: "With respect to any action brought in the High Court which could have been commenced in a County Court the following provisions shall apply: (1) If in an action founded on contract the plaintiff shall recover a sum less than 20*l.* he shall not be entitled to any costs of the action, and if he shall recover a sum of 20*l.* or upwards but less than 50*l.*, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a County Court." Then comes this: "(2) If in an action founded on tort the plaintiff shall recover a sum less than 10*l.* he shall not be entitled to any costs of the action; and if he shall recover a sum of 10*l.* or upwards, but less than 20*l.*, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a County Court. . . ." Now, if this action falls within the first clause, if it ought to be regarded as an action founded on contract, then the plaintiff can only get County Court costs. If, on the other hand, the action falls within the second clause, that is to say, if it is an action founded on tort, then there would be nothing to qualify the plaintiff's right, he would get his full costs. We are driven, therefore, to consider whether, adopting the language of the Act, this action brought by the plaintiff is an action founded on contract or an action founded on tort. The language of the Act is a little peculiar. I need not go into the history of it; I merely observe that the classification which is made by the Legislature is confined to actions brought in the High Court which might have been commenced in the County Court, and those two subdivisions exhaust the whole of that class of actions, and each excludes the other. That gives rise to the difficulty here. We no longer have to consider forms of actions. We are, however, compelled by the Legislature to put every action which can be brought in the County Court, but is brought in the High Court, into one or the other of those two categories. Every one who has studied the English law will know perfectly well that there is debateable ground between torts and contracts. There are what are called *quasi*-contracts and *quasi*-torts; and it is sometimes not easy to say whether a cause is founded on contract or on tort. Very often you put it either way. But here we are compelled to draw the line hard and fast and put every one of the actions in one class or the other. I have looked into the authorities, but it is only necessary, as I propose to do, to refer to those cases which bear upon the true construction of this Act of Parliament. I do not think that anything would be gained now by going into the old learning about the forms of actions. We have to consider this Act of Parliament, and the only cases which are of any importance and assistance, as enabling us to construe the Act, are those cases which have been decided upon it or upon the similar Acts which this Act has replaced. First and foremost there is the case of *Bryant* v. *Herbert* (39 L. T. Rep. 17; 3 C. P. Div. 389); secondly, there is the case decided in the same year of *Pontifex* v. *The Midland Railway Company* (37 L. T. Rep. 403; 3 Q. B. Div. 23); and then in the next year there was the case of *Fleming* v. *The Manchester, Sheffield, and Lincolnshire Railway Company* (39 L. T. Rep. 555; 4 Q. B. Div. 81). Having studied those cases with care (I do not think it necessary to go into them) it appears to me that this is an action founded on tort; and the conclusion to which I have arrived is based upon these reasons: That which caused the injury was not an act of omission; it was not a mere nonfeasance. It was not merely the not taking such care of the plaintiff as by the contract the defendants were bound to take; but it was an act of misfeasance—it was positive negligence in jamming his hand. Contract or no contract, he could maintain an action for that. All he would have to prove would be that he was lawfully on the premises of the railway company, and the contract is merely a part of the history of the case. I do not think it would be possible without running contrary to the reasoning of the Court of Appeal in the case of *Bryant* v. *Herbert* (*ubi sup.*), which reversed the decision of Denman, J. and myself in the same case, to hold that within the meaning of the County Courts Act 1888 this is an action founded on contract as distinguished from tort. The case to which Mr. Russell referred of *Alton* v. *The Midland Railway Company* (19 C.B. N. S. 213) at first appears to present some difficulty; but, in the first place, that case was not like this, and in the next place, it has been criticised and commented upon somewhat adversely; I do not say it has been overruled—that is quite another matter. But it is not a case on the construction of this Act of Parliament, and therefore I prefer to base my decision on what I consider to be the true construction of the Act of Parliament in this case. Therefore I come to the conclusion that this appeal ought to be

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allowed; and the plaintiff will have his costs here and below.

SMITH, L.J.—The question is, whether, when a passenger contracts with a railway company (*i.e.*, takes a ticket) entitling him to be carried upon a given journey, and he is injured thereon by a misfeasance for which the company is liable, and he brings an action therefor in the High Court of Justice, such action is founded upon contract or founded upon tort within the meaning of sect. 116 of the County Courts Act of 1888 (51 & 52 Vict. c. 43), for by that section different consequences arise as to costs if the action is founded upon contract or if founded upon tort. It has been held by this court that, in considering a matter of costs under sections similar to the present, the substance of the action and not its form is to be looked at, and it should be ascertained whether the real substantial complaint is for breach of contract or for a tort: (see *Bryant* v. *Herbert*, 39 L. T. Rep. 17; 3 C. P. Div. 389.) It is not disputed that, as a matter of pleading, a plaintiff for a cause of action such as the present may declare in either contract or tort, but this is not the governing consideration. It is clear that a person lawfully upon railway premises may maintain an action against a railway company for injuries sustained whilst there by reason of the active negligence of the company's servants, whether he has a contract with the company or not: (*Marshall* v. *The York, Newcastle, and Berwick Railway*, 11 C. B. 655; *Austin* v. *The Great Western Railway Company*, 16 L. T. Rep. 320; L. Rep. 2 Q. B. 442; and *Foulkes* v. *The Metropolitan Railway Company*, 42 L. T. Rep. 345; 5 C. P. Div. 157.) And he need not allege or prove any contract at all; he need only allege and prove that he was lawfully where he was, and was then injured by the active negligence of the company's servants; for this is sufficient to show a breach of that duty on the part of the defendants which is implied by law. It is equally clear that in such an action, whether the plaintiff sets up a contract or not, to succeed he must prove active negligence, *i.e.*, a misfeasance of the company's servants, and that in the proof of this negligence he will undoubtedly fail. The fact that the plaintiff happens to have a contract, *i.e.*, a ticket, is of use in such an action it is true, for the purpose of showing that the plaintiff was lawfully where he was when he sustained the injury. But proof of this fact can be given *aliunde*, and proof of a contract is by no means vital to success. Bramwell, L.J., in *Bryant* v. *Herbert* (*ubi sup.*) says—and in this I agree—that the foundation of an action are those facts which it is necessary to state and prove to maintain it, and no others. On the other hand, if the action be brought against a common carrier for non-delivery of goods, that is founded upon contract, as was held by this court in *Fleming* v. *The Manchester, Sheffield, and Lincolnshire Railway Company* (39 L. T. Rep. 555; 4 Q. B. Div. 81), and negligence need not be averred and proved. So also if brought for a nonfeasance, for then the plaintiff cannot succeed until proof of a contract and its breach. The case of *Alton* v. *The Midland Railway Company* (19 C. B. N. S. 213, 237), so much relied upon by the respondents, was decided upon demurrer to a declaration in which it was expressly averred that the rights of the servant for whose injuries the master was therein suing the company were founded upon contract, and this was taken as the premiss upon which the case had to be decided, and it was then held that the master could not sue for injury to his servant caused by breach of a contract entered into between the servant and the company. No question was or could be raised as to what would have been the result if the servant's remedy against the company had been founded upon tort, for the case as before stated was decided upon demurrer to a declaration which expressly averred that the servant's rights against the company were founded upon contract. This case, when looked into, is not the authority which it was supposed to be, and in no way decides that an action brought for personal injury against a company by a passenger who has taken a ticket is necessarily an action founded upon contract and not upon tort. The judgments of Bramwell and Brett, L.JJ., in the beforementioned case of *Bryant* v. *Herbert*, are very pertinent to this case, and having considered them and the other cases cited therein, and especially *Pontifex* v. *The Midland Railway Company* (37 L. T. Rep. 403; 3 Q. B. Div. 23), and for the reasons above, I hold that an action against a railway company for personal injuries by reason of the active neglect of the company's servant, even though the plaintiff has taken a ticket, is an action founded upon tort and not upon contract within the 116th section of the County Courts Act 1888. I may add that, having consulted the senior master of the Common Law Division, I find that this judgment is in accord with the mode of taxation hitherto adopted in the division. For the reasons above this application of the defendant company, referred as it has been by Wright, J. from chambers, must be refused with costs here and at chambers.

Appeal allowed.

Solicitors for the appellant, *Indermaur* and *Brown*, agents for *Gardner* and *Son*, Manchester.

Solicitors for the respondents, *Cunliffes* and *Davenport*, agents for *Lingards*, Manchester.

Monday, Nov. 12.

(Before the LORD CHANCELLOR (Herschell), LINDLEY and SMITH, L.JJ.)

PLEDGE *v.* CARR. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Mortgage — Consolidation — Several properties mortgaged by one mortgagor to different mortgagees—All the equities of redemption subsequently conveyed to one assignee — All the mortgages ultimately united by transfer in one person.

The owner of several properties mortgaged them to different mortgagees for distinct sums. The mortgagor afterwards, in 1868, *mortgaged all the properties by one deed to one mortgagee, the plaintiff's predecessor in title, subject, as to the different properties affected, to the prior mortgages thereon, some of which at that time still remained vested in different mortgagees. In* 1885 *the mortgage of* 1868 *was transferred to the plaintiff. All the prior mortgages were ultimately transferred to, or became vested in, the defen-*

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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dants before the plaintiff brought this action for redemption of some of the properties included in the mortgage of 1868 *without the rest. The defendants claimed to consolidate all the prior mortgages as against the plaintiff. It was decided by Romer, J.* (70 *L. T. Rep.* 586; (1894) 2 *Ch.* 328), *on the authority of* Vint *v.* Padget (1 *Giff.* 446; *on app.* 2 *De G. & J.* 611), *that, if an owner of two properties mortgages one to A. and the other to B., and then A.'s mortgage is transferred to B., or both are transferred to C., the owner cannot after that redeem B. in the one case or C. in the other, or one of his securities without the other, and that the right to consolidate was enforceable, as a rule, not only against the original mortgagor, but against his assignee of the equity of redemption; and that, applying these principles to the present case, if the original mortgagor had come to redeem the defendants after all the mortgages had become vested in them, he could not have redeemed one of their securities without redeeming the others; and the plaintiff, being his assignee by one deed of all the properties, subject to the defendants' mortgages, was in no better position.*

The plaintiff appealed.

Held (affirming the decision of Romer, J.), that the case was governed by Vint *v.* Padget (ubi sup.), *which this court could not overrule; and that therefore the appeal must be dismissed with costs.*

APPEAL by the plaintiff from a decision of Romer, J. (70 L. T. Rep. 586; (1894) 2 Ch. 328).

Bramwell Davis for the appellant.—This case was decided by Romer, J. on the authority of *Vint* v. *Padget* (*ubi sup.*). The question is whether *Vint* v. *Padget* is good law. I cannot distinguish it from the present case, and it governs the present case. [He was stopped by the Court.]

Edwin Ward, for the respondents, was not called upon to argue.

The LORD CHANCELLOR (Herschell).—I do not think that we can overrule *Vint* v. *Padget* (*ubi sup.*) it being a decision of a court of co-ordinate jurisdiction; and, as it governs the present case, the appeal must be dismissed with costs.

LINDLEY and SMITH, L.JJ. concurred.

Appeal dismissed.

Solicitors for the appellant, *A. R.* and *H. Steele*, agents for *J. Minter*, Folkestone.

Solicitors for the respondents, *Talbot* and *Tasker*.

Nov. 7, 8, *and* 12.

(Before the LORD CHANCELLOR (Herschell), LINDLEY and SMITH, L.JJ.)

RHODES *v.* MOULES. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Solicitor and client—Mortgage—Collateral security—Deposit of share warrants payable to bearer—Fraud of solicitors' partner—Liability of firm—Scope of business—Partnership Act 1890 (53 & 54 *Vict. c.* 39), *ss.* 11 *and* 12.

The plaintiff, who was a client of the firm of H., M., and R., consulted R. as to obtaining a loan on the security of certain freehold property. The transaction was carried out entirely by R., and in Aug. 1891 *the loan was obtained upon a mortgage of the property to two trustees who were also clients of the firm. Upon R.'s representations that the mortgagees required additional security, the plaintiff handed to R. share warrants of a mining company payable to bearer. In* 1893 *R. absconded, having misappropriated the share warrants. The plaintiff then brought an action against the mortgagees, and also against H. and M. As against the mortgagees the plaintiff claimed redemption of the property comprised in the mortgage and of the share warrants; and, as against H. and M., a declaration that their late firm of H., M., and R., acting as solicitors for the plaintiff, obtained the share warrants from him upon an untrue representation that they were required by way of collateral security for the mortgage debt, and that the firm were guilty of a breach of duty to the plaintiff in regard to the share warrants, and that the defendants H. and M. were jointly liable with R., and also severally liable, to make good to the plaintiff the loss sustained.*

It was proved that none of the defendants had any knowledge of the circumstances under which R. obtained possession of the share warrants. On the other hand, it was proved that the plaintiff had always dealt with R. as a member of the firm; that on two previous occasions the firm, through R., had received the same share warrants from the plaintiff in order to obtain loans thereon for him; and that the firm were in the habit of receiving and holding for clients securities payable to bearer.

Kekewich, J. decided, on the authority of Cleather *v.* Twisden (52 *L. T. Rep.* 330; 28 *Ch. Div.* 340), *that none of the defendants were liable. On appeal:*

Held (affirming the decision of Kekewich, J.), that the defendants, the mortgagees, were not liable; but (reversing the decision of Kekewich, J.) that R. was acting within the scope of his apparent authority in receiving and holding the share warrants for the purpose of the loan; and that consequently the defendants H. and M. were jointly and severally liable to make good his defalcations, i.e., the actual sum produced by the sale of the share warrants together with interest thereon.

Cleather *v.* Twisden (*ubi sup.*) *explained and distinguished.*

APPEAL by the plaintiff from a decision of Kekewich, J.

The facts of the case sufficiently appear from the head-note and the judgment of the Lord Chancellor.

Warmington, Q.C. and *Dibdin* for the appellant.—As regards the defendants Moules, theyare liable for the shares, for Rew obtained the shares for these defendants with their knowledge and with their authority, and the receipt of them by Rew was a receipt on their behalf. He held them on their behalf, and as forming part of the mortgage security. Kekewich, J. treated the case as if the freehold property was their only security, but in that we submit that he was wrong. As regards the defendants Hughes and Masterman, Kekewich, J. based his judgment upon the decision of the Court of Appeal in *Cleather* v. *Twisden* (52 L. T. Rep. 330; 28 Ch. Div. 340, 350), and particularly upon the observations of Bowen, L.J., where he

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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states the limits of the necessary inquiry: "We must inquire," he says, "first whether they," that is the other partners, "gave him," the defaulting partner, "express authority to take charge of the bonds; secondly, if not, whether they ratified what he did; and thirdly, if they neither expressly authorised nor ratified his acts, whether they consented that he should have general authority to act without their knowing what he did." There are three questions arising here: First, were the defendants' firm acting as the plaintiff's solicitors? That is answered in the affirmative by the finding of Kekewich, J. Second, did the shares come into Rew's hands? That is admitted as a fact. Third, did the shares come into Rew's hands as a partner in the firm of solicitors acting for the plaintiff in the ordinary course of the solicitors' business? We submit that it was the course of business of the defendants' firm to take care of the shares, and that therefore they came into their custody in the course of business. *Cleather* v. *Twisden* (*ubi sup.*) consequently does not cover the present case, and Kekewich, J. decided wrongly in regarding it as governing this case. [The LORD CHANCELLOR.—It was found as a fact by the Court of Appeal in *Cleather* v. *Twisden* (*ubi sup.*) that Parker was never treated by the plaintiff as a member of the defendants' firm. If a solicitor in partnership is dealt with not as a member of the firm he does not render the other partners liable.]

Marten, Q.C. and *Boome* for the respondents Moules.—There was no authority given by these defendants to Rew to include the shares in the mortgage, and he never did, in fact, hold the shares for these defendants as part of the mortgage transaction. They never ratified his acts, and they therefore disclaim all interest in the shares. They were unaware of the existence of the shares until Rew absconded.

Sir *Richard Webster*, Q.C., *Renshaw*, Q.C., and *S. Dickinson* for the respondents Hughes and Masterman.—These defendants knew nothing of the existence of the shares until after Rew had absconded, and they therefore cannot be bound by the transaction or incur any liability in respect of it. The shares never got into the possession of the firm, inasmuch as it was beyond the scope of Rew's authority as solicitor to take the shares as he did. It is not part of the general authority given by one solicitor to another, and as the other partners did not know of the transaction they cannot be said to have given special authority; nor did they ever ratify what Rew had done. [The LORD CHANCELLOR.—The question is, whether it can be said to be outside the scope of Rew's authority to take the shares as collateral security for a mortgage that he was negotiating on behalf of both parties.] If *Cleather* v. *Twisden* (*ubi sup.*) is a binding authority, it is not part of the business of a solicitor to take bonds payable to bearer for safe custody without the authority of his partners apart from special circumstances, and when one partner does so without the other partners being aware of it, they are under no liability for the loss of the securities. Can it be said to be the practice of solicitors to allow one of their number to take bonds to bearer and to hold the same for an indefinite time and to render the copartners responsible for the loss if the bonds are made away with?

Dibdin in reply.—The other side say that a solicitor for a mortgagee cannot receive securities to bearer and so bind his firm on account of the ease with which they may be converted. That cannot be the law, because the solicitor acting for a mortgagor may receive money in cash and bind his firm. Then with reference to the defence of the mortgagees, the Moules, they could not take payment off of part of the security, but only of the whole. They could not call upon the plaintiff to repay the sum lent without giving up to him the shares as well as reconveying the mortgaged freehold property.

Cur. adv. vult.

Nov. 12.—The following judgments were delivered:—

The LORD CHANCELLOR (Herschell).—This is one of those painful cases in which, whatever judgment is pronounced, the loss must fall upon some innocent person who has not by act or default contributed to it. The litigation in this case has arisen out of the frauds of Mr. Rew, who practised his profession as a solicitor in partnership with Messrs. Hughes and Masterman in the city of London. There is no doubt that 280 De Beers shares were placed in his hands by Mr. William Rhodes, the plaintiff, in Aug. 1891. Those shares he has fraudulently misappropriated; and the first question is, whether his partners, Messrs. Hughes and Masterman, are liable to make good the loss to the plaintiff. Before stating the circumstances under which the shares were received by Mr. Rew, it is necessary to revert to some prior transactions between the plaintiff and Mr. Rew, acting on behalf of the firm. It is clear that Mr. Rhodes was a client of the firm, and that the firm had acted for him in previous matters. In the month of Sept. 1889 Mr. Rhodes was desirous of raising a loan of 4000*l.*, and he communicated with Mr. Rew on the subject. Ultimately it was arranged by Mr. Rew that an advance should be made by a firm of stockbrokers named Haes and Co., and 280 De Beers shares, payable to bearer, and forty-five subscribed shares, were transmitted by or on behalf of Mr. Rhodes to Mr. Rew, and by him placed in the hands of Messrs. Haes and Co., who made the advance. That loan was paid off in the month of Nov. 1890, and on the 29th Oct. in that year Mr. Rew wrote to the plaintiff a letter in which he said: "I send you statement of account which shows the balance of 292*l.* 9*s.* 4*d.* in favour of my firm. The matter, you will see, commenced about a year ago, and I have brought everything up to date." That account was an account showing payments made by the firm on behalf of the plaintiff, and cash received by the firm on behalf of the plaintiff. The balance brought down was the sum mentioned in the letter. One item of that account was in these terms: "Our account as to negotiating and procuring loan, including making payments of interest from the 5th Nov. 1889 to date. 32*l.* 10*s.*" On the 10th Nov. that account was settled by payment to the firm, no doubt through the hands of Mr. Rew, and the receipt was given signed by Mr. Rew. thus: "Hughes, Masterman, and Rew." That is an account with the firm which passed through the books of the firm, and in every respect bore the character of a transaction of the firm, and the firm received payment for the work done in negotiating that loan. On the 29th Nov. Mr. Rew received back from Messrs.

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Haes and Co. the shares given as security, the loan having been repaid, and gave to Messrs. Haes and Co. a receipt for the 280 De Beer shares to bearer, and the forty-five transfers, signed "Hughes, Masterman, and Rew, solicitors for Mr. William Rhodes." The shares were then received by Mr. Rew, and he wrote on the 22nd Dec. 1890 to the plaintiff a letter, in which he said: "The De Beers shares which were with Messrs. Haes are now in our strong room, and at your disposal. These might be utilised in case you wanted a temporary loan at short notice." In the month of January following, Mr. Rhodes wanting a loan, 1000*l.* was raised again on the deposit of these shares with Messrs. Haes and Co., and the shares remained for some time in their possession. At this time Mr. Rhodes was desirous of obtaining a loan of a more permanent character, the transactions with Messrs. Haes and Co. being of a nature, I believe, of a loan from fortnight to fortnight. Accordingly he was in correspondence with Mr. Rew with reference to a mortgage of property of his called the Flore Fields property; and Mr. Rew intimated that he had a client with whom he thought that mortgage might be negotiated. Those negotiations proceeded, and the defendants, the Moules, agreed to advance 6000*l.* on a mortgage of the Flore Fields estate, a transaction which was completed in Aug. 1891. Mr. Rew had written to Mr. Rhodes, stating that, owing to a charge of an annuity upon the property, there was some difficulty as to the sufficiency of the security, but that he thought that his clients would be content to take it if they got, as collateral security, the De Beers shares, or some of them. Mr. Rhodes said that he was quite willing that the De Beers shares should be given to the mortgagees as collateral security. He came to London on the 28th Aug. 1891 to complete the transaction. He found that the De Beers shares were still in the hands of Messrs. Haes and Co., although the 1000*l.* had been repaid, and he obtained from Mr. Rew a letter to Messrs. Haes and Co. in these terms: "The bearer of this letter is Mr. William Rhodes, who will be glad to have the De Beers shares, so that he may collect the dividend. Will you kindly give them to him, and oblige." Indorsed on that is a receipt by Mr. Rhodes for the De Beers shares. Having received the De Beers shares from Messrs. Haes and Co., Mr. Rhodes handed them to Mr. Rew, and on that same day I think the mortgage was executed to the Moules. The statement made by Mr. Rhodes as to the circumstances under which he left the shares with Mr. Rew is as follows: "Mr. Rew said that his clients were prepared to accept the shares as collateral security, that they were to be deposited with the firm, and that they would have custody of them, provided that interest was not forthcoming from the Flore Fields property." Some criticisms were presented to the court on the evidence of Mr. Rhodes, and the learned judge in the court below has adverted to some inconsistencies in his evidence. I have read his evidence, and there seem to be no inconsistencies in it which are at all material. I think it cannot be doubted that Mr. Rew had represented to Mr. Rhodes that the lenders required some security beyond the mortgage of the freehold property, that that security was to be collateral and to consist of these De Beers shares, and that he induced Mr. Rhodes to leave the De Beers shares with him on the representation that he would arrange with the lenders that he should hold the shares for them as collateral security for their loan. Whatever verbal differences there may be I think there can be no doubt that this is the substance of the transaction, in view not merely of Mr. Rhodes' statements, but of the letters to which I have referred written previously by Mr. Rew to Mr. Rhodes. There is one other fact I shall mention —and it is the only one which I think I need add —namely, that the coupons attached to the shares were collected, in some cases at all events, by the firm by means of their clerks from the De Beers Company, and that on the 11th Nov. 1892 a letter was written to the plaintiff signed in the name of the firm, in these terms: "We have paid to the credit of your account at Lloyd's Bank Limited, Fleet-street, 245*l.* 12*s.* 6*d.* De Beers coupons 170*l.* 12*s.* 6*d.*," and that was signed by one of the clerks of the firm whose business it was to attend to the securities. The question is, whether under these circumstances the firm are liable in respect of these shares which have been misappropriated in the manner I have mentioned. It is said that the firm are not, inasmuch as it was beyond the scope of Mr. Rew's authority as a solicitor to take the shares for any such purpose, or under such circumstances; and that, inasmuch as his partners were admittedly ignorant of his having so taken them, they cannot be bound by the transaction or incur any liability in respect of it. It is clear that on previous occasions the firm had acted for Mr. Rhodes in negotiating loans and in receiving from him these very securities and transmitting them to the lenders, and in the first instance certainly receiving them back from the lenders. That that was a firm transaction I think it is impossible to dispute, because, as I have shown, it passed through the books of the firm, the firm credited themselves with the charges in respect of it, and an account was sent in in the name of the firm, and that account was discharged by Mr. Rhodes. Therefore it is impossible to dispute that Mr. Rhodes had on the previous occasion actually carried through a transaction with the firm, and as a part of the transaction they not only negotiated the loan, but received from him these very securities to be handed to the lender. Even apart from that circumstance, I am not prepared to say that it would be outside the scope of the business of solicitors, when they were negotiating a loan for one of their clients, to receive from him securities, whatever their nature, for the purpose of transmission to any of their clients who were making the loan. But it is not necessary to decide that as a matter of law. All I say is, that I am not satisfied. But in the present case, having regard to the prior dealings of this gentleman (Mr. Rhodes) with the firm, I think it is impossible for them to say that Mr. Rhodes was not perfectly justified in assuming that the partner with whom on this occasion he dealt had authority to receive from him the shares which he handed to him for the purpose of carrying out the mortgage transaction which they were negotiating for him. If these shares had been handed over to the lenders the transaction would be on all-fours with the one which had been previously carried through by Mr. Rew on behalf of the firm. In the present case it is true that the shares were not handed over to the lenders, but Mr. Rew represented to the plaintiffs that this was by arrange-

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ment between him and the lenders, who were also clients of the firm, and who had arranged that Mr. Rew, or rather that the firm, should hold the securities on behalf of the lenders instead of handing the securities over to them. It seems to me that that can make no possible difference in the result, for that was merely a matter between Mr. Rew or the firm, and their other clients for whom Mr. Rew had negotiated the loan. If in fact that authority had been received—a question which I shall have to deal with presently—it seems to me that it would be quite immaterial whether the transaction was carried out in that way or by Mr. Rew receiving the shares afterwards to hand them over to his clients, the lenders. For these reasons, apart from authority, I find it difficult to discover any ground upon which it could be stated that Mr. Rhodes was not justified in treating, and entitled to treat, the transaction as a transaction with the firm, which rendered not Mr. Rew only, but the firm, responsible if the shares received under the circumstances I have detailed were misappropriated and not forthcoming. This, of course, is subject to the question whether the firm had discharged themselves by showing that the shares were held for the defendants Moules under such circumstances that Moules are liable to the plaintiff, in which case, of course, the defendants Messrs. Hughes and Masterman would be discharged from liability, because they would, in fact, have handed the shares over to the lenders, and be freed from the responsibility to Mr. Rhodes, Moules being the persons responsible. But that is a subsequent part of the case which I will deal with presently. The defendants Messrs. Hughes and Masterman relied mainly upon the case of *Cleather* v. *Twisden* (*ubi sup.*), decided in this court in the year 1884. It was said that that case established that it was not part of the business of solicitors to take over for custody bonds payable to bearer, and consequently when one partner had done so without his other partners being aware of it, they were under no liability if he misappropriated them. I do not think that case covers the present case. In the view which I take these bonds were not handed to Mr. Rew merely for safe custody; they were handed to him in connection with a mortgage transaction which he was carrying out in order that they should pass, by being handed to him, to the lenders for whom he was acting, as collateral security. But it is to be observed that, in the case of *Cleather* v. *Twisden* (*ubi sup.*), Bowen, L.J. said: "The claim is against the firm to which Parwer belonged in respect of the custody of certain bonds by Parker. This is conceded to be beyond the ordinary scope of the business of solicitors, though of course it may be brought within it by special circumstances." There was therefore there no evidence. It was conceded by those who were arguing the case that such a transaction was beyond the ordinary scope of the business of solicitors. It cannot be said, therefore, that in that case it was held as a matter of law to be so, because obviously when that had been conceded as a matter of fact, any finding as a matter of law would have been superfluous. So that I do not think that case can be taken as a decision in point of law that such a transaction would be beyond the scope of the solicitors' authority. As the Lord Justice said, it must depend upon the special circumstances, and certainly, if it were to appear that it had been part of the practice of solicitors in the city of London to take securities of this description for safe custody, or if, indeed, in the case of a particular firm, it appeared that such had been the practice, the case would have been one that would have required the consideration of the courts to determine whether in the case of that firm, at all events if not generally, it was not a matter within the scope of the authority of one of the partners. I should say substantially that that decision appears to me to have amounted to this, that Parker had really taken charge of these bonds for a client as a personal matter as between him and that client. He had acted as a solicitor, of course, still not as a member of the firm, but as an individual. That seems to have been the conclusion at which the court arrived, and there were undoubtedly circumstances which point to that conclusion to which it is not necessary to refer further. Bowen, L.J. says this: "That the bonds were in the custody of Parker is common ground. The real question is whether, in letters for which the firm are responsible, language has been used which would justify the plaintiffs in assuming that Parker's custody was the custody of the firm." I have a difficulty in seeing how in this case that point can be doubted. Letters for which the firm were responsible, letters relating to the previous transactions to which I have alluded, passed through the letter-book of the firm, and charges made by the firm were paid by the plaintiff. I have a difficulty in seeing how those circumstances could be used otherwise than to justify the plaintiff in assuming that, when Mr. Rew received those bonds, he received them not as an individual, but received them on behalf of the firm, and that his receipt of them was the receipt of the firm. In Fry, L.J.'s judgment, in *Cleather* v. *Twisden* (*ubi sup.*), he says this: "He was advising," that is Parker, "the trustees in the realisation of the property, and I do not doubt that, as to any parts such as the mortgages which were received by Parker for distribution, the firm would be responsible; but as to the bonds they were not received for the purpose of distribution, but for safe custody long before the distribution began." Therefore, if circumstances such as these had been brought before the court which decided *Cleather* v. *Twisden* (*ubi sup.*), and they had been aware of a previous transaction such as that which we are aware of here, and had seen that shares were received in connection with the mortgage transaction in the way I have described, I see no reason to think that they would have come to any other conclusion than that at which we have arrived. But then it is said on behalf of the plaintiff that the defendants Moules are responsible for these shares, and the receipt of them by Mr. Rew was a receipt on their behalf; that he held them on their behalf, and whatever the liability of the firm to the defendants Moules, they cannot call upon the plaintiff to repay the sum lent without not only reconveying to him the freehold property, but also giving up to him these De Beers shares. In order to establish this case I think they must make out two things: first, that Mr. Rew did in fact receive and hold these De Beers shares for the Moules; and next, that he did so with the authority of the Moules. Now I have not been

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satisfied that he did in fact receive them, or ever intended to receive them and hold them for the Moules. No doubt he led Mr. Rhodes to believe that he did; but that is quite a different question. The case is a very peculiar one. Mr. Rew, when he drew the mortgage from Mr. Rhodes to the Moules, made himself a mortgagee without any, not only authority to do so, but any legitimate reason for doing so. He was, of course, not a mortgagee. He had told Mr. Rhodes that the mortgagees would require some collateral security, and that he thought they would take the De Beers shares. He had no communication on the subject with the Moules at all; they never required further security. They never told him that they were not satisfied with the security of the freehold property, and he never communicated with them on the subject. He told Mr. Rhodes that it was by arrangement with them that the shares were to be left in the custody of the firm. No such arrangement had been made, and there was no communication again, as I have said, on the subject. We know that Mr. Rew had commenced the Stock Exchange transactions which ultimately led to his ruin at a date prior to this, namely, in the January of this year, and he ultimately did dispose of those shares as his own. Under those circumstances, in the absence of any evidence that Mr. Rew ever identified the shares as the Moules', put them in an envelope, wrote their name on them, or did anything to earmark them as the Moules', and in view of the falsehoods and irregularities to which I have referred, I cannot be satisfied that at the time he received those shares he ever meant to hold them really for the Moules. But, even if he did, is there evidence that he had authority to receive and hold these shares on behalf of the Moules, so as to make them liable? It was not suggested that he received any express authority, or that they ever heard anything of the transaction. But it is said that he had a general authority, that the whole of the business in connection with the estate in which they were interested was left so entirely to Mr. Rew, and that he was intended to be by them absolutely master of the situation, taking what he pleased, and doing what he pleased. Now, I have read the correspondence, and it conveys to my mind precisely the opposite impression. I do not find Mrs. Moules leaving everything to him in that blind way at all. She required to know about everything. He professed to tell her about everything. He asked her approval at every step, and that approval was conveyed, and doubts were sometimes suggested; and seeing that she never learned, and neither of the Moules ever learned, that these shares had been taken for them by Mr. Rew, or rather held for them by Mr. Rew or the firm, it seems to me that it would be somewhat extravagant to arrive at the conclusion, notwithstanding all that, that they were held by the firm or Mr. Rew for the Moules, or that having been in effect handed to them they had become responsible for them. For these reasons I am unable to come to the conclusion that the defendants the Moules are liable. I do not think that the defendant firm, who undoubtedly received these shares from Mr. Rhodes, have discharged themselves of liability. It follows in the result, I think, as regards the Moules, that the appeal should be dismissed with costs, and, as regards the other defendants, that the judgment must be reversed, with the usual result, and judgment should be for the plaintiff.

LINDLEY, L.J.—In this case the plaintiff seeks to make four defendants liable for the loss of certain share certificates transferable to bearer, and given to him by one Rew, and misappropriated by Rew. Rew is said to have obtained these share certificates from the plaintiff as agent for the defendants the two Moules, and as partner of the defendants Hughes and Masterman. It is sought to make all four defendants liable as Rew's principals; but, although the plaintiff relies on the law of agency in order to establish liability on the part of all the defendants, the plaintiff's case against Rew's clients, the two Moules, is so different from his case against Rew's partners that it is necessary to examine the two cases separately. I will first take the case made against Hughes and Masterman, who were Rew's partners. The law applicable to the case against them is thus stated in sect. 11 of the Partnership Act 1890: "In the following cases, (*a*) where one partner, acting within the scope of his apparent authority, receives the money or property of a third person and misapplies it; and (*b*) where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm, the firm is liable to make good the loss." Sect. 12 says: "Every partner is liable jointly with his copartners, and also severally, for everything for which the firm while he is a partner therein becomes liable under either of the two last preceding sections. Now, the facts bring this case within this enactment. Rew, Hughes, and Masterman were partners, and Rew certainly wasacting in his transactions with the plaintiff as a member of the firm. The plaintiff wanted to borrow money on some property in Northamptonshire, and he applied to Rew as a solicitor to assist him to effect the necessary mortgage. Some clients of the firm, viz., the two defendants Moules, were said to be willing to lend the money; but, the plaintiff's interest in the land being subject to an annuity, Rew said that the rents were not sufficient to cover the interest, and that the plaintiff's shares might be brought in as further security. Accordingly, on the 28th Aug. 1891, the plaintiff obtained the shares from his brokers, and lodged them with Rew. At the same time the plaintiff executed a mortgage of the land referred to, and left that also with Rew. So far the transaction was an ordinary business transaction, and such as solicitors are in the daily habit of conducting. It is every day's practice for a solicitor to act for both borrower and lender in a mortgage transaction, and to receive from the lender the money to be lent to the borrower in order to hand it to him; and to receive from the borrower the deeds and other securities on which the money is raised, and to keep those deeds and securities for the lender until he wants them, or until the loan is paid off. What Rew did was neither more nor less than to receive the plaintiff's share certificates as part of an ordinary business transaction of this description. It is said that the ordinary course of business does not extend to the receipt of securities payable to bearer. But there is no authority for this proposition, nor is there any evidence to show that this is so in fact. Moreover, there is evidence to show that this firm, at all events, received such

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securities for the plaintiff, if not also for other clients. The only conclusion at which I can arrive is that the plaintiff's certificates came into Rew's hands when acting within the scope of his apparent authority. The case is thus brought within the first half of sect. 11 of the Partnership Act 1890. But it is also, I think, brought within the second half. Certain letters and accounts and other evidence, coupled with the facts to which I have already alluded, justify the inference that the plaintiff's certificates were received by the firm in the ordinary course of its business. I should not hesitate to draw this inference myself. The case of *Cleather* v. *Twisden* (*ubi sup.*), on which the defendants so much relied, is clearly distinguishable from the present. The securities there were deposited for safe custody only. They did not come into the hands of the firm (or of any of its members) as part of a transaction which was being conducted by the firm (or any of its members) in the ordinary course of business. There was no business being conducted except the deposit itself. But in the very same case it was conceded that the firm was liable for money received by one of the partners for investment on mortgage and misapplied by him. I pass now to the case of the two Moules. It is contended that Rew obtained the plaintiff's share certificates for them, and with their authority, and that this receipt was their receipt, and that they are consequently liable for their value. It is abundantly plain that Rew purported to act for them in this matter. Kekewich, J. appears to have thought that the Moules could not have ratified what Rew did. I cannot agree with the learned judge on that point. In my opinion the Moules could have ratified Rew's acts and have held the certificates as part of their security, if they had been so minded. But they never did, and of course they disclaimed all interest in the certificates when they knew the facts. Rew's authority to act for them in this matter is not proved; and my own conclusion from the evidence is that he had no such authority. The Moules never knew anything about the shares until Rew absconded. They had agreed to lend their money on the plaintiff's Northamptonshire estates; and they authorised Rew to act for them in that matter. When he got the plaintiff's certificates no document was ever signed to show that they were part of the Moules' security. It is said that the Moules left everything to Rew; but "everything" is a large and vague word, No doubt they left him to manage everything incidental to carrying out the mortgage which they authorised. But they never left him free to accept as a security anything more than, or different from, the mortgage which they had approved. The agency in this case is not, in my opinion, established, and there having been no ratification there is no liability on the Moules' part. The appeal must therefore be dismissed with costs as against the Moules; but it must be allowed with costs, both here and below, as against Masterman and Hughes; and they must be declared jointly and severally liable for the value of the shares the certificates of which Rew misappropriated, and there must, if necessary be an inquiry as to such value, and Masterman and Hughes must be ordered to pay the costs of it.

SMITH, L.J.—It is unnecessary for me to recapitulate in detail the facts of this case, for those which are material have been fully dealt with by the Lord Chancellor and Lindley, L.J. But, as I am differing from part of a judgment of the learned judge in the court below, it is right that I should state the grounds upon which I arrive at the conclusion I do. The error which, in my opinion, Kekewich, J. fell into was, in assuming as he did that the case of *Cleather* v. *Twisden* (*ubi sup.*), upon its facts was the equivalent of the present; and that therefore the questions formulated by Bowen, L.J. in that case were those which were to rule in this case, and if answered in one way should settle this case in favour of the defendant solicitors. It is true that the present case and *Cleather's* case (*ubi sup.*) are similar in this, that in each bonds payable to bearer were deposited by the owner with one member of a firm of solicitors who afterwards misappropriated them. But when the facts of each case are ascertained it will be seen that, although there is this *primâ facie* likeness between the two cases, there are yet radical differences between them. In the first place, in the present case it was proved that at the time when the bonds, the subject of this action, were deposited with Rew, the delinquent partner, for the purposes of the loan, the plaintiff was a client of the defendant firm to the knowledge of the partners therein, and also, as found by Kekewich, J., that the plaintiff throughout the transactions relating to the procurement of the loan dealt with Rew as a member of the firm. No such facts were proved in *Cleather's* case (*ubi sup.*), but on the contrary it was contended by the defendant that the plaintiff in that case had dealt with Parker, the delinquent partner, only in the character of a private friend, and not as a member of the firm. In the next place, it is not conceded in the present case as it was in *Cleather's* case (*ubi sup.*), that it was not within the ordinary scope of the business of a solicitor to receive and hold bonds of a client payable to bearer. And it was proved in the present case that, upon two occasions prior to the occasion out of which this action arises, the firm through Rew had received from the plaintiff bonds payable to bearer, in order that they might obtain loans of money thereon on behalf of their client, the plaintiff, and had been paid for so doing by the plaintiff. The deposit of the bonds in the present case was made by the plaintiff with Rew for the purpose of procuring a loan which the firm through Rew had undertaken to procure if possible for the plaintiff, whereas in *Cleather's* case (*ubi sup.*) it was found by the court that the bonds were not deposited with Parker for the purposes of any business the firm was then transacting for the plaintiff, but were deposited with Parker for safe custody. Again, evidence in the present case was given that the defendant firm were in the habit of receiving from and holding for clients bonds payable to bearer as well as cash; whereas in *Cleather's* case (*ubi sup.*) it was shown that the defendants therein were not in the habit of so doing. The letters to the plaintiff, for which the defendant firm are responsible in my judgment, are such as to justify the plaintiff in concluding that Rew's custody of the bonds was that of the firm; whereas the letters in *Cleather's* case (*ubi sup.*) were held by the court not to do so. And lastly, in *Cleather's* case (*ubi sup.*) there were no dealings by the firm with the coupons of the bonds as in this case, and

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no accounts were sent to the plaintiff; whereas accounts were sent to the plaintiff by the firm in the present case. That these constitute radical differences between the two cases cannot be denied, and in my judgment *Cleather's* case (*ubi sup.*) (which the learned judges who decided it in this court declared to be a case upon the border line) by no means governs the present. Now, what have we in this case? We have it proved that the position of solicitor and client existed between the defendant firm and the plaintiff, in relation to the proposed loan of 6000*l.* to the plaintiff. Then on two previous occasions the defendant firm had also acted as his solicitors in obtaining loans of money for him. That upon all three occasions Rew, on behalf of the firm, had transacted the plaintiff's business. That upon all three occasions shares to bearer were deposited by the plaintiff with Rew to be utilised in obtaining the loans negotiated by the firm through Rew. That the plaintiff believed, and was well warranted in believing, from letters and accounts received by him, and for which the firm were responsible, that Rew was acting on behalf of the firm both in negotiating the loan and receiving and holding the bonds for that purpose. It is true that the partners did not know of the deposit of these bonds to bearer with Rew; but, in my judgment, this is immaterial if the firm were the solicitors of the plaintiff in negotiating the loan for the plaintiff, and Rew was acting upon the firm business within the scope of his authority when he negotiated the loan and received the bonds for that purpose. I cannot myself see what ground there is for holding upon the proved facts of this case that Rew was acting outside the scope of his apparent authority in the third transaction when he was acting within the scope of that authority in the two prior transactions, and for which the firm have sent in bills and been paid. In my judgment, these prior transactions, the proved fact that the defendant firm did receive and hold securities of their clients whether bonds payable to bearer or not, as also costs, the letters and accounts received by the plaintiff, all constitute evidence from which only one inference can be drawn, which is, that Rew was acting within the authority granted to him by his partners in negotiating the loan for the plaintiff, and in receiving and holding the bonds for that purpose, and it cannot be maintained that he was not. It is clear from the last passage in the judgment of Fry, L.J. in *Cleather's* case (*ubi sup.*) that the learned judge, even upon the facts proved in that case, was of opinion that, if the bonds had been deposited with Parker upon firm business, the firm would have been responsible, for he says: "I do not doubt that as to any parts such as the mortgages which were received by Parker for distribution"—*i.e.*, the firm business—"the firm would be responsible; but as to the bonds, they were not received for the purpose of distribution, but for safe custody long before the distribution began"—*i.e.*, not upon firm business. In my judgment upon the facts of this case, the innocent partners of Rew are liable to the plaintiff to make good Rew's defalcations as regards these bonds, and, consequently, that the appeal of the plaintiff as to the case of the defendant solicitors must be allowed and judgment entered for the plaintiff against them. As to the plaintiff's appeal against the Moules, I agree that it should be dismissed for the reasons given by the Lord Chancellor and Lindley, L.J., and that as to this the learned judge was correct in the judgment he arrived at.

Sir *Richard Webster*, Q.C.—It is necessary that there should be an inquiry, because the defendants Hughes and Masterman would only be liable to replace the loss actually sustained by the plaintiff. They might be able to replace the shares at a less price than they fetched when sold by Rew. [*Warmington*, Q.C.—That matter was settled at the trial before Kekewich, J. The proceeds of the sale were agreed at 5241*l.* 4*s.* 6*d.* The plaintiff is entitled to that sum *plus* interest. An inquiry will not be required.] The plaintiff might have elected to take one of two courses. He might have adopted the sale and made the defendants liable for the proceeds with interest, or he might have required them to put the shares back. [The LORD CHANCELLOR.—He is entitled to the value at the time of conversion. He claims the loss that he has sustained.] If the shares are given back he can sustain no loss. [The LORD CHANCELLOR.—The shares have not been given back, they have been sold. He is entitled to say, "You sold my shares for so much, give me the money."] This was a standing mortgage. The plaintiff could not have sold the shares without the consent of the defendants the Moules, because the shares were subject to the mortgage to the Moules. The gist of the plaintiff's claim is, that he could not have recovered the shares until he brought this action. If, when the writ was issued, it had been answered by handing over to the plaintiff the shares, that would have relieved the defendants Hughes and Masterman from all further liability. And if the shares could now be obtained and handed back to the plaintiff, that would relieve these defendants. They are entitled to make good these shares if they can.

The LORD CHANCELLOR.—The shares need not have remained with Mr. Rew, for this reason: If the true view is that Mr. Rew did not really arrange for them as part of Moules' security, he has all this time been improperly keeping them by a deception from the plaintiff. All the plaintiff says is, "You have sold my shares; my shares have realised so much, and I ask you for the money."

LINDLEY, L.J.—I think that that is the law, I confess.

SMITH, L.J.—Yes, I agree. *Order varied.*

Solicitors for the appellant, *Bridges, Sawtell, Heywood, Ram*, and *Dibdin*.

Solicitors for the respondents, *Hempson* and *Elgar*; *Janson, Cobb, Pearson*, and *Co.*

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HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

May 24 and Oct. 25.

(Before STIRLING, J.)

Ex parte VICAR OF CASTLE BYTHAM AND *Ex parte* MIDLAND RAILWAY COMPANY. (a)

Settled land—Glebe lands—Inclosure Act—Award to vicar "and his successors"—Settlement—Land taken by railway company under compulsory powers—Payment into court of purchase-money—Improvements—Terminable rentcharge—Redemption—Capital moneys—Lands Clauses Consolidation Act 1845, *s.* 69—*Settled Land Act* 1882, *ss.* 2, 21, 32—*Settled Lands Acts Amendment Act* 1887 (50 *&* 51 *Vict. c.* 30), *ss.* 1, 2.

An award under an Inclosure Act to a vicar "and his successors" does not constitute a settlement within the meaning of sect. 2 *of the Settled Land Act* 1882.

The proceeds of the sale of glebe lands, taken by a railway company under its compulsory powers, and paid into court under sect. 69 *of the Lands Clauses Consolidation Act* 1845, *may be dealt with under sect.* 32 *of the Settled Land Act* 1882, *as "money liable to be laid out in the purchase of land to be made subject to a settlement."*

Re Byron's Charity (48 *L. T. Rep.* 515; 23 *Ch. Div.* 171), Ex parte Jesus College, Cambridge (50 *L. T. Rep.* 583; *W. N.* 1884, *p.* 37), and Re Bethlehem and Bridewell Hospitals (53 *L. T. Rep.* 558; 30 *Ch. Div.* 541) *followed.*

ADJOURNED SUMMONS.

Under an award dated the 18th Sept. 1807, and made in pursuance of an Inclosure Act (43 Geo. 3, c. lxxxiii.), the commissioners under the Act allotted and awarded unto the then vicar "and his successors, vicars of Castle Bytham," certain plots of land, which from that time were treated and enjoyed as part of the glebe lands of the vicarage.

The living was in the patronage of the Bishop and the Dean and Chapter of Lincoln alternately. In 1878 the present vicar found it necessary, in order to let the glebe lands to an advantage, to erect certain farm buildings and do certain repairs upon the lands, and for that purpose, and with the consent of the patrons and the Inclosure Commissioners, he borrowed 650*l.* from the Land, Loan, and Enfranchisement Company, on a terminable charge upon the glebe lands, to be repaid, in accordance with a condition imposed by the then patrons, by half-yearly payments during a period of twenty-five years. In 1879 and 1884 he borrowed further sums in the same way. All these sums were laid out in permanent improvements (all of which were improvements within the meaning of the Settled Land Acts), and very materially increased the letting value of the glebe lands.

The endowment of the vicarage consisted of about 360 acres of glebe, which, in the year 1880, were let at 285*l.* per annum. Deducting the land taken by the railway company, the remaining lands, owing to agricultural depression, now only produced 203*l.* per annum, and the total net income from the benefice from all sources (exclusive of the interest on the money in court) did not now exceed 190*l.*, out of which the vicar had to pay 75*l.* per annum to the Land, Loan, and Enfranchisement Company, leaving a net income not exceeding 115*l.*

This was a summons taken out by the vicar, asking that out of a sum of 1786*l.*, which had been paid into court by the Midland Railway Company, under sect. 69 of the Lands Clauses Consolidation Act 1845, as the purchase money of a portion of the glebe land comprised in the award taken by the company under its compulsory powers, a sum of 709*l.* might be applied in the redemption of these rentcharges.

Yate Lee for the summons.—The Inclosure Act and award constituted a settlement of the glebe lands within the meaning of sect. 2 of the Settled Land Act 1882. That being so, sect. 32 of that Act applies, and the moneys paid into court under sect. 69 of the Lands Clauses Consolidation Act 1845 may be invested or applied as capital moneys arising under the Act of 1882. That Act has been held to apply in the case of the purchase moneys paid into court in respect of land belonging to charities:

Re Byron's Charity, 48 L. T. Rep. 515; 23 Ch. Div. 171;
Re Bethlehem and Bridewell Hospitals, 53 L. T. Rep. 558; 30 Ch. Div. 541;
Ex parte Jesus College, Cambridge, 50 L. T. Rep. 583; W. N. 1884, p. 37.

Formerly, no doubt, terminable rentcharges were not within sect. 21 (ii.) of the Act of 1882:

Re Knatchbull's Settled Estate, 51 L. T. Rep. 695; 29 Ch. Div. 588.

But they are now specifically included by sects. 1 and 2 of the Settled Lands Acts (Amendment) Act 1887. *Ex parte Rector of Kirksmeaton; Re Hull Railway and Dock Act* (20 Ch. Div. 203) was decided before the passing of the Acts of 1882 and 1887. [STIRLING, J.—According to the decision in *Re Smith; Ex parte London and North-Western Railway Company and Midland Railway Company* (60 L. T. Rep. 77; 40 Ch. Div. 386), such rights as arise under sect. 32 of the Settled Land Act 1882 are dependent upon the discretion of the court.] That is no doubt so. The Act of 1887 shows the adoption by the Legislature of the principle that, where a terminable rentcharge is created by a person having only a limited interest, capital moneys may be applied in payment off of such charge. Many of the improvements authorised by sect. 25 of the Settled Land Act 1882 are merely temporary. The improvements here are all within sect. 9 of the Improvement of Land Act 1864, which is expressly extended by sect. 30 of the Settled Land Act 1882.

Wace for the patrons.—The patrons oppose the present application on two grounds: (1) that the court has no jurisdiction to grant it; and (2), if it has, this is not a case in which, having regard to its circumstances, the court ought to exercise such jurisdiction in favour of the applicant. Money paid into court under the Lands Clauses Consolidation Act 1845 cannot be applied in the payment off of terminable charges:

Re Louth and East Coast Railway Company; Ex parte Rector of Grimoldby, 2 Ch. Div. 225;
Ex parte Rector of Kirksmeaton; Re Hull Railway and Dock Act (*ubi sup.*).

A terminable rentcharge was not an improvement

(a) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

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within sect. 32 of the Settled Land Act 1882, but has been expressly made so by the Settled Lands Acts (Amendment) Act 1887, s. 1. To entitle the applicant to the benefit of those Acts he must show that the land in question is held under a settlement, and that the improvements are for the benefit of the settled land: (Settled Land Act 1882, s. 25.) He must also show that the rent-charge was created for the purpose of paying off the money expended on the improvements. Here I submit the glebe is not "settled land" within the definition contained in sect. 2 of the Act of 1881; and, further, that the land added to it under the Inclosure Act and the award made thereunder is not "settled land," for it was limited to the then vicar as a corporation sole. Assuming, however, that the land so added were "settled land," such addition would not make the whole of the glebe settled land. Again, if the application were granted, the effect would be to depreciate the value of the advowson, and it was for this reason that the then patrons made it a condition of their consent to the raising the money by the vicar, that the principal and interest on the loan should be made repayable in instalments extending over a period of twenty-five years. That being the bargain between the parties, the court ought not to interfere to alter it. *Re Byron's Charity* (*ubi sup.*) and *Re Bethlehem and Bridewell Hospitals* (*ubi sup.*) were cases of charities, and ought not to be extended to cases of ecclesiastical land.

Yate Lee replied.

The Midland Railway Company did not appear.

Cur. adv. vult.

STIRLING, J.—This is an application which raises several questions not free from difficulty under the Settled Land Acts. In the view which I take of the case, it is not necessary that I should decide every point which has been raised, but I desire to take some notice of them in due order. The case is a very simple one as regards the facts. The application is made by the vicar of Castle Bytham in Lincolnshire. The vicarage is in the patronage of the Dean and Chapter of Lincoln and the Bishop alternately. It appears that there is a glebe annexed to the vicarage and that, in addition to what may technically and strictly be called the glebe, there was in pursuance of an old Inclosure Act, a piece of land allotted and awarded to the vicar of Castle Bytham and his successors. I read that as simply a limitation to the vicar in his corporate capacity. The award was made not to the vicar as an individual, personally, but to him as an ecclesiastical corporation sole. In process of time the Midland Railway Company took part of the land and paid the purchase money into court where it still remains, and the income has been paid to the vicar for the time being under orders of the court. In the years 1878, 1879, and 1884, the vicar thought it desirable to make certain improvements in the way of erecting farm buildings and doing certain repairs on the glebe, and with the consent of the patrons and the sanction of the Inclosure Commissioners he raised certain sums for the purpose of making these improvements, all of which, or at all events certain of them, were improvements within the terms of the Settled Land Acts, and in that way certain sums became charged upon the land and were repayable by half-yearly instalments spread over a period of twenty-five years. The consent of the patrons, as I have said, was given to that form of raising the money, and they limited their consent to the loans being repayable by instalments in twenty-five years, which under the then existing statute was the longest term over which such payments could be extended. That being the state of things, it has come to pass, from causes with which we are all unfortunately but too familiar, that the value of the glebe land to the vicar is now very much less than it used to be, and it cannot be doubted that he heavily feels the pressure of the payment of these half-yearly instalments which have to be made, and he applies to the court that a portion of the fund in court should be applied in the redemption of these terminable charges. That cannot be done except under the powers of the Settled Land Acts. It is necessary, in order that the application should succeed, first of all to show that the case falls within the terms of the Settled Land Act 1882; and secondly that, if it does, the case is one in which the court ought properly to exercise the discretion vested in it by the Settled Land Act 1887 and direct the payment. With reference to the question of the discretion of the court to make any order at all, two arguments have been urged. First of all, it is said that this is settled land within the meaning of the Settled Land Act 1882, and that a settlement is defined—reading it shortly—to be any deed, copy of court-roll, Act of Parliament, or other instrument, under or by virtue of which "any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession." Now that raises a very wide question, because, if that contention be well founded, not only would there be jurisdiction in this court to deal with the money in court, but, independently of the court, each successive vicar would have power to deal with the land in question by sale or lease in accordance with the provisions of the Settled Land Acts. This is ecclesiastical land, and, by statute of 13 Eliz. c. 10, vicars are, amongst other persons, prohibited from alienating, except to a limited extent, any houses, lands, tithes, tenements, or other hereditaments being parcel of the possessions of the vicarage. The restrictions contained in that statute have been, to a certain extent, removed in modern times, but, in all cases I believe, alienation cannot take place by an ecclesiastical corporation, within the meaning of that statute, without the consent of the Ecclesiastical Commissioners, and it is difficult to imagine that when the Settled Land Act 1882 was passed the Legislature intended to repeal that statute as to the extent of alienation, or to dispense in such cases with the consent of the Ecclesiastical Commissioners to alienation. But, in truth, it seems to me that, when one looks at the definition contained in sect. 2 of the Act, it is clear that under the Inclosure Act and the award the estate is not limited "to or in trust for any persons by way of succession." No doubt the land is awarded to the vicar and his "successors," but the word "successors" is simply a word of limitation introduced, as it seems to me, for the purpose of showing that the vicar was to take in his corporate capacity and not as an individual, and really has no greater effect than the word "heirs" in a limitation to A. B. and his heirs. The whole fee simple of the land is in point of law vested in the

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vicar, subject to certain restrictions. I am not, therefore, prepared to hold that the Act and the award constitute a settlement within sect. 2 of the Act of 1882. But there is another way in which the matter may be looked at, and for this purpose the material section is sect. 32 of the Act of 1882, which provides that where under the Lands Clauses Consolidation Act, any money has been paid into court and is liable to be laid out in the purchase of land to be made subject to a settlement, such money may be invested or applied as capital money arising under the Settled Land Act, as if it had been authorised by the Act under which the money has been paid into court. Numerous cases have been decided, beginning with one by Fry, L.J. (when a judge of first instance), in which an interpretation has been put on the language of that section. The first is that of *Re Byron's Charity* (*ubi sup.*), the head-note to which is as follows: "Lands belonging absolutely to a charity were taken by a public body, and the purchase money paid into court under the Lands Clauses Act. Held, that the purchase money could be dealt with under the provisions of sect. 32 of the Settled Land Act 1882, as 'money liable to be laid out in the purchase of land to be made subject to a settlement.'" The very point was raised by the learned judge in the course of the argument. He says, "Can it be said that the purchase money of land belonging to a charity absolutely, is liable to be laid out in the purchase of land to be made subject to a settlement?" And it was argued on behalf of the petitioners, that sect. 32 of the Settled Land Act must be read with sect. 69 of the Lands Clauses Act, and that the money was settled within the meaning of the Lands Clauses Act sect. 69, and therefore was within sect. 32 of the Settled Land Act, and the learned judge says: "I think sect. 32 of the Settled Land Act must be read with sect. 69 of the Lands Clauses Act, and therefore I make the order." When one looks at sect. 69 of the Lands Clauses Act, it appears obvious that the word "settled" is used in a much wider and looser sense than in the Settled Land Act 1882. As was pointed out in *Re Byron's Charity* (*ubi sup.*), one of the ways in which the money may be applied, is in the discharge of incumbrances "affecting the land in respect of which such money shall have been paid, or affecting other lands settled therewith to the same or the like uses, trusts, or purposes." And it may be applied in the "purchase of other lands to be conveyed, limited and settled, upon the like uses, trusts, and purposes, and in the same manner as the lands in respect of which such money shall have been paid stood settled." The word used is "settled," and no one can dispute that, if the present application had been made under the Lands Clauses Consolidation Act for the investment of the fund in court or a portion of it in the purchase of land to be conveyed to the use of the vicar and his successors, that would have been a proper application of the money, and the land so bought would have stood settled to the like uses as the land taken by the railway company stood settled before it was so taken. The judgment of Fry, J. amounts to this, that inasmuch as in sect. 69 the word "settled" is used in this wide and popular way the like interpretation must be put on the word "settlement" occurring in sect. 32 of the Act of 1882, and that that word is not to be there read as having the strict meaning in accordance with the definition contained in sect. 2 (1) of that Act. The matter does not rest alone on the authority of Fry, J., great as that authority would by itself be, but his decision has been followed without question and apparently without argument, first by Kay, J. (when a judge of first instance) in *Ex parte Jesus College, Cambridge* (*ubi sup.*), and secondly by Chitty, J. in *Re Bethlehem and Bridewell Hospitals* (*ubi sup.*). So that there is apparently the authority of these three learned judges for the view which is pressed upon me. Having regard to that weight of authority, I am not prepared to take upon myself to say that that interpretation of sect. 32 is one with which I cannot agree. It certainly in many respects appears to me to be a very beneficial interpretation, as it enables the court to do things which may well have been within the purview of the Legislature. At all events I am not prepared to dissent from these decisions, although I might have felt some difficulty in coming to the same conclusion in the first instance. Therefore I assume that under sect. 32 there is jurisdiction to deal with the money in court in accordance with the provisions of the Settled Land Acts in the way suggested by the applicant. Now under the Settled Land Act 1882, the money could not have been so applied. It was formerly held that capital moneys could not be expended in the redemption of terminable charges of this kind. That was so decided by the Court of Appeal in *Re Knatchbull's Settled Estate* (*ubi sup.*). Shortly after that decision the Settled Land Acts (Amendment) Act 1887 was passed which provides that, where an authorised improvement has been made, and a rentcharge created, any capital money expended in redeeming such rentcharge shall be deemed to be applied in payment of an improvement authorised by the Act of 1882. The language is peculiar, but it provides that any capital expended in redeeming a rentcharge is to be deemed to be applied in payment for the improvement. I need not say that there is a discretion in the court as to whether the money shall be so applied or not. There are a number of ways in which money under the Act may be applied, and the court has a discretion in the matter. That is not and cannot be disputed. The question then arises whether this is a proper case for the exercise of the discretion vested in me. I have already said that the patrons of the living, the Bishop and Dean and Chapter of Lincoln, gave their consent which was necessary under the Act to the creation of the charge, on the terms that the charge should be redeemed within a limited period. None, I understand, of the ecclesiastical dignitaries who then constituted the patrons are now living; but the present patrons now appear and object to the order being made. They say, and say truly, that the expenditure of this sum in court, which represents corpus, would diminish the value of the advowson and that they themselves would not have consented to any such charge being created in perpetuity if they had been asked to do so in the first instance. The question therefore is, ought I now to say that this is a proper application of the fund in court. It does not appear to me that I ought. I cannot see that there is any hardship on the vicar, in my refusing to make the order, because I am simply keeping him to the bargain he made with his eyes open; and if I

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make it against the opposition of the patrons. I am driving them into a bargain which, as they say, they never made and never contemplated. I do not see my way in the exercise of my discretion to grant the present application.

Solicitors: *Routh, Stacy,* and *Castle,* for *Stapleton* and *Hildyard,* Stamford: *Paterson, Snow, Bloxam,* and *Kinder,* for *J.* and *R. Swan* and *Bourne,* Lincoln.

Oct. 25 *and Nov.* 14.

(Before STIRLING, J.)

Re HUME; FORBES *v.* HUME. (*a*)

Will—Construction—Devise to charity of reversionary interest in land — Will made before passing of Mortmain and Charitable Uses Act 1891—*Death of testatrix after passing of Act—Mortmain and Charitable Uses Act* 1888 (51 *&* 52 *Vict. c.* 42), *s.* 4—*Mortmain and Charitable Uses Act* 1891 (54 *&* 55 *Vict. c.* 73), *s.* 5.

The effect of the Mortmain and Charitable Uses Act 1891 *is to repeal the provisions contained in sect.* 4 *of the Mortmain and Charitable Uses Act* 1888, *so far as they relate to assurances by will in the case of testators dying after the passing of the later Act, and a gift therefore by will of land to a charity is valid, notwithstanding the fact that the interest so given is reversionary.*

Re Bridger; Brompton Hospital for Consumption *v.* Lewis (70 *L. T. Rep.* 204; (1894) 1 *Ch.* 297) *discussed.*

ADJOURNED SUMMONS.

Charlotte Hume, by her will dated the 24th Oct. 1890, devised her residuary real and personal estate to trustees upon trust either to retain it in its actual state of investment, or to sell and convert the same into money, with full discretion to postpone such sale and conversion for such period as they should think fit. The testatrix then gave certain pecuniary legacies and created certain life interests, upon the determination of which she directed the whole of her residue, or such part thereof as might be lawfully applicable for the purpose, should go and belong to the charity known as the Croydon Rescue and Preventive Association, and in case such charity should have ceased to exist, then to the Croydon Hospital, and, subject as aforesaid, she declared that her trustees should hold her residuary estate upon trust for the plaintiff.

The testatrix died on the 6th March 1892 possessed of certain real estate.

On the 5th Aug. 1891 in the interval between the will of the testatrix and her death the Mortmain and Charitable Uses Act 1891 came into operation.

This was an originating summons taken out by the plaintiff asking the opinion of the court upon the question whether, according to the true construction of the will, the real estate devised by her will, or the investments representing the same, would, upon the determination of the life interests given by the will, go and belong to the defendants, the Croydon Rescue and Preventive Association, the Croydon Hospital, or to the plaintiff.

Hastings, Q.C. and *Alexander Young* for the summons.—The gift to the charities is reversionary and the Mortmain and Charitable Uses Act 1891 does not apply. Sect. 5 of that Act requires that the land given to a charity must be sold within one year from the death of the testator, or such extended period as may be determined by the court or the Charity Commissioners. That section clearly implies that the gift must be immediate and not reversionary. It is true that in *Re Bridger*; *Brompton Hospital for Consumption* v. *Lewis* (70 L. T. Rep. 204; (1894) 1 Ch. 297), the gift was reversionary, but the only point there argued was as to the meaning of the words in the gift "which may by law be given for charitable uses" and Davey, L.J. in giving judgment refused to give an opinion as to what would have been the construction of the gift if the testator had inserted the word "now." The fact of the gift being reversionary was not brought to the notice of the court. The present case, therefore, we submit, falls within sect. 4 of the Mortmain and Charitable Uses Act 1888, which provides (*inter alia*) that an assurance to a charity must be made to take effect in possession immediately from the making thereof, and be without any power of revocation, reservation, condition, or provision for the benefit of the assuror or of any person claiming under him. Here the gift to the charities does not take effect in possession but is subject to the reservation of certain life interests in favour of persons claiming under the testatrix, and is, therefore, void.

Dibdin for the Croydon Hospital.—The gift to the charities is valid under the Act of 1891. The conditions enumerated in sect. 4 of the Act of 1888 do not apply to the case of a gift by will of land to a charity, for if such were the case, the effect would be that in order to render such a gift valid the testator must either live for twelve months after his own death or his will must be held to take effect from its date and not from the date of his death.

Buckley, Q.C. and *Eve* for the Croydon Rescue.—The case is entirely covered by the decision of the Court of Appeal in *Re Bridger; Brompton Hospital for Consumption* v. *Lewis* (*ubi sup.*). There, as here, the gift to the charity was reversionary, a fact which can hardly have escaped the notice of the learned judges. The basis of the contention on behalf of the plaintiff is, that, in the case of a charity, an assurance of land, to be valid, must take effect in possession immediately from the making thereof, and be without reservation in favour of the grantor, or those claiming under him. Here, however, the reservation is not as between the grantor and the grantees, but as between the respective grantees, and the words, "take effect in possession," must, we submit, mean, take effect in possession as between the respective grantees. In *Wickham* v. *Marquis of Bath* (13 L. T. Rep. 313; L. Rep. 1 Eq. 17) the reservation was for the benefit of the grantor, and the gift was, therefore, held to be bad. But a gift of a reversion might, it would appear, under the old Act, have been good, unless it were created for the purpose of evading the Act:

> Tudor's Charitable Trusts (3rd edit.), p. 391;
> *Doe* v. *Lloyd,* 5 Bing. N. C. 741;
> *Milbank* v. *Lambert,* 28 Beav. 206.

We submit, however, that the Act of 1891 is a wholly new enactment, entirely independent of sect. 4 of the Act of 1888, and that, although it

(*a*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

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does not expressly repeal any part of the then existing law, except the definition of "land" contained in sect. 10 of the Act of 1888, it does in effect repeal the whole of Part II. of that Act so far as it related to assurances by will: (Bristowe's Mortmain and Charitable Uses Act 1891, pp. 1, 2.)

Mulligan for the trustees.

Hastings, Q.C. replied. *Cur. adv. vult.*

Nov. 14.—STIRLING, J. stated the facts and continued:—The question is whether assurances of land by will to or for the benefit of a charitable use under sect. 5 of the Mortmain and Charitable Uses Act 1891, are subject to any of the restrictions contained in sect. 4 of the Mortmain and Charitable Uses Act 1889, and particularly to those imposed by sub-sects. (2) and (3) of that section. Part 2 of the Act of 1888 (which begins with sect. 4) is in substance a re-enactment of the Act of 9 Geo. 2, c. 36, intituled "An Act to restrain the disposition of lands whereby the same became unalienable." The preamble is in these terms: "Whereas gifts or alienations of lands, tenements, or hereditaments in mortmain are prohibited or restrained by Magna Charta and divers other wholesome laws as prejudicial to and against the common utility; nevertheless this public mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons or by other persons to uses called charitable uses, to take place after their deaths, to the disherison of their lawful heirs." Sect. 3 prohibited all gifts and grants of land and hereditaments, or of any estate or interest therein, or of charges or incumbrances affecting lands or hereditaments, or of personal estate, to be laid out or disposed of in the purchase of lands or hereditaments or of any estate or interest therein, or of any charge or incumbrance therein to or in trust for any charitable use, except in the manner and form by the Act directed, being by deed satisfying certain requirements therein prescribed. The policy and object of the Act were explained by James, L.J. in delivering the judgment of the Court of Appeal in *Attree* v. *Hawe* (38 L. T. Rep. 733; 9 Ch. Div. 337), and I cannot do better than read a short passage from his judgment. He says: "It had from the earliest times been the policy of the common law as interpreted by the judges to discourage the inalienability of land, and this altogether irrespective of the peculiar mischiefs supposed to arise from the vesting of lands in mortmain, which deprived the sovereign and the lords of the profitable incidents of feudal tenures. And this policy in more modern times approved itself to the Legislature. It was deemed in itself a mischief that lands should be rendered inalienable, and the Legislature found that this mischief was being mischievously increased in one particular way—that is to say, it was found that dying persons were, sometimes from spontaneous weakness, and sometimes from the readiness to yield to many influences which can be brought to bear on persons *in extremis*, too easily minded to give lands to charitable uses (words of the widest signification), and to be posthumously benevolent at the expense of their lawful heirs. And this was the mischief, and the sole mischief, which the Legislature set itself to prevent, viz., to prevent the increase of inalienable land through the weakness of or practices upon dying persons, or through posthumous charity. And upon examination of the enactments it will be found that the Act is in entire consistency with the recital. In the Act there is no prohibition of gifts of land by deeds *inter vivos*, but there are regulations securing that such gifts shall not be in substance posthumous, merely by avoiding the form. There is no prohibition of any amount of testamentary charity confined to pure personal property. But the Act does in the most comprehensive terms forbid any such testamentary or posthumous charity as to any interest in land or other real estate, or as to any charge or incumbrance affecting the same. At first sight it may seem that the enactment has gone far beyond the scope of the recited object, for it extends, as has always been held, even to a pecuniary legacy, so far as it is payable out of land or any charge or incumbrance on land. But it will be found on examination that all the comprehensive words in the prohibitory enactment were in truth necessary or useful to prevent evasions and devices contrary to the main intent of the Act, although, from the impossibility of legislating for every particular case, they have been found to apply in a great many cases to gifts which were neither in effect or intention contrary to the real object of the Legislature." The result has been that, while, ever since the passing of the Act, testators have enjoyed unrestricted power of leaving to charities personal estate unconnected with land (or, as it is often called, pure personal estate) of any amount, so long as the dispositions did not involve in the execution of them the purchase of land or interests therein or incumbrances thereon, the courts have enforced with great strictness the provisions of the statute in the case of attempted testamentary dispositions of personal estate consisting of interests in land or charges or incumbrances thereon, commonly termed impure personal estate. Considerable difficulty has arisen in many cases in determining whether particular kinds of personal estate fall within one class or the other. Reported decisions, some of recent date, show how narrow is the line which divides the two classes. Gifts of impure personal estate have been held invalid where the connection with land was extremely remote, and judges of great eminence have expressed their astonishment at the great extent to which the Act has been carried. See, for example, the judgment of the present Master of the Rolls in *Ashworth* v. *Munn* (43 L. T. Rep. 553; 15 Ch. Div. 363, 371). The Act of 1891 appears to have been passed with the object of restraining within narrower limits the application of the prohibitory legislation of 9 Geo. 2. c. 36. By sect. 3 the definition of land contained in the Act of 1888 is altered so as to exclude from it money secured on land and other personal estate arising from and connected with land, and all such personal estate has ceased to be subject to the restrictions originally imposed by the Act of Geo. 2. and continued to be re-enacted by that of 1888. Again, sect. 7 renders valid bequests in favour of charities of personal estate to be laid out in the purchase of land. It provides that such bequests shall be held to or for the benefit of the charitable uses as though there had been no direction to lay out the personal estate in the purchase of land. The question in the present

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case arises on sect. 5, which provides that "land may be assured by will to or for the benefit of any charitable use," words which in themselves appear to me to confer the widest power of testamentary disposition of land in favour of charities—that is to say, to enable testators to devise land in favour of charities for any estate or interest therein. The section goes on to provide that such land shall, notwithstanding anything in the will contained, be sold within one year from the death of the testator or such extended period as may be determined by the court or the Charity Commissioners, and sect. 6 provides that, so soon as the time limited for the sale of land by any such assurance shall have expired without completion of the sale, the land unsold shall vest in the official trustee of charity land. These enactments (like the concluding provision of sect. 7) appear to be directed to the prevention of the mischief pointed out in the judgment in *Attree* v. *Hawe* (*ubi sup.*), viz., the increase of inalienable land by means of charitable gifts; and as far as I can see the remedy thus provided by the Legislature is perfectly adequate for that purpose. Sect. 4 of the Mortmain and Charitable Uses Act 1888 provides that, "subject to the savings and exceptions contained in this Act, every assurance of land to or for the benefit of any charitable uses, and every assurance of personal estate to be laid out in the purchase of land to or for the benefit of any charitable uses, shall be made in accordance with the requirements of this Act, and unless so made shall be void." I need only refer to sub-sects. (2), (3), and (6). They provide (sub-sect. (2) that, "The assurance must be made to take effect in possession for the charitable uses to or for the benefit of which it is made immediately from the making thereof"; (sub-sect. (3) that, "The assurance must, except as provided by this section, be without any power of revocation, reservation, condition, or provision for the benefit of the assuror, or of any person claiming under him"; and (sub-sect. (6) that, "If the assurance is of land, not being land of copyhold or customary tenure, or is of personal estate, not being stock in the public funds, it must be made by deed executed in the presence of at least two witnesses." These sub-sections effect the main object of the Act, viz., the prohibition of charitable gifts of land otherwise than by Act *inter vivos*. They are inconsistent with and must be treated as repealed by sect. 5 of the Act of 1891; but it is said that this repeal by implication does not extend to sub-sects. (2) and (3), and that the testamentary assurances authorised by sect. 5 of the Act of 1891 must satisfy the requirements of those sub-sections. These, however, are merely subsidiary to the attainment of the object arrived at by sub-sect. (6); they are (in the language of James, L.J.) regulations securing that charitable gifts *inter vivos* "shall not be in substance posthumous merely by avoiding the form" and naturally fall with the removal of the restriction imposed by sub-sect. (6). If indeed the Act of 1891 had omitted to provide any remedy for the mischief which the provisions of the Act of 1888 were intended to prevent there might be ground for placing a limited meaning on the wide terms of sect. 5; but where a new and apparently adequate remedy is afforded, I fail to see why that section should be read in a narrower sense than its language warrants. The statutory provision that land assured by will in favour of charities shall be sold within one year from the death of the testator is relied on as showing that the estate or interest so assured must take effect in possession within that period. I am, however, unable to follow that argument. A future interest in land may be sold no less than an immediate interest. Moreover, a sale within a year is not absolutely imperative. The Legislature recognises that in particular cases reasons may exist which render a sale within that time undesirable, and has provided the means for extending the term. I am, therefore, of opinion that the charitable gifts contained in the will of the testatrix are valid. I may add that in point of decision the present case is covered by *Re Bridger* (*ubi sup.*). Inasmuch, however, as the question discussed before me does not appear to have been raised in argument, and is certainly not expressly dealt with by the judgments delivered in *Re Bridger* (*ubi sup.*), I have thought it right to express my opinion on it without relying on that case as an authority; at the same time I find great difficulty in supposing that, if the contention of the present plaintiffs had any solid foundation, it would have escaped the attention of all the learned judges before whom *Re Bridger* (*ubi sup.*) was argued.

Buckley, Q.C. applied for an extension of time for the sale of the land over the existence of the prior life interests.

Dibdin made the same application.

STIRLING, J.—You must amend the summons and the summons must be sent back to chambers.

Solicitors: *Last* and *Sons*; *West*, *King*, and *Adams*; *S. M.* and *J. B. Benson*; *Patey* and *Warren*.

July 13 *and Aug.* 3.

(Before WRIGHT, J., sitting as an additional Judge of the Chancery Division.)

Re PERUVIAN GUANO COMPANY LIMITED; *Ex parte* KEMP. (*a*)

Company — Winding-up — Directors — Remuneration by way of percentage on net profits—Bonâ fide *over-estimate of assets—Resolution based thereon—Validity—Payment out of capital—Stale demand—Interest*—3 & 4 *Will.* 4, *c.* 42, *s.* 28.

The articles of association of a company provided that the dividends should be paid out of net profits, and that 10 *per cent. of the residue of such net profits should be paid to the directors as remuneration.*

In 1883 *resolutions were passed by the shareholders declaring a dividend on the share capital, and providing after payment of such dividend for the application of the balance* (inter alia) *in payment to the directors of their* 10 *per cent. by way of remuneration. These resolutions were based upon a balance-sheet in which the assets had been greatly over-estimated, but which had been made out* bonâ fide. *Before the balance was distributed the company went into voluntary liquidation. All the creditors had been paid in full. The directors claimed the* 10 *per cent. on the net profits declared in* 1883. *The liquidator opposed the claim on the ground that, in order to meet it, it would be necessary to raise the larger portion of it out of capital.*

(*a*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

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Held, that, having regard to the lapse of time, and to the fact of there being no suggestion of want of bona fides, *the directors were entitled to the amount they claimed, but not to interest thereon.*

SUMMONS.

The Peruvian Guano Company Limited was incorporated in July 1876, with a capital of 800,000*l.* which was afterwards increased to 900,000*l.* in 180 shares of 5000*l.* each, of which 165 were issued. The principal object of the company as stated by the memorandum of association was to carry out a contract for the consignment and sale of guano, entered into between R. Raphael and Sons and the Peruvian Government.

The articles of association provided (art. 28) that the directors should receive as remuneration for their services the percentage of the net profits prescribed by art. 131, that should, however, in any year such percentage be insufficient to pay 500*l.* to each director, there should be set apart out of the funds of the company such an aggregate sum as would provide a sum of 500*l.* a year as the remuneration of each director in the year wherein such deficiency should arise; (art. 48) that an ordinary meeting should be held yearly, as the board of directors should appoint; (art. 53) that three shareholders present, personally or by proxy, should be the quorum for a general meeting for (*inter alia*) the declaration of a dividend recommended by the board; (art. 78) that any ordinary meeting might receive, adopt, and confirm the accounts, balance-sheets, and reports of the directors and auditors respectively, and might, subject to the regulations, decide on any recommendation of the directors of or relating to any dividend.

The other articles material for the purposes of this report were the following:

129. All dividends on shares shall be declared by the general meeting.

130. The net profits of the company shall be the sum certified to be such by the auditors.

131. Before declaring the net profits, the board shall deduct such sums as in their judgment may be necessary to meet any claims, whether ascertained or contingent, against the company. And subject thereto, the net profits of the company shall be applied as follows, viz.:—(1) To the payment of any preferential or guaranteed dividend attached to any class of shares (if any). (2) To the payment of interest up to 10 per cent. on the capital of the company represented by the ordinary shares. (3) Ten per cent of the residue of the net profits shall be paid and applied as remuneration to the directors. (4) The ultimate residue of the net profits shall be applied in payment of such dividend on the ordinary shares of the company, or in such other manner as (subject to the regulations) a general meeting may determine.

On the 29th Nov. 1882 a general meeting of the company was held, at which the accounts for the half-year ending the 30th June 1882 were submitted and approved. On the 22nd Feb. 1883 the auditor of the company certified a balance-sheet for the half-year ending the 31st Dec. 1882, which had been prepared, showing an apparent profit of 11,493*l.* 12*s.* 10*d.* On the 31st March 1883 he certified a supplemental balance-sheet, which had been prepared by the directors. This balance-sheet showed an increased profit balance of 176,493*l.* 12*s.* 10*d.*, which had been obtained by the transfer of a sum of 165,000*l.* from the suspense account to the profit and loss account. This transfer had been approved by the auditor, who had been consulted with reference to it. In estimating the amount of the suspense account an item of over 1,000,000*l.* was included as representing the amount which the company expected to recover in certain actions in which it was at this period engaged in Belgium and in England with Messrs. Dreyfus Brothers and Co., and from claims against the Peruvian Government.

On the 4th April 1883 a meeting of the directors was held, at which the resolutions to be submitted to the general meeting was approved, the balance-sheet and supplemental balance-sheet, both signed by the auditor, were settled, and a letter from H. Parkinson Sharp, one of the directors, to his co-directors was read, and ordered to be entered on the minutes. In this letter doubt was cast by Sharp on the value of certain of the items in the suspense account, and a compromise of certain disputes with the Peruvian Government was suggested by him. The latter part of the letter was as follows:

It is now proposed, as you are aware, with the consent of the shareholders, counsel having so advised, and the auditor having duly so certified, to pay interest at the rate of 10 per cent. upon the capital up to the 31st Dec. last, and also to set aside a further sum of 135,243*l.* 12*s.* 10*d.* to profit and loss to be dealt with and appropriated in accordance with the provisions of article 131 (sub-sects. 3 and 4) of the articles of association.

On the 11th April 1883 a general meeting of the shareholders was held, at which the following resolutions were passed:

(1) That the directors' report together with the balance-sheet, the profit and loss account, and supplemental balance-sheet as audited up to the 31st Dec. 1882, now submitted to the meeting be approved, adopted, and confirmed, and that 165,000*l.* transferred from the suspense account to the profit and loss account be approved and confirmed.

(2) That, as recommended by the board, interest at the rate of 10 per cent. per annum upon the fully paid-up share capital of the company in respect of the half-year ending the 31st Dec. 1882, free of income tax, be paid to the shareholders on the register this day, and that the same be paid by cheques to be posted on the 11th April instant.

(3) That the balance of 135,243*l.* 12*s.* 10*d.* be dealt with, appropriated, and paid in accordance with art. 131 (sub-sects. 3 and 4) of the articles of association.

At this meeting the only shareholders personally present were three directors holding one share each. They, however, represented by proxy eleven other shareholders holding 106 shares. In accordance with resolution (2) a dividend of 10 per cent. amounting to 41,250*l.* was paid to the shareholders. The balance was not, however, dealt with as authorised by resolution (3).

Under the provisions of art. 28 each of the directors received sums of 250*l.* in Dec. 1882 and May 1883 respectively.

In May 1883 the company went into voluntary liquidation. All the creditors had since been paid in full.

This was a summons taken out by the present liquidator under sect. 138 of the Companies Act 1862, asking that the claim of the directors to 10 per cent. on 135,243*l.* 12*s.* 10*d.* as remuneration might be determined by the court, and that he might be at liberty to distribute the same among the shareholders.

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In support of his application the liquidator deposed that the 165,000*l.* taken from the suspense account was part of a balance of 1,054,429*l.* 8*s.* 5*d.* shown on that account, but was composed of estimated not actual profit; that such balance depended on the result of disputes and litigations which ultimately resulted adversely to the company, that the true profit balance on the suspense account was under 10,000*l.*; and that part of the dividend had really been paid out of capital.

Haldane, Q.C. and *C. E. E. Jenkins* for the liquidator.—The net profits in respect of which the directors base their claim to remuneration never in fact existed. They were founded upon estimates in the suspense account which subsequently proved to be erroneous. Under these circumstances the claim, if it is to be satisfied, can only be paid by resorting to capital. This cannot be done:

Re Exchange Banking Company; Flitcroft's case, 48 L. T. Rep. 86; 21 Ch. Div. 519.

They also referred to

Re Mercantile Trading Company; Stringer's case, 20 L. T. Rep. 591; L. Rep. 4 Ch. 475.

Muir Mackenzie, for Petrie, the managing director, was stopped by the Court.

Bramwell Davis, *Stewart Smith*, and *G. Scott*, for other shareholders.

WRIGHT, J.—The claim made here for remuneration by these directors as it seems to me is a claim to be paid that which they have a legal title to be paid under the circumstances. All sorts of objections have been taken to the claim. It is said to be stale. It is said that events prove that they ought never to have recommended to the general meeting that this dividend should be paid, and that the general meeting ought not to have declared the dividend. But when the general meeting had in fact declared the dividend, which they did declare it follows from the articles, that the directors then became entitled to the 10 per cent. after payment of the 10 per cent. dividend to the shareholders. I cannot deprive them of that unless I am able to attack the very root of the matter by declaring the resolution improper—a resolution which was passed twelve years ago. At the time when it was passed it certainly was not impossible for a reasonable man of business to think that the items in the suspense account which we are discussing were items possessing a considerable value. I am doubtful whether on the present application I can enter into the question whether the resolution was valid or not, but I am not asked to impeach it as a whole. If I am entitled to go into the question it appears to me that there is not sufficient proof that the suspense account was of such a character that it must follow that the balance shown in it had not then got a really substantial value, or that it was of such a character that the directors acting as prudent men of business could not take the view that the balance had a substantial value. There is nothing imaginary in it at all. The amount shown in it exceeds a million made up for the most part of claims in respect of cargoes of guano which did actually exist, at rates of payment which according to the Raphael contract the company would have been entitled to receive. The directors acting on the report of their auditor, and in consultation with their auditor and quite openly in the face of the shareholders in general meeting, came to the conclusion that there was out of that claim over a million of money, a sum which they fixed for some reason at 165,000*l.* which could be legitimately used for payment of dividend, because out of the expected million at least that amount was expected to be saved. At this distance of time—twelve years afterwards—I find it very difficult to say that the view they took was a wrong one. At that time the various litigations which ended disastrously to them were proceeding in a manner favourable to the company—they had, in fact, obtained judgment in Belgium. That was under appeal, but no one anticipated the result of the appeal. The litigation in England involved very much the same questions, and was proceeding in the same way, and they were advised that the result was likely to be the same in England as it had been to that extent in Belgium. I should come to that conclusion without much doubt, but for one circumstance, that is the printed letter of Mr. Parkinson Sharp, which certainly throws considerable doubt upon the action of the directors, for it is clear that, in the opinion of Mr. Parkinson Sharp communicated to his co-directors and to many of the shareholders, the claims against the Peruvian Government, which formed so large a part of the suspense account, were likely to turn out the other way, and might leave the company to pay the balance to that Government instead of receiving it. But the letter also shows that the settlement which they hoped to accomplish with the Peruvian Government might enable the company to carry on the litigation against Dreyfus Brothers and Co., with success, and that the claims against that firm would yield a large sum. There was no suspicion on the part of anybody at the time when the letter was written that the outcome of the whole business would be other than to allow the company to return the whole of the capital to the shareholders. Even after the payment of this dividend it looks to me as if the idea throughout was this, that in 1883 the shareholders wanted to have their capital returned, and the whole affair wound-up, and the directors seem to have resolved that that was a proper step in the interests of the company, and before actually taking the steps necessary for a voluntary winding-up, they thought it better in the interests of the shareholders to declare a dividend. There is no reason to think that there was any wrong motive. The directors consulted their auditor as to how much of the suspense account it was proper to divide before going into liquidation, and they calculated it at 165,000*l.* whether on account of the claims against Dreyfus and Co., or on account of the claims against the Government I do not know. I am unable to interfere with the claim now made by the directors, and I must declare that they are entitled to 10 per cent. on the 135,000*l.* The costs will be costs in the liquidation.

M. Mackenzie submitted that the directors were entitled to interest on the amount of their claim.

WRIGHT, J.—If that is a matter for my discretion I shall not give you interest. You had better consider the point, and mention it again if necessary, on giving notice to the other side. If

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it is not mentioned again you will not have interest.

C. E. E. Jenkins.—The two sums of 250*l.* received by each of the directors as remuneration must be accounted for by them. They cannot be entitled to those sums in addition to the 10 per cent.

Wright, J.—Yes, the directors must give credit for the whole of the salary they received in that year. Mr. Muir Mackenzie's clients will have one set of costs, and the taxing master will consider whether there is any difference between the case of the other directors and that of Mr. Muir Mackenzie's clients, and allow them such costs as they have properly incurred.

Aug. 3.—The matter again came before the court with reference to the question of interest.

Muir Mackenzie for Petrie.—Petrie is entitled to interest from the date of the resolution of April 1883, or at all events from the date of certain letters which passed between him and the liquidator. He referred to

3 & 4 Will. 4, c. 42, s. 28;
Orton v. *Cleveland Fire Brick and Pottery Company Limited*, 3 H. & C. 868;
Buckley on Companies, 6th edit., p. 368;
Re East of England Banking Company, 18 L. T. Rep. 550; L. Rep. 4 Ch. 14.

Bramwell Davis for the executors of Parkinson Sharp.

Haldane, Q.C. and *C. E. E. Jenkins*, for the liquidator, referred to

Hill v. *South Staffordshire Railway Company*, L. Rep. 18 Eq. 154.

[They were stopped by the Court.]

Wright, J.—It will perhaps be sufficient in this case if I simply say that I do not think fit to allow interest. I will, however, give my reasons for so holding. This was a speculative matter, and on the eve of a winding-up a large sum was taken from the suspense account and appropriated as profits to a large extent by the directors themselves. Their claim is not, in my opinion, so meritorious that it ought to carry interest. It is doubtful also whether there was any sum certain within the Act of Will. 4. I therefore disallow the claim for interest.

Solicitors: *Murray, Hutchins, Stirling*, and *Murray*; *Waterhouse, Winterbotham*, and *Co.*; *E. F. Turner*; *Louis Du Cane.*

QUEEN'S BENCH DIVISION.

Friday, July 27.

(Before Mathew and Kennedy, JJ.)

Re A Bill of Sale; White *v.* Rubery. (*a*)

Practice—Bill of sale—Consent to satisfaction—Memorandum of satisfaction—Affidavit to verify signature and consent—Deponent not a solicitor—Order LXI., r. 26—*Practice, Masters Rules, r.* 25.

On an application in respect of a bill of sale having been made to a master in chambers for his direction to enter a memorandum of satisfaction of the bill, it appeared that the affidavit of verification of signature and consent, although there were no special circumstances, was made by a person who was not a solicitor.

Held, that the mere fact that the deponent of the affidavit is not a solicitor is not of sufficient reason for refusal to enter satisfaction.

Appeal from chambers.

An application had been made to a master in chambers in the usual manner for directions to enter a memorandum of satisfaction of a bill of sale. It then appeared that the affidavit of verification of the signature and the consent of the grantee of the bill of sale made for the purposes of the application was made by a person other than a solicitor, and no "special circumstances" were shown to exist in the case. The master thereupon refused to enter the memorandum of satisfaction on the ground that the deponent of the affidavit was not a solicitor.

On appeal, Pollock B., confirmed the master's refusal.

Order LXI., r. 26:

A memorandum of satisfaction may be ordered to be written upon a registered copy of a bill of sale, on a consent to the satisfaction, signed by the person entitled to the benefit of the bill of sale, and verified by affidavit, being produced to the registrar and filed in the Central Office.

By rule 25 of the Central Office Practice Rules (Annual Practice, Part III.) it is provided, as to satisfaction of bills of sale, that

If the attesting witness and deponent is a solicitor, and described as such, the entry of the satisfaction will be directed by the master (the papers being otherwise correct) as of course; but under special circumstances the master may accept any other deponent if satisfied that he is a proper person to attest and verify the signature and consent.

Germaine for the applicant.—It is submitted that rule 25 made by the practice masters is *ultra vires* and should be overruled. It is not in accordance with Order LXI., r. 26, which merely says that the memorandum of satisfaction shall be entered on the consent and signature of the person entitled to the benefit of the bill being verified by affidavit. Nothing is therein said as to the necessity of the deponent of such affidavit being a solicitor, nor it is submitted is it necessary. The practice masters have no authority or power to lay down a rule as to who shall make the affidavit and thus limit the scope and operation of the Order. The Orders and Rules of the Supreme Court have the same force as an Act of Parliament, and cannot be altered by a master's rule. It is submitted that the master was wrong, and that he should have ordered a memorandum of satisfaction to be entered on the bill.

Mathew, J.—I am of opinion that the affidavit of verification made in this case was amply sufficient, though it was not made by a solicitor, and that a memorandum of satisfaction should be entered. The mere fact that the deponent of the affidavit verifying the consent and signature of the person entitled to the benefit of the bill of sale is not a solicitor is not in itself sufficient reason for the refusal of a memorandum of satisfaction.

Kennedy, J.—I am of the same opinion.

Appeal allowed and order accordingly.

Solicitors: *Smiles* and *Co.*

(*a*) Reported by Henry Leigh, Esq., Barrister-at-Law.

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Thursday, Oct. 25.

(Before Mathew and Charles, JJ.)

The East London Waterworks Company (apps.) v. Kyffin (resp.). (a)

Waterworks rate—Recovery—Summary procedure—Order to pay—Demand—Waterworks Clauses Act 1847 (10 & 11 *Vict. c.* 17), *ss.* 70, 74, 85—*Railways Clauses Consolidation Act* 1845 (8 & 9 *Vict. c.* 20), *s.* 140.

On a summons being taken out by a waterworks company for a water rate against the owner of a house which was under the annual value of twenty pounds the magistrate dismissed the summons, on the ground that no demand had been made before a summons was issued, holding that, until such demand for payment was made, omission to pay was not a neglect or refusal to pay within the meaning of the Waterworks Clauses Act 1847 (10 & 11 *Vict. c.* 17), *and that in the absence of any such demand up to the date of the summons no matter of complaint had arisen upon which a court of summary jurisdiction had authority to make an order for the payment of money.*

Held, on a case stated for the court, that, having regard to the language of sects. 70 *and* 74 *of the Waterworks Clauses Act* 1847 (10 & 11 *Vict. c.* 17), *a formal demand was not essential as a condition precedent to the right of a water company to take proceedings in a court of summary jurisdiction to recover payment of a rate under sect.* 140 *of the Railways Clauses Consolidation Act* 1845 (8 & 9 *Vict. c.* 20).

Case stated by one of the metropolitan magistrates:—

1. The respondent was summoned before me upon a summons issued on the 25th April 1894 by the magistrate, then sitting at the North London Police-court, to answer the appellant's claim for the total sum of 16*s.* alleged to be due for water rates chargeable in respect of a house known as 96. Balcorne-street, situate in the parish of Hackney, within the metropolitan police district aforesaid.

2. The annual value of the house did not exceed 20*l.*, and from the 25th Dec. 1893 to the 9th May 1894, the said house was supplied with water by the appellants.

3. The respondent between the 25th Dec. 1893 and the 9th May 1894 received the rent of the house, being the owner thereof, and was liable to the payment of the water rates which might be chargeable in respect of the said house.

4. Half of the sum of 16*s.* claimed by the appellants was claimed in respect of water rates for two quarters to Christmas 1893, and the other half of the sum, namely 8*s.*, was claimed in respect of two quarters from Christmas 1893, due on Christmas-day 1893 and Lady-day 1894 respectively.

5. It was admitted that no demand had been made for the water rates in respect of these two latter quarters as and when they became due, nor at any time before the issue of the summons. An objection was thereupon with other objections made by the respondent that in default of such demand the rates for the two quarters, namely, 8*s.*, could not be recovered under the summons.

6. It was contended by the applicants that no such prior demand was required by statute or otherwise.

7. I was of opinion that until such demand for payment should have been made by the appellants the respondent's omission to pay the rate was not a neglect or refusal within the meaning of the Waterworks Clauses Act; and I was further of opinion that in the absence of any such demand up to the date of the summons no matter of complaint had then arisen upon which a court of summary jurisdiction had authority to make an order for the payment of money, and I therefore made an order dismissing the appellant's claim for the sum of 8*s.* contained in the summons on the ground that no demand had been made for the payment of the sum or any part therefore prior to the issue of the summons. The other part of the claim contained in the summons I dismissed upon other grounds in respect of which the appellants have not required me to state a case.

The question for the opinion of the court was whether this decision was correct in law.

Finlay, Q.C. (*Rawlinson* with him) for the appellants.—The question raised by this case is, whether proceedings can be taken in a court of summary jurisdiction to recover water rates before a demand for the payment of such rates has been made. The magistrate has held that such a demand is a condition precedent, and it is submitted that in giving such a decision he is clearly wrong. Sect. 81 of the East London Waterworks Act 1853 (16 & 17 Vict. c. clxvi.) imposes the liability of paying the water rate on the owner or person receiving the rent in cases where the annual rent is under twenty pounds. By sect. 3 of that Act the Waterworks Clauses Act 1847 (10 & 11 Vict. c. 17) is incorporated with it. Sect. 74 of the Act of 1847 provides for the recovery of rates, and sect. 85 points out how this is to be done, namely, by the same means as set out in sect. 140 of the Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20). By this section it is provided that with respect to the recovery of damages not otherwise specially provided for, and of penalties, the amount shall be ascertained and determined by two justices. The determination by the justices of the sum to be paid amounts to an order to pay the sum:

East London Waterworks Company v. *Charles*, 71 L. T. Rep. 200; (1894) L. Rep. 2 Q.B. 750.

The section then goes on to say that, if the amount so ascertained be not paid within seven days after demand, such sum may be recovered by distress, and on application a warrant shall be issued. Clearly, therefore, the word "demand" here refers to a demand after the order for payment is made. The company might levy distress without applying to the magistrate for any further order. If the respondent's contention is right, it would also be necessary to make a demand under this section in cases where the rate to be recovered amounts to twenty pounds or upwards before an action could be brought to recover the same. The decision of the magistrate was wrong, and the case should be remitted to him.

A. J. Walter for the respondent.—Sect. 74 of the company's private Act provides that the water shall be supplied "at a rate per centum per annum on the annual value of the house not exceeding five pounds." This is not necessarily

(a) Reported by Henry Leigh, Esq., Barrister-at-Law.

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a fixed sum payable quarterly, but is an amount to be ascertained. The respondent should have been informed of what sum the company required him to pay, but instead of this all he received was the summons. It is for the company to show what the respondent owes. He cannot be summoned at a police court to pay rates, the demand of which has never been made of him. It is submitted that the magistrate was right, and that the order in this case cannot be made.

MATHEW, J.—I cannot agree with the decision, as I understand it, of the learned magistrate that it is essential as a condition precedent to the jurisdiction that there should have been a formal demand made. It is suggested that he arrived at his conclusion because of the use of the word "neglect" in sect. 74 of 10 & 11 Vict. c. 17. It appears to me to be perfectly clear that there may have been a dispute between the waterworks company and the defendant of long continuance, that he may have known perfectly well what it was that was demanded of him, and may have refused to pay on grounds which would be evidence of his neglect. But I do not think that it is at all necessary in order to establish his neglect that there should be proof of a formal demand upon him. With reference to the argument of the learned counsel it is founded on the contention that sect. 140 of the Railways Clauses Consolidation Act 1845 (8 & 9 Vict. c. 20), incorporated, as we have heard, with the special Act by sect. 3, has no bearing upon the case, and that our decision must depend upon the construction to be put upon the two statutes, the special Act of 1853 and the Waterworks Clauses Act of 1847. By the latter Act incorporated with the special Act, it is clear that the rates under sect. 70 shall be paid in advance by equal quarterly payments, "and the first payment shall be made at the time when the pipe by which the water is supplied is made to communicate with the pipes of the undertakers, or at the time when the agreement to take water from the undertakers is made." Then comes section 74, which provides that, if any person supplied with water neglects to pay, then the steps may be taken which are described in that section. Our attention has been called to sect. 74 of the special Act, the East London Waterworks Act of 1853. It is pointed out that the rate is to be a rate per cent. on the annual value of the house not exceeding five pounds and then we are treated to an argument that we ought to assume in this case that the respondent did not know of the rate to be paid in respect of a house, and had no means of knowing, and was therefore justified in refusing to pay. That involves the argument that there must be a formal demand in every case, so that the owner shall know exactly the amount that he has to pay I can only repeat what I have said already. I do not arrive, by an examination of these sections, at the conclusion at which the learned magistrate arrived, that a formal demand is necessary. The case must go back to him with an intimation of our opinion, and we will leave him to deal with the costs inasmuch as there are other questions remaining to be settled.

CHARLES, J.—I am of the same opinion. I think that, having regard to the language of sects 70 and 74 of the Waterworks Clauses Act of 1847 it would be impossible to hold that a demand is a condition precedent to the right of the water company to apply to a magistrate under sect. 140 of the Railways Clauses Consolidation Act of 1845. I was struck, I own, with the argument presented to us by counsel for the respondent that the rate prescribed by the special Act, being a rate per cent. not exceeding a certain amount, was uncertain until it had been fixed by the water company, and in this case it was suggested to us that it had never been fixed by the water company, and that the respondent was ignorant of what he had to pay. How, it was asked, could it possibly be said that he had neglected to pay a rate, the amount of which he was ignorant of. I was impressed somewhat by that argument, but upon reference to this special case it seems to me that the facts which have been stated to us by the magistrate do not warrant us in inferring in any sense whatever that the respondent was ignorant of the amount which he would be called upon to pay. On the contrary, it seems, from what we have been told, that the very reverse was the case; at all events, we cannot infer that he was ignorant of the amount which the company had fixed. Then I think, for the reasons given by my brother Mathew, and the reasons that I have given myself at the beginning of my observations, that the magistrate was wrong in saying that a demand was a condition precedent to the right of taking out the summons. The case must therefore go back to him. *Case remitted to the magistrate.*

Solicitors for the appellants, *George Kebble* and *Miller*.

Solicitor for the respondent, *Charles V. Young*

Friday, Nov. 2.

(Before WRIGHT and COLLINS, JJ.)

SKELTON *v.* WOOD. (*a*)

Stock Exchange—Principal and agent—Broker and client—Outside broker—Running stock against client—Differences—No contract with third party.

In an action by an outside broker against a client to recover the balance of account for stocks and shares alleged to have been bought and sold for him, it appeared as to part of such stocks and shares that the broker appropriated certain stocks that he already held to the client's account, without the latter's knowledge.

Held, that there had been no contracts made by the broker with a third party for the client's benefit, and that therefore the broker could not recover differences or commissions in respect of such shares.

Further, as to other stocks and shares it appeared that the broker after buying them for the client resold them without the latter's knowledge, and subsequently bought them back again, but charged the client with the differences, as though such stocks had been kept open on his account, and it was

Held, that no real continuing contracts had been in existence for the benefit of the client, and consequently no real differences had arisen which the broker was entitled to recover from the client.

APPEAL by the defendant from an order of the

(*a*) Reported by H. LEIGH, Esq., Barrister-at-Law.

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ficial referee (Mr. Ridley, Q.C.), and also a cross appeal by the plaintiff from so much of Mr. Ridley's findings as were against the plaintiff.

The plaintiff, who was an outside broker, brought an action against the defendant to recover the sum of 164*l.* 0*s.* 11*d.*, the balance of account for certain stocks and shares bought and sold by the plaintiff for and on account of the defendant, and for commission and interest in respect thereof, and for money paid by the plaintiff for and on behalf of the defendant.

The defendant denied that the plaintiff had bought or sold the said stocks or shares, or paid the said money on account or on behalf of the defendant, or at his request, or so as to render the defendant liable.

In the alternative, the defendant said that the sum claimed was in respect of contracts by way of gaming or wagering.

By way of set-off and counter-claim the defendant set up an agreement with the plaintiff, whereby he was entitled to receive certain commission on introducing clients, and claimed to have an account taken and to set off the amount against the plaintiff's claim and to have the balance paid to him.

The action was ordered to be tried by the official referee.

From the evidence given before him the following facts appeared:—

That with regard to the transactions forming the greater part of the claim there were no contracts made by the plaintiff with third parties for the defendant, but the plaintiff already held stock of his own, and without disclosing this fact recommended the defendant to buy such stock, and pretended to make contracts for him in the usual way, and then charged him with the differences on the rise and fall.

In respect of this part of the claim the official referee found for the defendant, holding that no valid contracts had been made by the plaintiff with a third party on account of the defendant.

As to the residue of the claim the evidence showed that the plaintiff received orders from the defendant to buy for him 250 Canadas, and in fulfilment of that order he bought, on the 15th Aug. 1890, from Lane Brothers, brokers of the Stock Exchange, 800 Canadas, of which he allocated 250 to the defendant. On that day the plaintiff had altogether 1050 Canadas open with Lane Brothers.

On the 19th Aug. he sold 1000 to them, leaving fifty open, and between the 19th and 26th Aug. he had only fifty open.

On the 11th Sept. the plaintiff had 1050 open with Lane Brothers, and on that date he sold 1000, again leaving fifty open, and from the 11th to the 17th Sept. he had only fifty open with Lane Brothers, or anyone else on the Stock Exchange, and the plaintiff had no contract on which he was liable to any third party with the exception of fifty Canadas.

On the 22nd Sept. the plaintiff closed his account with Lane Brothers.

On the 24th Sept. the plaintiff bought 600 Canadas from another broker on the Stock Exchange, and on the 26th Sept. he sold through the same broker 250 Canadas on behalf of the defendant.

On the 20th Aug. 1890 the plaintiff bought twenty Brighton A's through Lane Brothers, of which he allocated five to the defendant's order.

On the 10th Sept. he closed his account with Lane Brothers, and between the 10th and 19th Sept. he had none open with Lane Brothers.

On the 19th Sept. the plaintiff bought five Brighton A's through Lane Brothers, and sold them again on the 22nd Sept., and on that date had none open with anybody on the Stock Exchange. On the 24th Sept. he bought five Brighton A's through another broker on the Stock Exchange. On the 25th Sept. he sold through the same broker five Brighton A's and on the 26th Sept. five Brighton A's on behalf of the defendant, and so closed the latter's account. Further, it appeared that on the 20th Aug. the plaintiff bought fifteen Sheffield A's through Lane Brothers, of which he allocated five to the defendant's order. On the 2nd Oct. he sold five and on the 3rd Oct. ten through Lane Brothers, and after that date he had none open. On the 13th Oct. he sold five Sheffield A's for the defendant through another broker, and so closed the defendant's account.

There was thus an interval of time between the dates of the original purchases respectively and the dates at which the differences had to be ascertained, during which time there were no contracts in existence with a third party for the benefit of the defendant. The plaintiff, nevertheless, charged the defendant with differences in respect of these stocks as if they had been kept open on his account, and now sought to recover such differences from the defendant.

As regards this part of the claim the official referee was of opinion that what the plaintiff had done did not affect the validity of the contracts, as either party might call upon the other to fulfil, and that as long as the plaintiff could go into the market and get the stock it did not matter when he did so, unless it could be shown that the market was purposely rigged. He was further of opinion that the transactions were not gambling transactions within the meaning of the Gambling Act. As to this part of the claim the official referee found in favour of the plaintiff, and ordered judgment to be entered for him for 258*l.* 13*s.* 9*d.*

From this decision the defendant now appealed. There was also a cross appeal by the plaintiff as to so much of the findings as were against him.

T. Willes Chitty for the appellant. — These transactions were not *bonâ fide* or carried out on behalf of the defendant by the plaintiff, and the official referee's findings in respect of them are wrong in law and in fact. The plaintiff has made out no case entitling him to indemnity in respect of these transactions, and has failed to show that he bought or sold the stocks on account of the defendant so as to render the defendant liable. The plaintiff was bound to keep stock open with brokers to supply the defendant's order, and he cannot be permitted to run such stock against the defendant, nor is he entitled to carry over stock for the defendant's account without having such stock open with the brokers through whom he bought for the defendant. He cannot claim differences on stock that he had never bought for the defendant. The referee was clearly wrong in holding that, as long as the plaintiff could go in the market and get the stock, it did

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not matter when he did so. The broker must buy the stock at the time ordered. There was no contract from the beginning between the plaintiff and the defendant:

Kimber v. *Barber*, 27 L. T. Rep. 526; L. Rep. 8 Ch. App. 56;

Ex parte Rogers; Re Rogers, 43 L. T. Rep. 163; 15 Ch. Div. 207;

Whitlark v. *Davis*, 10 Times L. Rep. 425.

Edgar Foa for the respondent.—The official referee's findings in respect of the two stocks are findings as to fact and cannot be reversed; he has found, as a matter of fact, that the plaintiff has not acted wrongly. Even if there is no contract in the beginning between the broker and his client, yet an original contract arises on the client's order to carry over:

Bongiovanni v. *Société Generale*, 54 L. T. Rep. 320.

The carrying over is a fresh transaction, and is a good one:

Shaw v. *Caledonian Railway*, 17 Scotch Sess. Cas. 4th series, 466.

T. Willes Chitty in reply.

Wright, J.—As regards the greater part of the claim, something like 700*l.*, the learned official referee has found for the defendant, and I entirely agree with him. The contracts which the plaintiff pretended to make for the defendant were not contracts made for him with any third party at all, but were sales to the defendant of stocks which the plaintiff already held of his own, and which he recommended the defendant to buy, and pretended to sell to the defendant, without disclosing the fact that they were his own stocks that he was recommending and selling. It appears to me that that cannot stand. Then, as to the residue of the claim, some 200*l.*, the learned official referee has given judgment for the plaintiff, on the ground that, as regards those stocks, these were real contracts made in the first instance by the plaintiff for the defendant. That seems to have been to some extent admitted, although I very much doubt if it is so; but, even assuming that these ever were contracts made by the plaintiff with some third party, Lane and Co., for the defendant, yet before the time came for the differences, which are sued for, to arise, there had ceased to be, if there ever was, any existing contract made by the plaintiff with any third party for the defendant. The plaintiff had gone through the operation of selling back to Mr. Lane a greater quantity of stock than he had bought from Mr. Lane, and there remained no contract which by any possibility could stand for the benefit of the defendant against anybody but the plaintiff himself. Of course that was not what the defendant authorised the plaintiff to buy for him, and there being no real third party and no real continuing contracts, no real differences could arise, and, therefore, the payment of those differences was not a payment made by the plaintiff on behalf of the defendant at all, and he cannot recover it. No doubt transactions like this are common in relation to Stock Exchange matters, but, none the less, they appear to me to be entirely sham transactions. Of course, if they are sham transactions carried out with the knowledge of the defendant, in cases like this the word "fraud" cannot properly be applied to them, but in such a case, as it seems to me, if it were part of the contract between the parties, part of the arrangement between the plaintiff and defendant, that there should be no real contract for the purchase and sale of stock, that would be a gambling transaction, and there, again, the plaintiff would be in a difficulty. We have not to try that question. But if, as is alleged here, the defendant was wholly unaware of the real nature of the transaction that the plaintiff was carrying on, then I do not shrink from saying that that is a fraud on the part of the plaintiff which will disentitle him to come into this court to enforce any part of his claim, upon the principle recognised by the Court of Appeal in a recent case where one of the Stock Exchange transactions was in question. On the plaintiff's own admissions it seems to me there is a very strong case for taking that view; I go further, and say that in these transactions, if they are carried on without full knowledge of persons in the position of the defendant, any two persons combining to carry them on bring themselves within reach of the criminal law of conspiracy.

Collins, J.—I am of the same opinion. As to a certain portion of the plaintiff's claim the learned referee gave judgment for the plaintiff, and as to that part of the decision the defendant appeals. Now, the material point of the defendant's appeal is this, a certain sum purports to have been paid by the plaintiff in respect of differences upon stocks carried over for the defendant. In other words, it is a claim for money paid for the defendant at his request. The facts with respect to that are undisputed, and they are these: The defendant is willing to admit for the purposes of the argument that stocks were purchased from third parties or sold to third parties as the case may be, purchased I think it was in this case from third parties in pursuance of the order of the defendant, so far as this point is concerned; but it turns out that after these stocks were purchased, and without the knowledge of the defendant, they were resold; the same stocks were resold to the same person from whom they were purchased. Therefore, there was an interval of time between the date of the original purchase and the date at which the differences had to be ascertained, during which there was no contract in existence for the benefit of the defendant with a third party. The plaintiff himself admits that he had none of those stocks open. I can put no other construction upon that but that there were no contracts in existence for the defendant with third parties made by the plaintiff. That being the case, when the period for carrying over arrived, what was the transaction which took place? It is said that there was an original transaction then of sale and purchase, but that transaction would be made in pursuance of orders either given or implied by the defendant to carry over these stocks then bought for him by the plaintiff. There were none such in existence. Therefore, the order whether given or implied could have no relation to any fact, there were no contracts which the defendant could have enforced against third parties, or which could have been enforced against them by third parties in existence at the time, and therefore there was never any request to carry over that which the plaintiff has carried over if he carried over anything. He did not really carry

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over anything. He entered into a fresh contract, not on behalf of the defendant at all, but he entered into a fresh contract for sale and purchase for which no one was responsible but himself, because he entered into it not upon the authority of the defendant but in pursuance of an order given which related to something which never existed, and therefore that could give him no authority. The result of that is that his claim for differences on those transactions falls to the ground. I do not think any point arises on the accounts as they actually stand as to whether if the whole account is taken it will turn out that the defendant has received under these transactions a sum which would wipe out the claim of the plaintiff. As far as I can understand the account, if the whole thing were opened *de novo* it would turn out that a larger sum of money would be due to the defendant than that which he now seeks to avoid paying. Therefore I do not think it necessary to consider whether this point is made for him, it can only be made on the terms of his bringing into the account all the sums that he has received by way of differences on these transactions. I am inclined to think that Mr. Chitty's argument on that point is correct, and that he is entitled to refuse to pay these sums claimed by the plaintiff, without at the same time bringing into the account sums that he has himself received under these transactions where they showed a balance in his favour. It seems to me that that money was paid with a full knowledge of the facts by the plaintiff to the defendant, and that the plaintiff is not in a position to sue for them and recover them back. Of course, if that is so, the defendant is not obliged to bring them into account in resisting the plaintiff's claim to pay the balance now sued for. That disposes of the appeal by the defendant, which I think ought to be allowed. Now, as to the cross, appeal by the plaintiff, that depends on the question whether there were any contracts made by the plaintiff with third parties for the defendant. It has been admitted before us that there were no such contracts in point of fact made, and that being so it is clear there could be no right to receive any differences or commissions in respect of them; therefore I entirely agree with the decision of the learned official referee on that part of the case. The result is, that the appeal of the defendant will be allowed, and the cross-appeal of the plaintiff will be dismissed.

Defendant's appeal allowed. Plaintiff's cross appeal dismissed.

Solicitors for the appellant defendant, *Morten, Cutler, and Co.*

Solicitor for the respondent plaintiff, *Horace K. Gow.*

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, Oct. 31, 1894.

(Before Lindley and Smith, L.JJ.)

Re General Phosphate Corporation Limited. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Company — Winding-up — Public examination— Report of official receiver—Statement in report that fraud has been committed — Companies (Winding-up) Act 1890, *s.* 8.

In order to obtain an order for public examination under sect. 8 *of the Companies (Winding-up) Act* 1890, *the official receiver should, in his further report under sub-sect.* (2), *state matters of information and belief, and that in his opinion such matters constitute a* primâ facie *case of fraud by some person—not defining which person—in the promotion or formation of the company or in relation to the company since the formation thereof; though, if it is manifest on the face of the report that fraud has been committed, it is not necessary for him to say so in express terms. It is not sufficient for the report merely to suggest that fraud has been committed.*

Decision of Williams, J. (70 *L. T. Rep.* 626) *affirmed.*

Re Laxon and Co. (67 *L. T. Rep.* 654; (1893) 1 *Ch.* 210); *and* Re The Birkdale Steam Laundry and Carpet Beating Company (1893) 2 *Q. B.* 386) *disapproved.*

This was an appeal *ex parte* from a decision of Williams, J. (70 L. T. Rep. 626), refusing to make an order for the public examination of certain persons who were directors or promoters of the General Phosphate Corporation Limited under sect. 8 of the Companies (Winding-up) Act 1890.

The above corporation was registered in June 1890, and was afterwards ordered to be wound-up. The official receiver made his preliminary report on the 13th Nov. 1893, and on the 24th Feb. 1894 he made a further report, in which he stated a number of facts relating to the formation and history of the company, and concluded by saying:

> The official receiver is of opinion that it is desirable that a public examination should be held, and that the persons named in the schedule hereto should be publicly examined as to the promotion or formation of the company, and as to the conduct of its business.

The persons named in the schedule were promoters, directors, and officers of the company. The report did not in express terms state that in the opinion of the official receiver fraud had been committed, nor was it contended that the statements contained in the report showed clearly that he was of such opinion. The official receiver applied to the court for an order for the public examination of the persons named in the schedule. Williams, J. refused the application, on the ground that the report did not show that in the opinion of the official receiver such a fraud as is mentioned in sect. 8 had been committed.

The *Attorney-General* (Sir R. T. Reid, Q.C.) and *Ingle Joyce* for the Board of Trade.—This order

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

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should be made, for, although the official receiver does not state that in his opinion fraud has been committed, yet a case of suspicion is raised by the facts stated in the report, and he does say that he is of opinion that further inquiry is desirable, and that a public exam nation should be held, and that the persons named should be examined. It is sufficient that this report states facts which suggest the existence of fraud:

Re Laxon and Co., 67 L. T. Rep. 654; (1893) 1 Ch. 210;
Re The Birkdale Steam Laundry and Carpet Beating Company Limited, (1893) 2 Q. B. 386;
Re Great Kruger Gold Mining Company; Ex parte Barnard, 67 L. T. Rep. 770; (1892) 3 Ch. 307;
Re Trust and Investment Corporation of South Africa, 67 L. T. Rep. 777, (1892) 3 Ch. 332;
Re The New Zealand Loan and Mercantile Agency Company Limited, 71 L. T. Rep. 130.

Lindley, L.J.—In this case I am of opinion that we must refuse the application; in fact, we cannot do otherwise if we are consistent with our previous decisions. It is quite obvious—it has appeared to us on two occasions, and it appears to me now—that the construction put on this Act of Parliament by the court is right, and that there is no power to put in force this process of public examination upon a report which does not show upon the face of it that some fraud has been committed, though not necessarily by a particular person, as we have most carefully explained. There is always great danger in going beyond or varying the language of an Act of Parliament, and I adhere to my former decision (*Re Great Kruger Gold Mining Company* (*ubi sup.*) that "such report" in sect. 8, clause 3, of the Companies (Winding-up) Act 1890, means a further report, and not a preliminary report. The language of the Act is, that the official receiver may, "if he thinks fit, make a further report or further reports, stating the manner in which the company was formed, and whether, in his opinion, any fraud has been committed." That, in my opinion, is what he ought to state. The exact language in which he is to state it is another matter, and in the second case which came before us (*Re Trust and Investment Corporation of South Africa* (*ubi sup.*) the court held that the report would be sufficient if it showed fraud; that is to say, it did not think it was necessary where the fraud was manifest on the face of the report to send it back to the official receiver to make him say in black and white that in his opinion fraud had been committed. That has been, I think, interpreted in a way which I consider too lax, because we did not intend in any way to depart from the requirement of the Act of Parliament. But our observations have been understood as amounting to this—that it is sufficient if the official receiver in his report suggests fraud: (*Re Laxon and Co.* (*ubi sup.*); and *Re The Birkdale Steam Laundry and Carpet Beating Company Limited* (*ubi sup.*) The word "suggest" is very ambiguous. What we meant was to adhere to the Act of Parliament, and to hold that circumstances must be stated which showed that the official receiver was of opinion that some fraud had been committed. If that appears, we think it unnecessary that there should be a paragraph stating what is apparent on the face of it; but when it is said that the result of our decision is, that it is sufficient for the official receiver to suggest fraud, I think it is time to protest and to disclaim having gone that length. The result is that, in my opinion, the order of Williams, J. is right, because these reports, even if they do suggest fraud, are perfectly consistent with the absence of all fraud, and you cannot find that in the opinion of the official receiver any fraud has been committed in this case. Whether it has or has not is not apparent on the face of the report, either in substance or in form.

Smith, L.J.—I am entirely of the same opinion, and I will only read what I think is the pith of the judgment of Williams, J. in this case. He says, "It seems to me that sect. 8 of the Companies (Winding Up) Act of 1890"—I leave out a few words—"intends that the official receiver should report matters of information and belief, but that when doing so he should pledge himself that such matters in his opinion constitute fraud by some person (not defining which person) falling within the description of persons mentioned in sub-sect. 2 of that section." It seems to me that that really lays down what this court has already held, and I think Williams, J. was right in the decision he came to in this case.

Solicitor: *The Solicitor to the Board of Trade.*

Thursday, Nov. 1, 1894.

(Before the Lord Chancellor (Herschell), Lindley and Smith, L.JJ.)

Montforts v. Marsden. (a)

APPEAL FROM THE COUNTY PALATINE COURT OF LANCASTER.

Action conducted in name of another—Agreement—Indemnity—Interference by nominal defendant—Injunction.

A defendant to an action for the infringement of a patent, not being willing to defend the action, agreed to allow the maker of the machine which was the subject of the action, to do so in his name on being indemnified against the costs. The indemnity as to the costs of the action was given, and the defendant signed a retainer to the solicitor of the maker of the machine to act as solicitor in the action, and in any appeals. An appeal to the House of Lords having been presented by the maker, the defendant, on the ground that he had refused to give him a further indemnity, purported to withdraw his retainer to his solicitor, and instructed another solicitor to take steps to withdraw the appeal. The costs of the proceedings up to the time of the appeal to the House of Lords had been paid and security lodged for the costs of that appeal.

Held, that the defendant, being fully indemnified against the costs, had no right to revoke the retainer, or otherwise interfere with the proceedings; and an injunction must be granted restraining him from doing so.

Whether the defendant could have interfered even if the indemnity which he had accepted did not prove sufficient, quære.

The plaintiff, Montforts, is a patentee and manufacturer of "raising" machines, carrying on business in Germany, and his agent in Manchester,

(a) Reported by W. C. Biss, Esq., Barrister-at-Law.

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Geiler, sold one of these machines to the defendant Marsden.

In 1891, another patentee and maker of "raising" machines, named Moser, commenced an action (*Moser* v. *Marsden*) in the Palatine Court of Lancaster against Marsden alleging that the machine sold to him by Montforts was an infringement of his patent.

Moser was unwilling to defend this action, and agreed to allow Montforts to do so in his name upon receiving an indemnity as to the costs, and after some negotiation a retainer, dated the 5th Feb. 1892, to Mr. E. Robinson Walker, Montforts' solicitor, was signed by Marsden and accepted by Walker. It was headed with the title of the action of *Moser* v. *Marsden*, and was as follows:

I retain you to act as solicitor in the defence of this action and any appeals therefrom, it being distinctly understood that your acceptance of such retainer is on the terms of your not charging me personally any costs whatever or pledging my credit in any way.

On the 6th April 1892 a deed of indemnity to Marsden was signed by Montforts and Geiler, which recited the purchase of the machine by Marsden, the commencement of the action against him by Moser, that Montforts was desirous that the action should be defended, and that "for this purpose the said Edward Marsden has agreed to allow the said Auguste Montforts to use the name of the said Edward Marsden, and to defend the said action and have the sole conduct of such defence upon being indemnified in manner hereinafter appearing." And in pursuance of the said agreement Montforts and Geiler jointly and severally covenanted with Marsden that they (but Geiler only to the amount of 1000*l.*) would at all times thereafter "keep indemnified the said Edward Marsden, his heirs, executors, and administrators, from all taxed costs and damages in the said action."

Montforts defended the action in the Palatine Court, and it was dismissed with costs, but on the 17th July 1893 the Court of Appeal reversed that decision. The costs of these proceedings were afterwards paid by Montforts to Moser.

On the 17th July 1894 a petition of appeal from the decision of the Court of Appeal on behalf of Montforts, but in the name of Marsden, was lodged with the House of Lords, and soon after a sum of 700*l.* was lodged by Montforts as security for the costs of the appeal.

On the hearing of the appeal to the House of Lords, Marsden's solicitors wrote claiming a further indemnity to the extent of 1000*l.*, and after some correspondence, on the 23rd Aug. a notice was served by them, on behalf of Marsden, on Messrs. E. Robinson Walker and Co., which referred to the deed of the 6th April 1892, and stated that, unless Marsden received within twenty-one days a further indemnity to be approved by his solicitors, the retainer given to Robinson Walker, dated the 3rd Feb. 1892, would be withdrawn.

No further indemnity having been given, on the 14th Sept. the following letter, signed by Marsden, was served on Messrs. E. Robinson Walker and Co.:

Referring to the notice dated the 23rd day of August last, I hereby withdraw the retainer given by me to you on the 5th day of Feb. 1892.

On the 18th Oct. notice of change of solicitors was lodged at the House of Lords, Marsden purporting to appoint Messrs. Diggles and Ogden, his own solicitors, to be solicitors in the action in the place of Walker.

The writ in this action was then issued, claiming an injunction restraining Marsden from acting in breach of the agreement to permit Montforts to have the sole conduct of the action of *Moser* v. *Marsden*.

A motion for the injunction came before the deputy Vice-Chancellor, and was dismissed, and Montforts appealed.

Finlay, Q.C., *Hopkinson*, Q.C., and *Astbury* for the appellant.—Marsden is fully indemnified, and has no right to interfere with the conduct of the action in any way.

Oswald, Q.C. and *T. C. Eastwood* for Marsden.—The appellant has mistaken his remedy, and ought to have applied to the appeal committee of the House of Lords. Marsden was within his rights. A client cannot be chained to a particular solicitor. A retainer is revocable by the client at any time:

Re Galland, 53 L. T. Rep. 921; 31 Ch. Div. 296, 300;
Rees v. *Williams*, 32 L. T. Rep. 462; L. Rep. 10 Ex. 200;
Emmens v. *Elderton*, 4 H. L. Cas. 624.

Besides, the deed of indemnity is not co-extensive with the retainer. The latter includes any appeals, while the indemnity only includes the costs of the action, and that only includes the costs up to the trial, and not of any appeals.

Finlay, Q.C.—To avoid any dispute on the point Mr. Montforts and Mr. Geiler are ready to undertake that the indemnity provided by the deed of the 6th April 1892 shall apply to the costs of the appeal to the House of Lords.

The LORD CHANCELLOR (Herschell).—This is an application to restrain Mr. Marsden, who was the defendant in an action brought by Mr. Moser, from interfering with the presentation of an appeal in that action by Mr. Montforts. It appears that Mr. Montforts is a patentee who had sold one of his patented machines to the defendant Marsden. Mr. Moser alleged that the machine was an infringement of a patent belonging to him, and brought an action against Marsden for the purpose of restraining the infringement of this patent. Mr. Montforts was, of course, concerned to defend the validity of his patent, and to maintain that the machine which he had sold to Mr. Marsden was not one which violated any of Mr. Moser's rights. Mr. Marsden, not unnaturally, was not particularly anxious, perhaps not desirous at all, to defend the action. Accordingly, an arrangement was come to between Mr. Montforts and Mr. Marsden. No agreement was entered into in writing, though two documents were executed, the one in the form of a retainer to Mr. Montforts' solicitor by Mr. Marsden, the other in the form of an indenture containing an indemnity; but these were only instruments employed for the purpose of giving effect to an agreement between Montforts and Marsden which is to be implied from the circumstances and from the perusal of those documents. The agreement in its general nature was of a kind perfectly well known. It is a very common thing for a person who is interested in litigation much more than the nominal defendant, to arrange that he shall have the conduct of

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that litigation, that it shall be really his litigation, although it still has to be conducted in the name of the defendant who is sued. That is the nature of the agreement entered into here. It was intended as between Marsden and Montforts that, although Marsden was the person sued, Montforts should defend, take charge of, and act really as the litigant in the action, and, as is common in such cases, it was part of the arrangement that the solicitor of the real litigant should be the solicitor who was to conduct the litigation. That was the general nature of the arrangement come to. Now, as I have said, its extent and scope is to be gathered from the circumstances and the terms of the documents. There has been some criticism upon the language of the deed of indemnity with a view of showing that it applied to the action only up to trial, and not to any subsequent appeal. It is not necessary to express an opinion upon it, although I think, to say the least, that is open to very great doubt, and the parties, it may be observed, did not act upon that view, because it is obvious that the appeal which was fought in the Court of Appeal after the action had been tried was treated by the parties as though it were a matter covered by the deed of indemnity. But when one looks at the terms of the retainer, which are in no respect ambiguous, I think it is impossible to doubt that the intention of both parties was that the litigation not only on the first trial of the action, but on any appeal therefrom, should be conducted by Mr. Montforts, and that in the conduct of them his solicitor should be employed. I think the fallacy of Mr. Oswald's argument is this, that it is not a question of Mr. Marsden being chained to a particular solicitor in litigation which is being conducted for him; it is a question of his interfering with the real litigant, who he has agreed shall conduct the proceedings in his name, in the employment of the solicitor whom he wishes to employ in the conduct of the litigation. In the course of the argument I asked Mr. Oswald whether he could contend, if in pursuance of an arrangement of this sort the defence to the action had been commenced by Walker as solicitor for Montforts, and on his instructions, and it had been prosecuted down to the eve of the trial, that then Mr. Marsden could come in and say, "I withdraw my retainer. Mr. Walker shall no longer act for me; I will substitute my own solicitor, and he may on some arrangement I have made with the plaintiff give the plaintiff judgment," rendering the whole of the costs which have been incurred absolutely useless. Mr. Oswald, I think, naturally shrunk from maintaining that he could take any such course, but if so, and if in such a case as that Mr. Marsden would not be allowed to set aside Mr. Montforts' solicitor, who had been really acting for him, I am at a loss to see how he can do it at the later stage, seeing that the terms of the retainer apply not only to the defence to the action but to any appeals therefrom, putting the appeals on precisely the same basis as the defence to the action, and rendering it, as it seems to me, as impossible to contend that he has a right to intervene in the way he is contending for at the later stage as he would have had at the point I put, viz., immediately before the trial of the action. No doubt, if the defendant had been in peril, if the prior costs had not been paid, if there were some reason to believe that he would be left liable to loss in a litigation that was not really his but another's, the court would have been very unwilling to interfere and bring about such a result. It might even then be doubtful whether the answer to any such objection would not have been: "Before entering into the agreement into which you did enter you should have taken care that the indemnity which you obtained was sufficient to satisfy you throughout and in all events. If you have not done so it may be your misfortune, but at all events you cannot now insist upon intervening." But it is not necessary to consider that question, because the case now stands in this way. The sum of 700*l.* has been deposited in the House of Lords to answer the costs of the appeal. It is suggested that that may not be sufficient. It is suggested also that the indemnity provided for by the indenture would not cover any extra costs in the House of Lords; but all those difficulties are got rid of by the undertaking which has now been given. I think that the order should be prefaced by a statement that 700*l.* has been deposited in the House of Lords, and that Montforts and Geiler undertake that the indemnity provided for by the indenture of the 6th April 1892 shall apply to any costs of the appeal not covered by the 700*l.* deposited; then on that undertaking restrain the defendant from taking any step in or in relation to the action or any appeal thereon by himself or by any solicitor other than E. R. Walker, and from interfering with the prosecution of any such appeal by Montforts in the name of the defendant.

Lindley, L.J.—I am of the same opinion. Mr. Oswald has said, and said truly, that this is an unprecedented application. I certainly do not recollect any application of the kind, but the reason that it is unprecedented is that the circumstances have never arisen before. There is a patent action of *Moser* v. *Marsden* in which Mr. Marsden is the defendant. The real person interested in that patent action was not Mr. Marsden, but Mr. Montforts, and Mr. Montforts is desirous, and has been always desirous, of defending the action. He did defend it, but the decision of this court being against him he now desires to appeal to the House of Lords. It is his action in substance and his defence, and there was an agreement, the whole terms of which are not in writing, but there was an agreement clearly to be inferred from the retainer and the indemnity deed, that Mr. Montforts should be at liberty to use Mr. Marsden's name, and should indemnify him against the costs. Up to a certain point that has been carried out loyally. Then there is an appeal to the House of Lords, and Mr. Marsden for some reason or other takes the view that it should be stopped. I think it is only throwing dust into our eyes to say that he has taken these proceedings in order to get further security. The 700*l.* deposited in the House of Lords as security for the costs of the appeal so long ago as July are sufficient, and if 700*l.* had not been enough, there would have been some affidavit saying so, some application to increase it. But it seems to me that it is obvious, from what took place in the court below and what has taken place here, that for some reason or other which it is quite unnecessary to go into, Mr. Marsden has changed his mind and does not want the appeal to the House of Lords to go on, and

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intends to stop it if he can. That is a gross breach of faith, in my opinion, towards Mr. Montforts, and ought to be stopped, and inasmuch as the circumstances are unprecedented, the order will be unprecedented. I think the parties are quite right in treating this as an appeal from the judgment on the trial of this action, and that there is no necessity to have the case fought over again, and that also, I think, ought to be prefaced to the order. Then, with the undertaking which the Lord Chancellor has referred to, I think the injunction should be granted.

SMITH, L.J.—I have nothing to add to what has been said by the Lord Chancellor and Lindley, L.J., except that I agree.

Solicitors for the plaintiff, *Jaques* and *Co.*, agents for *E. Robinson Walker* and *Co.*, Manchester.

Solicitors for the defendant, *Norris, Allens*, and *Chapman*, agents for *Diggles* and *Ogden*, Manchester.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Thursday, Nov. 1, 1894.

(Before CHITTY, J.)

Re GRAHAM; GRAHAM *v.* NOAKES. (*a*)

Recognisance—Receiver of rents and profits of real estate—Sureties—Extent of liability.

Upon the appointment of a receiver of the rents and profits of the real estate of a testator, a recognisance in the usual form was entered into by him with two sureties. The receiver insured the buildings on part of the real estate in his own name, as receiver, and was allowed the premiums paid in respect thereof on passing his accounts. A fire having occurred, he received the insurance money and misapplied a portion of it. He also received the dividends on a sum of consols representing the proceeds of sale of real estate, and which was liable to be laid out in the purchase of other real estate, for which he had not fully accounted, and he also received out of court a sum of money forming part of the testator's personal estate to be applied in repairs of the real estate, part only of which was so applied, and the balance was unaccounted for.

The receiver having absconded, the sureties were held liable for the several sums so received by the receiver, and not accounted for, there being no equity for relieving the sureties in respect of any of such sums.

THIS was an application in an administration action, which raised a question as to the extent of the liabilities of the sureties of a receiver of the rents and profits of real estate.

In April 1884 Henry Breton was appointed receiver of the rents and profits of the real estate of James Graham, the testator in the action, and security was given by him with two sureties in the usual way. By the recognisance which was in the form given in Appendix L. to the Rules of Supreme Court 1883, the receiver and two sureties were jointly and severally bound in the sum of 3500*l.*, and the condition of the bond was that if the receiver "shall duly account for all and every the sum or sums of money which he shall so receive on account of the rents and profits of the real estate of the said testator at such periods as the said court or judge shall appoint, and do and shall duly pay the balances which shall from time to time be certified to be due from him," then the recognisance should be void.

The receiver absconded, and by an order dated the 15th Feb. 1894 he was discharged and ordered to leave his final account at chambers and pay into court the balance certified to be due from him. This order not having been complied with, the sureties submitted to the jurisdiction of the court in the action as fully as if an action to enforce their bond and recognisances as sureties for the receiver had been brought, and the receiver's accounts were taken in their presence. In taking the accounts the question was raised whether certain items could be charged against the sureties. These items were:

(1) A sum of 350*l.* for fire insurance money, as to which it appeared that the receiver had in 1885 insured some farm buildings in his own name, describing himself in the policy as receiver of the rents and profits of the real estate of James Graham, deceased; that he had charged and been allowed the premiums in his accounts; and that a fire having occurred in 1893 he had received the insurance money and misapplied part of it.

(2) Various sums amounting to about 100*l.* paid to the receiver under order of the court representing dividends on consols in court purchased with the proceeds of sale of part of the testator's real estate sold by order of the court pending the action and after the date of the order appointing him receiver, such consols standing to a separate account and being liable to be reinvested in real estate.

(3) A sum of 21*l.*, the balance of a sum of 220*l.* paid to the receiver under an order of the court out of moneys representing personal estate to be applied in repairs of the real estate, 199*l.* only having been spent by him in repairs.

Byrne, Q.C. and *T. L. Wilkinson* for the sureties.—The insurance money is capital, and cannot in any sense be said to be rents and profits for which only the sureties are liable. In *Maunsell* v. *Egan* (3 Jo. & Lat. 251), which will be relied on by the other side, the form of recognisance was different to that in the present case. The cases of *Dawson* v. *Raynes* (2 Russ. 466) and *Re Lockey* (1 Ph. 509) are distinguishable. The other items do not represent rents and profits of the real estate.

Levett, Q.C. and *Bramwell Davis* for the plaintiffs.—The sureties are liable for all that the receiver could be required to pay to the amount of the penalty, and there is no equity for relieving the sureties from payment of any of these items. They referred to

Maunsell v. *Egan*, 3 Jo. & Lat. 251;
Dawson v. *Raynes*, 2 Russ. 466.

Byrne, Q.C. in reply.

CHITTY, J., after stating the facts, said:—The argument for the sureties raises the question of the principle upon which this account is to be taken as against the sureties. Now, it is clear that at common law, there having been default on the part of the receiver, the whole sum of 3500*l.* mentioned in the recognisance is recoverable as against the sureties, and if authority be

(*a*) Reported by G. WELBY KING, Esq., Barrister-at-Law.

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required on that point it is furnished by the certificate that was given by the judges in *Dawson* v. *Raynes* (*ubi sup.*), who were of opinion that if there had been any breach of the condition of the recognisance, the penalty was a debt at law, and the question of interest did not arise at law. The practice is, as stated by Kerr on Receivers, and as is well known, when the recognisance is put in force at law, to apply to the court by whom the receiver has been appointed, to submit to the jurisdiction, and offer to have the account taken by the court who appointed the receiver. On taking the account the court does not necessarily exact the full amount of the sum mentioned in the recognisance; but the court, when it looks into the case and considers the nature of the office of the receiver in the circumstances, applies, not a principle of contract, but a principle of equity, to the account, and relieves the sureties against demands which the court, on a full consideration of the matter, thinks the sureties ought to have allowed in their favour. Mr. Kerr states in his book on Receivers (3rd ed. p. 217) that the surety is answerable to the extent of the amount of the recognisance for whatever sum of money, whether principal, interest, or costs, the receiver has become liable for, including the costs of his removal and the appointment of the new receiver in his place;" and in my opinion that is a correct general statement of the principle on which the court proceeds. Now, in *Dawson* v. *Raynes*, the Lord Chancellor pointed out that the penalty was forfeited by breach of the condition, the amount of the penalty is the debt due from the sureties; but he did consider the question whether they should be charged, in taking the account, with interest; and in the circumstances of that case, that is to say upon equitable considerations, he relieved them from the penalty of the recognisance to the extent of the demand made against them for interest. He said: "It seems to me that it would be difficult to say, that, where the principal debtor"—that is, the receiver—"would be obliged to pay interest, there would not be an equity that the surety should pay the interest in default of the principal." Now, having stated what I take to be the principle on which the court proceeds, I am in a position to deal with the particular items. The first item is the sum of 350*l.*, part of the insurance money misapplied by the receiver. With regard to this insurance it appears that, in the former accounts passed by the receiver, he had been allowed by the court, and properly allowed, the premiums which he had paid. The policy itself is referred to in the former accounts, and the court, therefore, sanctioned this insurance, and, I think, I am justified in saying, sanctioned the insurance in the receiver's own name. I have inquired into the matter. It is, say my chief clerks, the practice for receivers to insure; but I am not satisfied one way or the other whether they insure in their own names. Of course, they might insure the property in the names of the trustees or in other names, though this receiver was allowed to insure in the manner I have mentioned. In many cases when receivers are appointed there is an insurance already on foot, and then he takes over the policy, pays the premiums, and is allowed them, on passing his accounts. It appears to me that it is consistent with his duty as receiver, and that the court has itself sanctioned it, that he should make and keep this insurance on foot, and I think that he received the insurance money as receiver. The policy, on the face of it, was granted to him on that footing. It appears to me that what the receiver did with regard to this insurance, was done by him in his character of receiver: that he himself, in accounting to the court, would have been held liable to account for these moneys; and when I am considering the equities fairly applicable to a case of this kind, it seems to me that if I charge him, as I must have charged him, as between himself and the court, with the amount of this insurance money thus received, so I ought to charge the sureties. I think there is no equity on their part sufficient to justify me in saying that they ought to be relieved against this charge for 350*l.* Some cases of course may be put where possibly orders might be made which would be altogether outside the scope of the receivership. That is not the case which I am dealing with here on this first item, and any case of that kind may be left to be considered when it arises. In my opinion the sureties are chargeable with the sum that the receiver received on this policy, and did not apply in accordance with his duty. The next item is as to the sum of 100*l.* Under orders of the court the receiver received these dividends as part of the income of the real estate. In my opinion this again was within the scope of his duty as receiver, and I ought not to relieve the sureties, who are liable (as I have said) at law to the full extent of 3500*l.* in respect of this income, which was income of real estate, seeing that the money in court was liable to be laid out in the purchase of other land. It was strictly income, that is to say, profits of real estate. Then the next item is the sum of 21*l.*, balance of moneys which ought to have been spent in repairs on the real estate. Now repairs of real estate fall within the scope of the receiver's duty. He is allowed to do certain repairs without even coming to the court. In fact, he may at his own risk execute repairs of a more extensive kind. There is no exact rule that I know of as to the amount he may do upon his own responsibility; but, of course, what he does upon his own responsibility is liable to be questioned unless he has obtained the previous sanction. Proper repairs of real estate appear to me again to be a matter which falls within the functions of a receiver, where the receiver is appointed to receive the rents and profits. That being so, it appears to me again that I ought not to relieve the sureties from the sum of 21*l.* with which the chief clerk has proposed to charge them. The result, therefore, is that the surcharges made in respect of these three items are proper and must be allowed, and, as the sureties have failed in their contention, the cost of this application must be costs of the surcharge.

Solicitors: *Indermaur* and *Brown*, for *C. Hamilton White*, Maidstone; *A. H. Arnould* and *Son*.

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Friday, Nov. 16, 1894.

(Before NORTH, J.)

HUTCHINSON *v.* BARKER. (*a*)

Practice—Payment of money into court by plaintiff in satisfaction of defendant's counter-claim—Order XXII., r. 4—Supreme Court Funds Rules 1886, *r.* 30*—Printed form of request for lodgment of money.*

The plaintiff in an action desired to pay a sum of money into court in satisfaction of a claim made in two paragraphs of the defendant's counter-claim, but the Paymaster-General refused to issue the necessary direction to the Bank of England to receive the money on the ground that the printed form of request for lodgment of money authorised for use in the pay office did not contain any statement applicable to the circumstances of the case. On a motion ex parte *on behalf of the plaintiff for directions as to the payment of the money into court:*

Held, that the plaintiff was entitled to make the payment into court, and that a statement which was applicable to the circumstances of the case should be inserted in the printed form of request.

THE action was brought for trespass. The defendant Henry Barker delivered a defence and counter-claim.

The plaintiff Harriet Hutchinson desired to pay into court the sum of 1*l.* in satisfaction of the claim made in paragraphs 3 and 4 of the defendant's counter-claim, and preferred a request to the Paymaster-General to issue a direction to the Bank of England to receive the money. The plaintiff filled up a printed form of request, with the statement that the amount was paid in "on behalf of the plaintiff in satisfaction of the matters pleaded in paragraphs 3 and 4 of the counter-claim of the defendant."

The Paymaster-General, however, refused to issue a request to the bank to receive the money on the ground that the statement with which the plaintiff's printed form of request was filled up did not follow any one of the three statements directed to be inserted in the printed form of request authorised for use in the Pay Office by Rule 30 ofthe Supreme Court Funds Rules 1886.

The printed form of request, so far as material in the present case, runs as follows:

Pay office, No. 12, rule 30, High Court of Justice, Chancery Division. 1. Request for lodgment of money under Order XXII., or rule 26 of Order XXXI.

Then after a blank space for insertion of the title of the cause or matter, and the names of the parties thereto, &c., it proceeds:

The paymaster is requested to issue a direction to the bank to receive ——— which amount is paid in.

Then comes a star referring to a note below which contains the following direction:

Insert one of the following statements in accordance with the circumstances: (A.) on behalf of the defendants [state name] in satisfaction of claim of above-named [state name of party] (or with defence setting up tender); (B.) on behalf of defendant [state name] against claim of above named [state name of party] with defence denying liability; (C.) to security for costs account on behalf of [state name of party, and whether plaintiff or defendant.]

This was a motion *ex parte* on behalf of the plaintiff for directions as to payment into court by him of the money.

S. Mayer for the motion.—The plaintiff is entitled to pay the money into court in satisfaction of the claim made by paragraphs 3 and 4 of the defendant's counter-claim: (Order XXII., r. 9.) The Paymaster-General ought to issue a direction to the bank to receive the money, although the statements in the printed form of request are not applicable to the case.

NORTH, J.—The plaintiff is entitled under rule 9 of Order XXII. to pay the money into court in satisfaction of the claim made by paragraphs 3 and 4 of the defendant's counter-claim. The payment had better be expressed to be made on behalf of Harriet Hutchinson, the plaintiff in the claim and the defendant in the counter-claim, in satisfaction of paragraphs 3 and 4 of the claim of the above-named Henry Barker, the plaintiff in the counter-claim in the action of *Hutchinson* v. *Barker*.

Solicitor: *W. H. Norledge.*

Nov. 7 *and* 8, 1894.

(Before NORTH, J.)

Re KNAPP; KNAPP *v.* VASSALL. (*a*)

Voluntary settlement — Construction — Gift to children as a class—Period for ascertaining class.

By a voluntary settlement the settlor covenanted to pay to trustees a fund to be held, in default of appointment by the settlor, upon trust to divide the same among the children of A., who, being a son or sons, should attain twenty-one, or, being a daughter or daughters, should attain twenty-one or marry, to the intent that the fund should be in addition to the portions provided for such children by a previous settlement, under which all the children of A., who, being sons, should attain twenty-one, or being daughters should attain that age or marry, would be entitled to take subject to any appointment by A. The settlor died without exercising his power of appointment, and the sum was duly paid to the trustees of the voluntary settlement. Two children of A. had attained twenty-one, and A. was living and might have more children. An originating summons was taken out for the determination of the question whether, under the voluntary deed, only those children of A. who were living when the first attained twenty-one were entitled to the fund, or whether any future children of A., who might be born, would be entitled to share in it.

Held, that only those children of A. who were living when the first attained twenty-one were entitled to the fund.

The rule laid down by Andrews *v.* Partington (3 *Bro. C. C.* 401) *extended to a voluntary settlement.*

BY an indenture dated the 21st Feb. 1867, Matthew Grenville Samuel Knapp, in exercise of the power given him by an indenture of settlement of the 28th Sept. 1866 of charging portions for his children, charged certain settled estates with payment in case he should have one or more child or children by his then present or any future

(*a*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

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marriage (other than a first or only son entitled under the indenture of settlement of the 28th Sept. 1866 to the settled estates for the first estate in tail male) of the sums thereinafter mentioned, that was to say if there should be but one such child (other than as aforesaid) the sum of 3000*l.*; and if there should be but two such children (other than as aforesaid) the sum of 4000*l.*; and if there should be but three such children (other than as aforesaid) the sum of 5000*l.*; and if there should be four or more such children (other than as aforesaid) the sum of 6000*l.*, the same to be an interest or interests vested or payable unto or among such child or children, or any one or more exclusively of the other or others of such children, at such age or time, in such manner, and, if more than one, in such shares and with such provisions for maintenance, &c., and other powers and provisions as he should appoint, and in default of appointment if there should be but one such child other than as aforesaid, the said sum of 3000*l.* to be the portion for such only child, and to be vested in such only child, being a son, at the age of twenty-one years, or being a daughter, at the age of twenty-one years, or day of marriage with such consent as therein mentioned which should first happen, and to be paid to him or her at the same age or time if the same should happen after the death of the survivor of Matthew Knapp and Matthew Grenville Samuel Knapp, but if the same should happen in their, or either of their lifetime, then immediately after the death of such survivor, and if there should be two, three, four, or more children of Matthew Grenville Samuel Knapp by his then present or any future marriage other than as aforesaid, then the sum of 4000*l.*, 5000*l.*, or 6000*l.*, as the case might be for the portions of such of those children, as being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age, or marry with such consent as therein mentioned. and to be interests vested in them accordingly, and to be divided between such children in equal shares to be paid to them respectively, being a son or sons, at his or their age or respective ages of twenty-one years, or being a daughter or daughters, at her or their age or respective ages of twenty-one years, or day or respective days of marriage, with such consent as aforesaid which should first happen, if the same respectively should happen after the death of the survivor of Matthew Knapp and Matthew Grenville Samuel Knapp, but if the same should happen in their or either of their lifetime then immediately after the death of such survivor.

By an indenture, dated the 30th Aug. 1882, after reciting that Matthew Grenville Samuel Knapp had then an eldest son, namely John Matthew Knapp and four younger children, namely Robert Bruce Knapp, Catharine Anna Knapp, Arthur Douglas Knapp, and Alured Faunce Primatt Knapp, and that Arthur John Knapp was desirous of making such settlement by way of further provision for Matthew Grenville Samuel Knapp and his wife and children as thereinafter expressed, Arthur John Knapp covenanted with trustees that he would in his lifetime, or that his heirs, executors, or administrators would within twelve calendar months after his death, pay to the trustees the sum of 14,000*l.* with interest at 4 per cent. per annum from his death, to be held by the trustees upon such trusts as he should appoint, and, in default of appointment, in trust to divide the same equally among all the children of Matthew Grenville Samuel Knapp, who, being a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age or marry (other than John Matthew Knapp, his eldest son, and such other son or sons (if any) as under the limitations of the indenture of the 28th Sept. 1866 should become entitled while under twenty-one to the settled estates as tenant in tail male in possession or in remainder immediately expectant on the death of Matthew Grenville Samuel Knapp), to the intent that the sum of 14,000*l.* should be in addition to the portions provided for the younger children by the indenture of the 28th Sept. 1866, with a proviso that (*inter alia*) if there should be only one child of Matthew Grenville Samuel Knapp (other than as aforesaid), who, being a son, should attain the age of twenty-one years, or being a daughter, should attain that age or marry, such one child should take under the indenture now in statement the sum of 2000*l.* only, and if there should be two children of Matthew Grenville Samuel Knapp (other than as aforesaid), and no more, who, being a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age or marry, such two children should take between them under the same indenture the sum of 6000*l.* only; and if there should be three children of Matthew Grenville Samuel Knapp (other than as aforesaid), and no more, who, being a son or sons, should attain the age of twenty-one years, or, being a daughter or daughters, should attain that age or marry, such three children should take among them under the same indenture the sum of 10,000*l.* only. The deed also contained a provision that during suspense of absolute vesting of any part of the fund the income of a presumptive share should be applicable for maintenance and education under the statutory powers in that behalf.

Arthur John Knapp died on the 21st Feb. 1883. without having exercised the power reserved to him by the indenture of the 30th Aug. 1882 of appointing by deed the sum of 14,000*l.*

Matthew Grenville Samuel Knapp was alive at the date of the summons, and had five younger children, viz., Robert Bruce Knapp, Catharine Anna Knapp, Arthur Douglas Knapp, Alured Faunce Primatt Knapp, and Keturah Mary Knapp.

Robert Bruce Knapp attained twenty-one on the 2nd July 1892, and under an order in chambers of the 8th Aug. 1892 the sum of 2000*l.* had been paid to him.

Catharine Anna Knapp attained twenty-one on the 2nd May 1899; and thereupon Robert Bruce Knapp claimed an additional sum of 1000*l.*, and Catharine Anna Knapp claimed the sum of 3000*l.*

The 14,000*l.* had been handed over to the trustees of the indenture of the 30th Aug. 1882 and invested by them; and by reason of the increase in value of the investments, the fund was at the date of the summons regarded as amounting to over 16,000*l.*

This was an originating summons taken out by Robert Bruce Knapp and Catharine Anna Knapp against the trustees of the indenture of the 30th Aug. 1882, and the three infant children of

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Matthew Grenville Samuel Knapp, for the determination of the question whether the five younger children of Matthew Greville Samuel Knapp take the whole fund equally between them as they attain twenty-one, or whether any future children of Matthew Grenville Samuel Knapp which might be born would be entitled to share in the fund.

Swinfen Eady, Q.C. and *Whateley* for the plaintiffs.—The question is whether the rule laid down in *Andrews* v. *Partington* (3 Bro. C. C. 401) which applies in the case of wills, is applicable to the case of a voluntary settlement. The reason for the rule, viz., that it is a rule of convenience arising from necessity, applies to the case of a voluntary settlement as well as to the case of a will. [*Everitt*, Q.C.—I concede that the rule is thoroughly established in the case of wills.] They refer to

Re Emmet's Estate; *Emmet* v. *Emmet*, 42 L. T. Rep. 4; 13 Ch. Div. 484;
Re Smith, 2 J. & H. 594;
Gillman v. *Daunt*, 3 K. & J. 48;
Re Mervin; *Mervin* v. *Crossman*, 65 L. T. Rep. 186; (1891) 3 Ch. 197.

Henry Fellows, for the three defendants, the infant children of Matthew Grenville Samuel Knapp, supported the argument for the plaintiffs.

Everitt, Q.C. and *Warrington* for the defendants, the trustees of the deed of the 30th Aug. 1882.—The rule of *Andrews* v. *Partington* (*ubi sup.*) has never been applied to the construction of a deed. There is no decision either in favour of or against such application of the rule; but there is a great difference between a settlement for valuable consideration and a will. In the present case the document to be construed is a voluntary settlement, but it is stated therein that it is made for the purpose of adding to the portions provided for the younger children of Matthew Grenville Samuel Knapp by the indenture of the 28th Sept. 1866. Under that indenture any children of Matthew Grenville Samuel Knapp who may be subsequently born are entitled to share the fund provided for portions for his younger in children; and it is to be presumed that the children intended to take under the deed of the 30th Aug. 1882 are the same as those entitled under the former deed.

NORTH, J.—I think that the order made in chambers is the order I must follow now. It seems to me to have been right. If Arthur John Knapp, the settlor, had done what he has done by will instead of by voluntary settlement it is not disputed for a moment what the position of the parties would have been. The children who had attained twenty-one would be entitled to have their shares actually paid over to them. The result would be that the shares must be ascertained, and that being so, no person who is not alive can have a share set apart for him. That is the rule in *Andrews* v. *Partington* (*ubi sup.*), and a great many other cases, and it is too clearly settled to allow of any doubt about it now. There are only two cases I want to refer to. One is the case of *Re Emmet's Estate*; *Emmet* v. *Emmet* (*ubi sup.*). There the property stood thus: It was limited by will on trust to convert, and after payment of debts to invest and to permit H. E. during his life to receive the rents and income for his own benefit, and after his death, as to one undivided third part, for all the children of H. E. equally, the shares to be conveyed and paid to them as they should attain twenty-one as to sons, and twenty-one or marriage as to daughters. There were clauses of maintenance and accruer. The testator gave another third part of the estates after the death of H. E. in favour of the children of his sister, and the remaining third part in trust for all and every the children of G., the shares to be conveyed and paid at the ages and times above-mentioned, and in case H. E., the tenant for life, should die without children, the share given for them was to be divided between his sisters and G.'s children as the two-thirds given to them. H. E. died a bachelor. At his death G., a widower, had two children. He married again, and when his eldest child attained twenty-one he had six children, all of whom attained twenty-one. Another child was born afterwards. It was held by Hall, V.C., and confirmed by the Court of Appeal, that the six children or their legal personal representatives were entitled to a moiety of the estates. That looks very much like a decision on this exact point, but in point of fact it was not anything of the kind, The question really raised and argued was whether the six children took, or whether two of them took to the exclusion of the other four, and the case of the seventh child seems to have been thought so clear that there was no person to represent that child before the court. It was decided in the absence of that child, and treated as a perfectly clear settled point about which there could be no dispute. There were reasons on the cases for suggesting that it was two instead of six, and that was what was negatived by both courts, but the law laid down by Sir G. Jessel is perfectly clear in accordance with the earlier cases, and a portion of that I must read. He says that the will appears to me as clearly and well drawn as any will need be. Under that will any layman would understand that all the children of George Nelson Emmet, at whatever time born, would become entitled, and in the absence of authority so should I;" that is to say, the words most clearly pointed to all the children. "There has, however, been established a rule of convenience, not founded on any view of the testator's intention, that since when a child wants its share it is convenient that the payment of the share should not be deferred, it shall be made payable by preventing any child born after that time from participating in the fund. The rule is, that, so soon as any child would, if the class were not susceptible of increase, be entitled to call for payment, the class shall be incapable of being increased. That rule of convenience, being opposed to the intention, is not to be applied where it is not necessary, there being also a rule that you let in all who are born up to the time when a share becomes payable." I do not think I need read it further, because that is a very clear statement of the law with respect to it. The result is that you may have to take the testator's death as the time when the class is ascertained, but if there is a life estate which prevents the distribution of the fund till the life estate is over, then you look to the period of distribution which is, in that case, the termination of the life estate and then you fix—not the persons who will take—but you fix the maximum number of which the class can consist, and then divide the shares as far as they are divisible on that footing. If there are

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six children living, one of whom has attained twenty-one, he will get his one-sixth. If another attains twenty-one he will get his one-sixth afterwards. If a third dies under twenty-one, he does not take a share, and the fund will be divisible in fifths, and the first two who have had their sixth shares which were what they were clearly entitled to, would be found entitled each to one-fifth of another sixth, and so on. In the case of a life estate, the period of distribution is the death of the tenant for life. But it is not necessarily the determination of a life estate. Anything that fixes the period at which the fund has to be distributed marks the time that actually has to be taken, and in *Watson* v. *Young* (28 Ch. Div. 436) the period of distribution was got at in another way. In that case there was a devise in trust for J. for life, and after his death in trust for his children who should attain twenty-one, and the issue of any child who should die under twenty-one leaving issue who should attain that age; but in case there should be no child nor the issue of any child of J. who should attain twenty-one—that is the event that happened—the property was to be held on trust for the child or children of R. who should respectively attain twenty-one, and if more than one in equal shares. So that J. was tenant for life, and on his death without children according to the usual rule the class would be fixed. It would be, if it stopped there, but there was this further provision "Provided always that the rent of the trust premises should during the term of twenty-one years from the day next before the day of the testator's death be accumulated by way of compound interest, and the accumulated fund should be held in trust for the child, if only one, or all the children equally if more than one, of R., who should attain twenty-one." J. died without ever having had a child. R. had six children who attained twenty-one. The youngest of them was born after the eldest had attained twenty-one, but before the end of the period of accumulation. Thus, although the tenancy for life had expired, a further term had to elapse during which the rents had to be accumulated, and till that period came to an end there could be no distribution. Therefore in that case the period for distribution and fixing the class was not the death of the tenant for life, but the expiration of the further period that had to run to make up the twenty-one years. The learned judge seemed to think it was a new case. I think it was a case of new circumstances to which the rule had to be applied, though he had no difficulty in applying the rule to that new state of things. In the present case the settlor has given the fund to all the children of Matthew Grenville Samuel Knapp, who being sons shall attain twenty-one, or being daughters shall attain that age or marry. There is no preceding life estate, and if this had been a will it would be perfectly clear, that as soon as any child had attained twenty-one that child was entitled to have his or her share paid, and there are various indications in the settlement pointing that way. The income is given for maintenance during minority only, and the shares vest at twenty-one. This is all the more reason for saying that, as soon as the child attains twenty-one, the time has come at which he is entitled to his share when he comes and asks for it. There are two reasons suggested why the general rule should not apply to this case: the first is, that this is not a will, but is a voluntary settlement. Now, what difference does that make? I confess I cannot see that it makes any difference. I do not see any logical difference, and I do not see any legal difference. If this gentleman had chosen to do it by his will the matter would have been perfectly clear, and that he did it by a deed instead seems to me to come to precisely the same thing. In point of fact it was as nearly like a will as it could possibly be, because, although he made the settlement, he reserved to himself the general power of appointment over the the whole, so that the fund remained in his entire control down to the time of his decease. But neither on legal nor on logical grounds do I see any distinction between a voluntary settlement and a will. Counsel have told me they cannot find, and I certainly do not know of, any case in which the doctrine has been applied to the case of a settlement; but, on the other hand, no one can refer me to any statement in any case whatever indicating grounds for a decision which would prevent its application to a voluntary settlement — a settlement by a voluntary deed instead of a settlement by will—and I do not see any distinction between the two. It was suggested there might have been a distinction, if, instead of being a voluntary settlement, it had been a settlement for value. I do not quite see what that distinction is, but that is not the case I have to deal with, and therefore about that I say nothing. Then the only other ground suggested why the ruling in *Andrews* v. *Partington* (*ubi sup.*) should not apply was this: this was a settlement by the settlor upon the children of Matthew Grenville Samuel Knapp, who already were entitled under a previous settlement; and they were entitled to certain portions of fixed amounts. Then in this settlement which I have to deal with the trust as to the 14,000*l.* is "in trust to divide the same equally among the children of the said Matthew Grenville Samuel Knapp, who, being a son or sons, shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, other than and except John Matthew Knapp, his eldest son." It is said that that clearly points to all the children, and no doubt it does. It is as clear here as the Master of the Rolls said it was in *Re Emmet's Estate; Emmet* v. *Emmet* (*ubi sup.*), but then the rule of law comes in here, and, although the intention might be to provide for all, this rule of convenience prevents that intention from having effect given to it. But then it was said that there are these further words, "to the intent that the said sum of 14,000*l.* may be in addition to the portions, provided for the said younger children," and it is said that that makes a difference, because under the original settlement all the children, whenever born, other than a first, would take if they attained twenty-one, because there was a life estate that must last until the children had all been ascertained by birth; and as all the children, therefore, were to take under the original settlement, it was argued that if the 14,000*l.* is to be added to their shares, it must be the intention that all the children should take the 14,000*l.* That does not make it any clearer, and the reason why they cannot take is not because it was not the intention that they should take, but because, in spite of the intention, the property has

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to be divided, inasmuch as the persons who are entitled to absolute shares ask for them and cannot be gainsaid. Then, further, I do not see that this clause throws any light upon the question, because the statement that those who take the 14,000*l.* are to have it in addition to the shares they take under the original settlement, only means that those who take under both are to have what they take under the second in addition to what they take under the first, and not by way of substitution, or satisfaction, or anything of that sort, of the amounts which they take under the first. That phrase, therefore, does not, in my opinion, in any way tend to show that it was the intention that more should take, because the intention already was that all should take; and even if it was the intention to carry the gift to a larger number of persons, it is inconsistent with what those who have attained twenty-one are entitled to now, viz., to have their shares ascertained and paid to them.

Solicitors: *Rooper* and *Whately*; *Torr* and *Co.*

Nov. 8 *and* 10, 1894.

(Before NORTH, J.)

Re NATIONAL PROVINCIAL BANK *v.* MARSH, (*a*)

Vendor and purchaser—Summons for return of deposit—Sale by auction—Condition precluding inquiry or objection as to prior title whether appearing in abstract or not—Defect in prior title discovered by purchaser aliunde—*Purchaser precluded from objecting in respect of defect.*

A purchaser of real estate at public auction paid a deposit on the purchase money, and signed an agreement to complete the purchase according to the conditions of sale, the third of which provided that the title should commence with a conveyance on sale of a certain date, and that the prior title whether appearing in any abstracted document or not should not be required investigated or objected to. The purchaser afterwards discovered aliunde *what he regarded as a serious defect in the prior title; but it was not suggested that the alleged defect was known to the vendor when framing the conditions of sale. On a summons under the Vendor and Purchaser Act* 1874 *for a declaration that the vendors had not shown a good title to the property, and for an order for repayment of the deposit with interest and costs:*

Held, that the purchaser was precluded by the third condition of sale from making any objection in respect of the alleged defect in the prior title, and that the summons must be dismissed.

ON the 27th April 1893 the National Provincial Bank of England put up certain real estate at Temple Combe in the county of Somerset, for sale by public auction, subject to printed conditions; and George Marsh, of Temple Combe, railway guard, became the purchaser thereof at the price of 315*l.*, paid a deposit of 31*l.* 10*s.*, and entered into a contract to complete the purchase according to the conditions.

The third condition of sale was as follows:—

The titles shall commence with an indenture of conveyance on sale dated the 23rd Jan. 1869, and the prior title, whether appearing in any abstracted document or not, shall not be required, investigated, or objected to.

The conveyance on sale of the 23rd Jan. 1868 was a conveyance by Elizabeth Worthey Davis, containing a recital that she was entitled to the property in fee simple, to one Austen, who mortgaged the property to the vendors. In the course of investigating the title the purchaser discovered *aliunde* what he alleged to be a fatal defect in the title prior to the conveyance of the 23rd Jan. 1869, namely, that on the right construction of the will, dated in 1865, under which Elizabeth W. Davis had claimed the property, which did not appear in the abstract of title, she only took a life estate therein; and he objected to the vendor's title on that account. It was not suggested that the vendors had been aware of the alleged defect in the prior title, when the conditions of sale were drawn up and they declined to entertain the purchaser's objection on the ground that it was precluded by the third condition of sale.

This was a summons taken out on behalf of the purchaser under the Vendor and Purchaser Act 1874 for a declaration that the vendors had not shown a good title to the property, and for an order that the vendors should repay the deposit which had been paid by the purchaser, with interest, expenses, and costs.

B. B. Rogers, for the purchaser, stated the facts.

Edward Beaumont, for the vendors, raised the objection that the purchaser was precluded by the third condition of sale from making any objection in respect of the alleged defect discovered in the prior title. The vendors had no knowledge of the alleged defect, and did not frame the third condition with any fraudulent intention. This is a condition that the prior title shall not be objected to, and not simply a condition against requisitions. He referred to

Fry on Specific Performance, 3rd edit., p. 594;
Waddell v. *Wolfe*, L. Rep. 9 Q. B. 515;
Dart on Vendors and Purchasers, 6th edit., vol. 1, p. 169, note (3).

This shows that the observations of Lord Hatherley in *Darlington* v. *Hamilton* (Kay, 550,) are too broad. I rely on the third condition, which was honestly framed to preclude the purchasers from taking the objection.

B. B. Rogers.—The observation of Lord Hatherley in *Darlington* v. *Hamilton* (*ubi sup.*) shows that the purchaser is entitled to make the objection. [NORTH, J.—Is this consistent with the decisions referred to on the point?] The other decisions show that there are two exceptions to this rule: (1) Where the purchaser agrees to take such title as the vendor has. (2) Where the subject of the purchase is an underlease, and the lessor's title, which is not a part of the lessee's title, is in question. He referred to

Waddell v. *Wolfe* (*ubi sup.*).

There the decision was in favour of the purchaser; and the language of Blackburn, J., must be taken as referring to the case of a purchase of leasehold property, and has no application to the present case. [NORTH, J.—What do you say to *Hume* v. *Bentley*, 5 De G. & Sm. 520?] That was a decision respecting leasehold property, and does not apply to the present case. In *Else* v. *Else* (25 L. T. Rep. 927; L. Rep. 13 Eq. 196) the objection of the purchaser in respect of a defect discovered *aliunde* in the prior title was supported, although the conditions of sale provided that it should not be inquired into or objected to. The case of

(*a*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

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Jones v. *Clifford* (35 L. T. Rep. 937; L. Rep. 3 Ch. Div. 779) shows that the court will, even in case of a completed contract, grant relief in a case of common mistake without fraud. In *Smith* v. *Robinson* (41 L. T. Rep. 405; L. Rep. 13 Ch. Div. 148) a condition that the earlier title should not be required or inquired into did not preclude the purchaser from insisting on an objection not discovered through any inquiry made by him, but accidentally disclosed by the vendor.

NORTH, J. stated the facts and proceeded:—The question is whether the purchaser is entitled to have the whole transaction undone. There is no question now of the specific performance of the contract. Without expressing any opinion upon that, I can see that there might be a difficulty in the way of the bank if they were seeking to enforce specific performance. But this summons is equivalent to an action by the purchaser for the return of his deposit. The conveyance of the 23rd Jan. 1869 contains a recital that Miss Davis, the then grantor, was entitled in fee simple to the property, and the third condition of sale provides that the prior title shall not be objected to. It is said on behalf of the purchaser that, although he is not entitled to make any objection to the prior title, yet he is at liberty to show *aliunde* that the vendor is not entitled to the property in fee. In Sir Edward Fry's treatise on Specific Performance (3rd edit., p. 594) the learned author says: "The cases on the question whether and how far the inquiry into title has been limited fall into two categories: first, where the stipulations of the contract preclude the purchaser from making requisitions upon or inquiries from the vendor as to his title, which relieves the vendor from the necessity of complying with or answering any such requisition or inquiry, but does not prevent the purchaser from showing, by any means in his own power, that the vendor's title is defective; and, secondly, cases in which the stipulations preclude the purchaser, not only from making such requisitions upon and inquiries from the vendor, but from making any inquiry or investigation about the title anywhere which may quite validly be stipulated, and will generally, provided that the stipulation be clear, altogether preclude inquiry and investigation for every purpose. Of the first of these categories an illustration may be found in the case of *Darlington* v. *Hamilton* (*ubi sup.*), where there was a stipulation that the lessor's title should not be produced, and the purchaser discovered that the lessor's title was objectionable by reason of its being involved with the title to other property, and the court accordingly refused specific performance." That case clearly belonged to the first category in which the condition was not considered a bar to the purchasers showing that the vendor's title was defective; but in the judgment of Lord Hatherley there are some observations which are relied on on behalf of the purchaser in the present case which I will consider presently. I will refer first to the case of *Hume* v. *Bentley* (*ubi sup.*). There one of the conditions of a sale by auction of leasehold property was "the lessors' title will not be shown, and shall not be inquired into." The vendor brought an action for specific performance of the contract, and the purchaser raised the objection that certain Acts of Parliament which he produced showed that the lessors had no power to grant the lease of the premises. It was held, however, that the conditions precluded inquiry into the lessors' title for any purpose, and specific performance was decreed. Parker, V.C., in his judgment at p. 525, observed: "As to the question whether it was open to the purchaser to object to the lessor's title, it arose purely upon the construction of the contract for sale. According to the ordinary rule, a vendor of leasehold property was under an obligation to show the lessor's title; but there was no doubt that the vendor might stipulate that he should be relieved from that obligation; and in the case of *Shepherd* v. *Keatley* (1 Cr. M. & R. 117), a stipulation of that kind was held not to amount to a stipulation that the purchaser should be obliged to accept the title without objection or inquiry. If the purchaser could show by any means in his own power that the vendor had a defective title he might do so. There was no doubt, however, that the parties might stipulate beyond that, viz., that the purchaser must accept the title without inquiry or objection; that would be a lawful stipulation, and the court put such a construction on the contract in *Spratt* v. *Jeffery* (10 B. & C. 249). Although comments had been made upon that case, there did not appear to be any inconsistency between it and the case of *Shepherd* v. *Keatley* (*ubi sup.*). In one of those cases the court had construed the conditions of sale as more extensive in terms than in the other case. It might possibly be that in *Spratt* v. *Jeffery* (*ubi sup.*), the court had erred in construing the contract as importing an acceptance of the lessor's title without objection; but there could be no doubt upon the authorities that, if it had been a stipulation in the contract that the purchaser should accept the title without objection or inquiry, that would be a lawful agreement. Here the contract was that the title would not be shown, and should not be inquired into. The question was, did that oblige the purchaser to accept the lessor's title such as it was, or what was the meaning of the stipulation? Here, in addition to the term of the contract that the title would not be shown, other words were found to which effect must be given: that the title should not be inquired into. The only reasonable meaning of that stipulation was, that inquiry was altogether precluded for every purpose. Now, the purchaser had called upon the master to look into the vendors' title to some extent; and he had produced before the master the Acts of Parliament which he asked the master to look into. The purchaser was precluded from going into that inquiry by the terms of the fourth condition of sale. No force could be given to the words "that the title should not be inquired into" except as meaning that it should be accepted by the purchaser without objection or inquiry. I am unable to distinguish the condition that the lessor's title "shall not be inquired into" in that case, from the condition that the prior title "shall not be required, investigated, or objected to" in the present case. In *Darlington* v. *Hamilton* (*ubi sup.*) the condition was that the purchaser shall not require proof or production of the lessor's title or any title prior to the lease. The vendor brought an action for specific performance, and Lord Hatherley held that this did not preclude the purchaser from showing, as he did, that the lessor's title was bad, and refused to decree specific performance of the contract. The

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learned judge made this observation (p. 558): "It is quite clear according to the doctrine referred to and confirmed in *Warren* v. *Richardson* (Younge, 1) and *Shepherd* v. *Keatley* (1 Cr. M. & R. 117) that, whatever may be the terms of the condition of sale, if the purchaser obtain information *aliunde* that the title of the vendor is not clear and distinct, he has a right to insist on the objection." It is said that this covers every possible case. I am not, however, aware of any authority for the proposition there stated. In Dart on Vendors and Purchasers, 6th edit., vol. 1, p. 169, note (3) it is observed: "The doctrine laid down in the 2nd paragraph of the judgment in *Darlington* v. *Hamilton* (*ubi sup.*) that whatever may be the terms of the conditions of sale, if the purchaser obtain information *aliunde* that the title of the vendor is not clear and distinct, he has a right to insist upon the objection, appears to be too broadly stated." The actual decision in *Darlington* v. *Hamilton* (*ubi sup.*) appears clearly within the authorities, the condition being only that "the purchaser shall not require proof or production of the lessor's title or any title prior to such lease." But the cases to which Lord Hatherley referred in support of the proposition which I have mentioned do not, when examined, bear it out. In *Warren* v. *Richardson* (*ubi sup.*) an action was brought by the vendors for specific performance of an agreement to accept an underlease, and the court holding that the defendant had, by his conduct, waived all objections to the vendor's title, decreed specific performance. But subsequently when the terms of the lease where being settled it became necessary for the purpose of identifying the parcels to produce before the master the original lease under which the vendor was entitled to the property, and since the lease when produced showed that a lease could not be made to the defendant in accordance with the agreement, the court declined to enforce specific performance. There was no question in that case as to the effect of any condition of sale. The case of *Shepherd* v. *Keatley* (1 Cr. M. & R. 117) also differed altogether from the present. There one of the conditions of sale of leasehold property was that the vendors "shall not be obliged to produce the lessor's title." The purchaser discovered *aliunde* certain defects in the lessor's title. An action was brought by the vendors against the purchaser, and it was held that the purchaser was entitled to insist upon those defects notwithstanding that condition, which was entirely different from the condition in the present case, which I think falls clearly within the second catagory mentioned in the passage I have read in Fry on Specific Performance. The dictum of Lord Hatherley in *Darlington* v. *Hamilton* (*ubi sup.*) appears to me to go beyond the cases which are referred to in support of it. The other cases which have been cited on behalf of the present plaintiff are: First, *Else* v. *Else* (*ubi sup.*), where a sale was made by the Court of Chancery under conditions which precluded the purchaser from making any objection or requisition in respect of any title or evidence of title prior to the document chosen as root of title. The purchaser inquired into the prior title, and refused to complete, on the ground that the prior title was bad. The court was of opinion that the objection was well founded, and held that the sale being by the court, the purchaser was not precluded by the conditions from raising the objection, and that he ought to be discharged from his purchase. In his judgment, however, Lord Romilly, M.R. said (p. 201): "I do not mean to express any opinion as to how the court would look at this question if it arose between two strangers." I do not see that that has any application to the present case. Then *Waddell* v. *Wolfe* (*ubi sup.*) was relied upon by both sides. There leasehold premises were put up for sale by auction, subject to a condition that the abstract of title should commence, with a specified indenture of underlease, and which provided that "it shall form no objection to the title that such indenture is an underlease, and no requisition or inquiry shall be made respecting the title of the lessor or his superior landlord, or his right to grant such underlease." The purchaser discovered that the grantor of the underlease had previously to the date thereof mortgaged the premises, and objected that the legal estate being outstanding the grantor had no power to grant the underlease; and it was held that the grantor was not precluded by the condition from taking the objection, and that he was not bound to complete the purchase. Blackburn, J. in his judgment observed (p. 519): "The principle which ought to guide us in construing conditions of sale is very accurately expressed in *Hume* v. *Bentley* (*ubi sup.*) by Parker, V.C." Then, after reading the passage which I have already quoted, he proceeded: "Now, the question is, what construction are we to put on the 6th condition? Does it sufficiently appear that the parties have by their agreement stipulated that the title, though bad, shall be accepted without objection, or does it mean that the vendor is merely relieved from answering requisitions on title? In *Hume* v. *Bentley* (*ubi sup.*) the words were very strong. 'The vendor shall at his own expense deliver to the purchaser a proper abstract of title; but recitals or statements in deeds or wills dated twenty years ago shall be received as conclusive evidence of the matters or particulars stated therein; and the lessor's title will not be shown, and shall not be inquired into.' Construing the last sentence of that condition with what went before, it distinctly showed that the vendee was precluded from inquiring into the vendor's title, and Parker, V.C. came to a right conclusion. In the present case the words are: 'It shall form no objection to the title that such indenture is an underlease, and no requisition or inquiry shall be made respecting the title.' If the vendor meant to express that whatever the title was the vendee was bound to accept it, he should have said so in clear and unambiguous words. A distinction appears to me to be made in the condition between 'objection' to the title and 'requisitions' on title. The construction I put upon the condition is, that no objection shall be made to the title on the ground that the indenture is an under-lease, and that no requisitions on title shall be made." This view was expanded by Quain and Archibald, JJ., who held that the condition was equivalent to a provision that no inquiry should be made as between the vendor and the purchaser. Quain, J. said (at p. 521): "The word 'inquiry' in the sixth condition has not so wide a meaning as that word had in the condition in *Hume* v. *Bentley* (*ubi sup.*) because the words there were 'the lessor's title will not be shown and shall not be inquired into.' Evidently pointing, therefore, to inquiries from all quarters and in all ways;

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whereas, I think in the present case the stipulation points to inquiries and requisitions between the vendor and purchaser." That decision does not assist the purchaser in the present case. It was stated there that a condition that the purchaser should accept the title shown without inquiry or objection would be a lawful condition, and that is the very condition with which I have now to deal. In *Jones* v. *Clifford* (*ubi sup.*) the defendant contracted to buy from the plaintiff freeholds and leaseholds under the condition that he should assume that E. M. who died in 1841 was seised in fee of the freeholds and should not "require the production of or investigate or make any objection in respect of the prior title." The defendant accepted the title, and before completion he contracted to sell the lands with a farm of his own adjoining the freeholds to a sub-purchaser who discovered from an inclosure award prior in date to 1841 (as to the effect of which both the plaintiff and the defendant had been under a misapprehension) that the freeholds had never belonged to E. M., but at the date of the contract belonged to the defendant himself in fee subject to a leasehold interest in the plaintiff. It was held that the defendant was not precluded by the condition or by his acceptance of the title from taking the objection, and that the court could not decree specific performance. The decision was based on the ground that there had been a mutual mistake. Hall, V.C. in his judgment observed (p. 790): "It has been said that, even if it is made out that the purchaser had bought his own property, yet that, having regard to the terms of the contract and the law he ought to be compelled to complete his purchase and pay for that which is his own. The cases are divisible into two classes —first, cases in which the terms of the contract preclude the purchaser from making requisitions upon the vendor as to his title; and, secondly, cases in which they preclude him not only from making inquiries from the vendor as to his title, but from making any investigation anywhere about the title. A condition of the latter class is no doubt valid, but the court has never yet gone so far as to hold that such a condition precludes a purchaser from saying to the vendor, at any rate, before the completion of the contract, 'We have both been proceeding under a common mistake. You said the property was yours, but I now find by some document which I have seen that it is mine, and the contract which you are asking me to complete is one without consideration, for I shall be paying the purchase money and getting nothing for it.' The condition has never been construed to include such a case as that, and where there has been such a common mistake and there is no fraud, the court will not in a suit for specific performance compel the purchaser to complete such a contract." One other case was referred to, viz., *Smith* v. *Robinson* (*ubi sup.*), where freehold property was sold in 1877 subject to a condition that the title should commence with a deed, dated the 30th Dec. 1867, and that no earlier or other title should be required or inquired into by the purchaser, and it was held that this condition did not preclude the purchaser from insisting on an objection to the prior title which was not discovered through any inquiry made by him, but was accidentally disclosed by the vendor. Fry, J. observed (p. 151): "The first question is whether the purchaser is precluded by the condition from raising the objection which he has raised. In my opinion he is not. The condition precludes the purchaser from doing two things—first, from making any requisition on the earlier title; and, secondly, from making any inquiry into it. It does not preclude the vendor from disclosing or admitting some blot on his title about which the purchaser does not inquire. And that is what the vendor has actually done. He has himself confessed the objection to the title; it has not been discovered by the purchaser. If I were to hold that the condition applied I should be stretching its meaning. Similar conditions have in many cases, such as *Waddell* v. *Wolfe* (*ubi sup.*), been construed strictly. . . . It appears to me that the condition cannot apply to a case where the vendor has himself raised the difficulty and confessed the cloud on his title." That case is very similar to *Warren* v. *Richardson* (*ubi sup.*). After considering these cases, what is there to show that a condition such as that in the present case is not valid? I do not see that any of the cases which have been referred to throw any light upon the question, except the observation of Lord Hatherley which I have read, and which is in favour of the purchaser. But these observations profess to be founded upon two cases which, when they are examined, do not bear out the view of the learned judge. I am not deciding that the purchaser is bound to accept the vendor's title if it should turn out to be a bad one, and I do not know whether the title is good or bad. But I can see no reason why such a condition should not be imposed, and upon its construction I think the purchaser is not entitled to make this application. I must dismiss the summons, but I think it is not a case for giving costs.

Solicitors: *Gasquet* and *Metcalf*, for *Bell* and *Freame*, Gillingham, Dorset; *Robins, Hay, Waters*, and *Lucas*, for *H. S.* and *S. Watts*, Yeovil, *Wilde, Berger*, and *Moore*.

Oct. 27 and Nov. 15, 1894.

(Before KEKEWICH, J.)

BUDGETT v. BUDGETT. (a)

Costs—Taxation — Copy correspondence—Taxing master's discretion—Costs, charges, and expenses of trustees—Statute-barred costs paid and payable.

The amount to be allowed for copy correspondence is in the discretion of the taxing master, but his answer must show that he has ascertained what portion of the correspondence, having regard to all the circumstances of the case, was necessary and proper for the due consideration of the case.

The practice of disallowing statute-barred items under a common order to tax a solicitors' bill, or under a special order not expressly dealing with the question of statute-barred items, is not applicable to a case where there is an order containing an express direction to ascertain the costs, charges, and expenses properly incurred by trustees. Under such an order trustees are entitled to be allowed statute-barred costs, which they have properly incurred, whether paid or payable. With respect to the latter class of items, trustees cannot be compelled to plead the Statute of

(a) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

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Limitations, as they are paying debts which they have themselves incurred.

THESE were cross-summonses to review taxation of costs.

At the hearing of an action brought by a beneficiary against the trustees of an indenture of settlement made by S. Budgett, deceased, certain correspondence amounting to 3477 folios, was referred to, and a considerable portion of it read. It was entered as read in the judgment.

The taxing master having allowed one-third only of the copies of the correspondence, objections were carried in, in answer to which he said:

The correspondence was examined and considered by me carefully on more than one occasion. I gave the matter all the attention of which I am capable, and exercised my discretion upon it to the best of my ability . . . The fact that the correspondence is entered as read does not affect me . . . After mature consideration I allowed one-third, which in my judgment and discretion comprises all that was necessary and proper to allow,

Ingle Joyce for the trustees.

T. G. Butcher for the beneficiary.—The matter is entirely one for the discretion of the taxing master. He referred to

Turnbull v. *Janson*, 3 C. P. Div. 264.

Oct. 27.—KEKEWICH, J.—I must send this back to the taxing master for reasons which I will state. The question whether any allowance ought to be made for copies of correspondence supplied to the court and to counsel is one of very great importance. One has to bear in mind on the one hand the necessary provision for the administration of justice, and on the other the hardship which any extravagance in the matter of costs inflicts on the suitors. These are the two points which one has to observe and keep in mind, and steer as well as one can between the two dangers. Having now had considerable experience in trying witness actions, I confess to a strong opinion that in a large number of cases a well arranged copy correspondence is, if not essential, at any rate extremely useful to the judge, in order to enable him to master the case as it goes along and to dispose of it; and if the judge has it, of course counsel must have it, and, not only that, but if it is to be really useful there must be on both sides copies of the same character; and I have strongly urged on solicitors to agree that a copy correspondence should be made in a particular manner. The inconvenience of handing up a letter of the plaintiff to the defendant by the defendant's solicitors and then the handing up of the answer to that by the plaintiff's solicitors, the delay, and the trouble in referring to these documents from time to time, increases the burden of litigation, the time occupied, and the risk of insufficient mastering of the case. All these considerations point to the necessity of a copy correspondence, and I have often had occasion to complain of not being furnished with a copy at all. Unfortunately, a copy correspondence is not of itself an unmixed good. Sometimes some of the most important items are omitted, and, on the other hand, it frequently happens that large portions are quite unnecessary. My opinion, however, is that where the merits of the case turn on the correspondence, as they undoubtedly did here, a proper copy correspondence is so necessary for the administration of justice that the costs of it ought to be allowed, but only the costs of a proper copy in the sense which I have indicated. I follow Mr. Butcher's argument to this extent, that what is a proper correspondence is entirely a matter for the discretion of the taxing master; that is to say, that the court would not review his discretion unless he had inadvertently, or by some erroneous concusion, omitted to allow an important letter, or had included a trumpery letter. There are matters in which even the discretion of the taxing master on such matters may be reviewable. But it is within the discretion of the taxing master to say what is a proper copy correspondence. That unfortunately involves his mastering the whole case and the proceedings, and seeing how counsel treated it, how the judge treated it, what was read, and what was not read, and so forth, and as it may be impossible for the most careful solicitor to say what ought to be copied and what ought not; it may be the taxing master's duty to make a rough guess at what ought to be allowed in respect of any particular part of the correspondence. It might very often be easy —I mean easy in the sense of not presenting serious difficulty, although presenting very serious trouble—to reduce 100 folios to twenty-five. In a case of that kind a taxing master would properly only allow half, or one-fourth, or one-third. If therefore I was satisfied on the taxing master's statement here that he had considered this copy correspondence from that point of view I should be very loth to interfere with his discretion, as at present advised I should not do so, but I cannot come to that conclusion from his answers to the plaintiff's objections. If the taxing master had said that he had looked into it from the point of view that I have mentioned, I certainly should not have doubted it. But he does not say it, at least I do not read his answers as saying it. He says that, the fact of the correspondence being entered in the judgment as read does not affect his discretion. I only mention it in passing to say that I entirely agree with him. The taxing master must look at it independently of that—that only shows that it was before the court. He says that, he has examined and considered it carefully on more than one occasion. He says he gave the matter all the attention of which he was capable, and exercised his discretion upon it to the best of his ability. That I have not the slightest doubt of, but when he comes to allow one-third, he says that he allows that particular amount as the equivalent to 1159 folios, "which in my judgment and discretion comprises all that is necessary and proper to allow." He may mean that the one-third of the copy correspondence comprised all the correspondence that was necessary and proper to supply to counsel and the court, and therefore one-third of the whole is all that ought to be allowed in respect to that copy correspondence. But that is not what he says. He says one-third comprises all that was necessary and proper to allow. It may be a mere misuse of language. It may be that I do not quite understand what he means, but he does not state what I must ask him to state, what part of the correspondence, having regard to all the circumstances of the case and to the way in which the case was brought before the court and treated by counsel and the court, was necessary for the proper argument and decision of the case. If he adheres to the one-third, as at present advised, I

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cannot interfere with him, but I think he ought to allow all that was necessary and proper in that point of view. It must go back to him with that intimation.

The taxing master having reported that after full consideration he was of opinion that he had allowed the correct amount, the summonses relating thereto were dismissed.

The order made in the action directed (*inter alia*) that the costs of the trustees of the settlement should be taxed as between solicitor and client, including therein any charges and expenses properly incurred by them as such trustees, and that the trustees should pay and retain such costs when taxed out of the trust funds. Under this order the taxing master allowed (1) the costs of an action, *Budgett* v. *Walsh*, brought by the trustees against one Walsh more than six years previously which were payable by Walsh, but which could not be recovered from him; and (2) certain statute-barred costs, some of which had been actually paid by the trustees, but some of which, although not actually paid, ought, in the trustees' opinion, to be paid. Objections were carried in, in answer to which he said: "Upon the whole, I think the steps taken by the trustees to recover the costs were sufficient, and I think so still." As regards the statute-barred items he said: "In the teeth of the order I cannot disallow them, at the same time I feel considerable difficulty in allowing them, the proper course seems to be to certify them separately, and this I have done."

T. G. Butcher for the beneficiary.—With regard to the costs of the action, *Budgett* v. *Walsh*, the trustees did not pursue all their remedies against the debtor. The statute-barred costs ought not to be allowed. The trustees cannot be put in any better position by the form of the order than they would be in an action. As regards the statute-barred items not yet paid, as soon as a beneficiary intervenes he can step in and say, "I will insist on the statute:"

Re Wenham; *Hunt* v. *Wenham*, 67 L. T. Rep. 648; (1892) 3 Ch. 59.

Ingle Joyce for the trustees.—These are charges and expenses properly incurred by the trustees, and they ought to be allowed. He referred to

Curwen v. *Milburn*, 62 L. T. Rep. 278; 42 Ch. Div. 424;
Re Murray, W. N. 1867, p. 190;
Carter v. *Carter*, 53 L. T. Rep. 630; 55 L. J. 230, Ch.

Nov. 15.—KEKEWICH, J.—As regards the first point I think that the trustees did all that was necessary as reasonable men in endeavouring to recover the costs, and I think they are entitled to be recouped out of the estate. With respect to the question of the statute-barred items, in this as in all other cases it is of the utmost importance to ascertain exactly what the court is required to decide, and that is sometimes more easily approached from the negative side, that is to say by ascertaining what the court is not required to decide, and that seems to be convenient here. Reference has been made to authorities, and through the authorities to the practice of the court concerning common orders to tax a solicitor's bill, and the arguments and remarks which apply to a common order may with equal propriety be applied to a special order, that is to say, an order made under special circumstances, but not dealing with the particular question of statute-barred items. The question whether statute-barred items ought to be considered by the taxing master or not, came before North, J. in the case of *Curwen* v. *Milburn* (*ubi sup.*), and he expressed a doubt whether on a common order to tax a solicitor's bill, the taxing master ought to strike out without taxing them all statute-barred items. I believe that it always has been the practice of the taxing office, having no special directions, to strike out statute-barred items. That appears so from *Curwen* v. *Milburn*. It also appears from the earlier case of *Re Murray* (*ubi sup.*). In both these cases it was decided ultimately that, quite apart from any question of that kind, the solicitor's lien was not affected by the fact that some of the costs for which he claimed a lien were statute-barred, and therefore not dealt with by the taxation. But those decisions go no further than that. They may be said to leave the question open still whether the taxing master ought to include in the taxation statute-barred items. But if I am right, as I believe I am, in saying that it has never been the practice of the office to tax them, they will remain untaxable under a special order not dealing with the particular circumstances as hitherto. *Curwen* v. *Milburn*, however, is useful. I mention that as I pass as indicating a convenient course to be followed where an objection is taken before the taxing master respecting statute-barred items in a bill submitted to taxation, and the question has to be determined whether in that case, not being the common case, statute-barred items ought to be allowed. It seems to me that the taxing master here has followed a convenient course in certifying what ought to be allowed, if anything, leaving it open to the court to determine whether there shall be an allowance or not. I do not see how he could have adopted a more convenient form than he has done; that is he has remitted the question to the court in fact as he could not dispose of it himself. Now I am not, I say, dealing with any question of the common order, or of a special order to tax a solicitor's bill. What I am dealing with is a direction to ascertain by the process of taxation the charges and expenses properly incurred by trustees. Mr. Joyce has called my attention to the form of the order—that the trustees pay and retain such last-mentioned costs when taxed, out of the capital moneys subject to the trusts of the indenture of the settlement. This must not be forgotten, but I am not sure that it really has to govern the question in any way, because there might just as well be, as we often have it, liberty to apply in chambers to raise them, or a direction at once that they be raised and paid by a mortgage or sale and so forth. The importance of it is not its exact form, but as showing that these costs and expenses were to be paid somehow or other out of the trust estate, that is to say that the trustees were to be indemnified by the trust estate against these costs, charges, and expenses. Why should they not be indemnified then against costs which they have properly incurred to their solicitors, but which they might have refused to pay on the ground that they were statute-barred? The costs divide themselves into two classes, first, the costs which the trustees have paid, though they were not bound to pay them, that is to say they might have pleaded the statute. It has often been said that the statute is frequently

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dishonestly pleaded. Trustees are not bound to do anything which is dishonest, or to do anything immoral for the sake of their *cestuis que trust*; and, therefore, having paid them, it seems to me that they are entitled to be indemnified against them out of the trust estate. The analogy is quoted, and it becomes important as regards the second division, of an executor. Like all other analogies it is far from complete, but to the extent to which it may properly be applied it assists the trustees very largely. An executor may pay a statute-barred debt; he is perfectly at liberty to do so, and unless dishonesty or fraud is set up that cannot be impeached. Being at liberty to pay a statute-barred debt, he is at liberty to retain a statute-barred debt. There is no need really to go into the law on the subject, but I have found one case—a recent case—which was not cited in argument, and which is well worth a reference because of its comment on earlier cases. That is the case of *Midgely* v. *Midgely* (69 L. T. Rep. 241; (1893) 3 Ch. 282). Lindley, L.J., in giving judgment in that case, refers to a case of *Hill* v. *Walker*, where Wood, V.C. said (4 K. & J. 16): "This court had decided in previous cases that an executor is not bound to set up the Statute of Limitations as a defence to claims made by third persons against the testator's estate. And if he is not bound to take that course in dealing with others, what principle can there be for saying he is to be more rigorous in regard to himself?" In a recent text-book, Walker and Elgood on Executors (2nd edit.), I find the law stated in a concise and neat way on page 188 thus: "Inasmuch as an executor may pay a debt of his testator which is barred by the Statute of Limitations, he may retain for his own statute-barred debt and, *eo converso*, as he would be committing a *devastavit* if he were to pay a debt barred by the Statute of Frauds, he may not retain for such a debt due to himself." The advantage of that on the present occasion is that it shows the reason: that is, an executor is not committing a *devastavit* in retaining a statute-barred debt. It may be perfectly right to do it. A trustee is in a much better position than an executor for many reasons, and for one which I will come to presently. When it is said that they are to be indemnified against costs which they have properly paid, and when you have once got to this, that statute-barred claims, including certainly those to solicitors as much as to any tradesmen, may properly be paid, the question seems to me to be concluded. But that does not establish their claim to pay solicitors' costs which ought to have been paid, where properly incurred, for which they were once liable at law, but which have become statute-barred, and which have not been paid by them, but which, nevertheless, they assert ought to be paid, and assert honestly, no one impeaching their honesty in that respect. That does raise another question. It occurred to me to inquire how a claim of that kind could pass a taxing master, because certainly the practice is that a taxing master does not allow the certificate to go for costs unless a voucher is produced after payment. That, however, was impossible in the present instance, and the taxing master adopted the course which I have already stated I think a convenient one of taxing them in order to remit to the court the question whether they were to be paid or not. But that does not create any practical difficulty. It is a question which cannot often arise before a taxing master. Are the trustees then entitled honestly to say these costs ought to be paid, and that therefore they ought to be allowed to be retained and paid out of the trust estate? Mr. Butcher's strong point on that is, that when once the *cestuis que trust* intervene they are entitled to exercise their own judgment. "If the trustees had paid them it might be that there is nothing to be said, but if the trustees have not paid them I," says Mr. Butcher, representing the *cestuis que trust*, "step in and say I will insist on the statute, although the trustees do not," and there he relies on the analogy of the administration of a deceased person's estate, and refers to the most recent examples in *Re Wenham* (*ubi sup.*), where the old practice was applied to an administration summons. The law is perfectly clear. The residuary legatee may after judgment step in and say, "Now I am in command, and you, the executor, shall not do what you might have done if there had been no judgment; that is to say, I will insist on the statute being set up." Now, what is the distinction? The distinction seems to me to be very clearly shown by the cases to which I have referred, and to which I have referred more than I otherwise should have done for this purpose. The executor is not paying his own debt. He is paying the testator's debt. He is admitting a creditor to prove against another's estate. The trustee is paying his own debt, and he, although the legal liability may be gone, still owes the money. It may not be recoverable, but still the debt is not gone. It is a debt due from him; he still remains morally liable. Any question of dishonesty, any setting up of the statute being out of the way, he still remains morally liable, and he remains liable in every sense except that an action cannot be brought. Ought he not to be indemnified against that? What is the meaning of indemnity? Not, surely, that he is only to be indemnified against that which he can be forced by action to pay, but against all fair claims against him. The distinction seems to me to get rid of what otherwise struck me as a powerful argument. The trustees are not admitting claims against another's estate, although indirectly that is so. These are claims against themselves, and I think they are entitled to be indemnified against them. Therefore I think that all these sums—there may be some details—but all these sums which the taxing master taxes as having been properly incurred by the trustees paid or payable to the solicitor, notwithstanding the statutes, ought now to be included in the costs which are to be retained and paid out of the capital moneys subject to the trusts of the indenture of settlement. These summonses must therefore be dismissed.

Solicitors: *Ingle, Holmes*, and *Sons*; *Foss* and *Ledsam*.

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Thursday, Nov. 15, 1894.

(Before KEKEWICH, J.)

OLIVER *v.* ROBINS. (*a*)

Costs—Taxation—Discretion of taxing master—Order LXV., r. 27, *sub-rule* 29.

The court has no jurisdiction to review the allowance of a witness's costs under Order LXV., r. 27, *sub-rule* 29, *if on proper consideration they have been allowed by the taxing officer.*

UPON the taxation of the defendant's bill of costs under the judgment in this action, the plaintiffs carried in objections to any allowance for one of the defendant's witnesses, Hugh Percy Smith, on the ground that his evidence was immaterial and useless, and that the expense of the witness had been incurred through over-caution or mistake, within the meaning of Order LXV., r. 27, sub-rule 29. The taxing master overruled the plaintiff's objections, and allowed the costs of the witness, fully setting forth in his answers to the objections his reasons for so doing.

This was a summons to review the taxation.

Eve, for the summons, submitted that the court had jurisdiction under Order LXV., r. 27, sub-rule 29, which provides that: "As to costs to be paid or borne by another party, no costs are to be allowed which do not appear to the taxing officer to have been necessary or proper for the attainment of justice or defending the rights of the party, or which appear to the taxing officer to have been incurred through over-caution, negligence, or mistake, or merely at the desire of the party." He also referred to sub-rules 40 and 41.

W. Baker, for the respondent, was not called on.

KEKEWICH, J.—I think I have no jurisdiction because by the rule the matter is left to the discretion of the taxing master, I think the rule means that the taxing master is to do his best—and doing his best his discretion is to be conclusive. It is most desirable that matters of detail of this kind should be left to his discretion. The rule provides: [His Lordship then read Order LXV., r. 27, sub-rule 29, and continued:] Those are just the matters which the taxing master has the materials for inquiring into, and it seems to me that the provisions of that rule are founded on common sense and convenience. Although, of course, they do not prevent the court from going into the question whether or not the taxing master has properly considered the matter, and if the court were of opinion that he had not, it would, of course send the matter back to him for re-consideration. I think then that I have no jurisdiction under the rule, but even supposing I had I do not think it is the province of the judge to go into matters of detail of this kind which have been properly gone into and settled by the taxing master in the exercise of his discretion. This summons must be dismissed with costs.

Solicitors for the plaintiffs, *S. Pilley*, for *J. M. Criddle*, Newcastle-on-Tyne.

Solicitors for the defendant, *Williamson, Hill*, and *Co.* for *Ingledew* and *Daggett*, Newcastle-on-Tyne.

(*b*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

QUEEN'S BENCH DIVISION.

Monday, Nov. 5, 1894.

(Before MATHEW and CHARLES, JJ.)

REG. *v.* THE REVISING BARRISTER OF LIVERPOOL AND CHADWICK; *Ex parte* WARDE. (*a*)

Registration of voters—Duplicate qualifications—Right of selection by voter—Form of notice of same to revising barrister—Duty of revising barrister—Right of appeal—Registration Act 1843 (6 & 7 *Vict. c.* 18), *s.* 42—*Parliamentary and Municipal Registration Act* 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-sect.* 14—*Registration Act* 1885 (48 *Vict. c.* 15), *s.* 5, *sub-sect.* (1)

No appeal lies from the decision of a revising barrister upon an objection made to a qualified parliamentary voter selecting the place of his qualification under sect. 28, *sub-sect.* 14, *of the Parliamentary and Municipal Registration Act* 1878.

THIS was an application for a *mandamus* to the revising barrister for Liverpool to compel him to state a case. A rule *nisi* was obtained, and cause was now shown against the rule obtained. The application had been made to the Lord Chief Justice sitting in chambers, who referred it to the court.

The elector, Charles Chadwick, had a place of business in the town of Liverpool, and a place of residence in the suburbs, thereby having two qualifications. In such cases the Parliamentary and Municipal Registration Act 1878 enacts that the elector can only vote for one of the qualifications at the polling place to which it belongs, and that the other qualification is to be "starred," that is to say, to be marked with an asterisk, in order to prevent the elector voting twice. In some of the cases the electors gave notices in writing to the revising barrister that they elected to vote for their place of business, and not for their place of abode. The barrister would allow this, and "star" the other qualification—the place of abode—otherwise if he received no notice, he would "star" the place of business, and allow the place of abode qualification.

On the 3rd Sept., at the opening of the court held for the revision of the list of electors for the Parliamentary and Municipal Borough of Liverpool, there was handed to the revising barrister on behalf of the elector, the following form:

To the revising barrister of the parliamentary borough of Liverpool: I the undersigned being on the list of voters for two or more divisions of the parliamentary borough of Liverpool, do hereby select the following, viz., for Parliamentary Division No. 7, Polling District No. 29, No. on list 1724. (Signed) Charles Chadwick. Place of abode, 38, Walton-road, Polling District No. 3, No. on the list, 1906. August, 1894.

The name of the elector was entered more than once as a parliamentary voter for the parliamentary borough in different parliamentary divisions.

The entry in the Kirkdale Parliamentary Division was in respect of his place of abode.

The entry in the Abercromby Parliamentary Division was in respect of the place of business.

On the 27th Sept. the elector, C. W. Ward, through his agent or solicitor, duly objected to the name of the elector Chadwick being expunged from or starred on the list of electors for the

(*a*) Reported by T. R. BRIDGWATER, Esq., Barrister-at-Law.

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said Kirkdale Parliamentary Division on the ground that the elector had not made a selection in accordance with "Form P." prescribed by the Registration of Electors Acts and the Registration Order 1889, and on the ground that the form disregarded the form and substance of "Form P."

The revising barrister held that the form handed to him on behalf of the elector complied with the form of selection of double entries, and thereupon "starred" or expunged the name of the elector from the list of voters for the Kirkdale Parliamentary Division (being the entry in respect of his place of abode), and retained the entry in the Abercromby Parliamentary Division (his place of business)

Notice was given to the revising barrister by the objector that he was desirous to appeal against the decision in the case of the elector Chadwick, or in that of other persons whose names were set out in a schedule, but the revising barrister refused to state a case for the opinion of the High Court for appeals from revising barristers.

The Registration Act 1843 (6 & 7 Vict. c. 18), s. 42, provides as follows:

It shall be lawful for any person who . . . shall have made any claim to have his name inserted in any list, or made any objection to any other person as not entitled to have his name inserted in any list, or whose name shall have been expunged from any list, or who in any such case shall be aggrieved by or dissatisfied with any decision of any revising barrister on any point of law material to the result of such case . . . to give to the revising barrister in court . . . a notice in writing that he is desirous to appeal. . . .

The Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26), s. 28, sub-sect. 14, provides that

Where the name of any person appears to be entered more than once as a parliamentary voter on the list of voters for the same parliamentary borough, . . . the revising barrister shall inquire whether such entries relate to the same person, and on proof being made to him that such entries relate to the same person shall retain one of the entries for voting, and place against the other or others a note to the effect that the person is not entitled to vote in respect of the qualification therein contained for the parliamentary borough, . . . he being on the list for voting in respect of another qualification. Any person may, by notice in writing delivered to the revising barrister at the opening of his first revision court, select the entry to be retained by voting, and in making such selection may select one entry to be retained for voting for the parliamentary borough, . . . but if he does not make any selection the entry to be so retained shall be selected by the revising barrister.

Sir *Henry James*, Q.C. and *W. F. Taylor*, on behalf of the revising barrister, showed cause.—The notice of the elector was sufficient, and the form of the notice was as it should be; even if it was not it did not matter, because sects. 17 and 18 of the Registration Act 1885 (48 Vict. c. 15), provide that the forms and instructions contained in the schedules of the Act shall be used and observed in all cases to which they apply, and the 18th section goes on to say, "but a disregard of any form or instruction shall not of itself invalidate any list, notice, or other thing." The objector has not been in any way wronged or grieved by the marking of the elector's name in the list of parliamentary electors; what happened was a matter entirely between the revising barrister and the elector himself. Even if the form was wrong, or the objector had no right in any way to object, there is no right of appeal under sect 42 of the Registration Act 1843 (6 & 7 Vict. c. 18), except in the case of the person (1) who made a claim to have the name inserted in any list, (2) who has made objection to any other person as not entitled to have his name inserted in any list, (3) whose name shall have been expunged from any list. The case of *Arnold* v. *The Clerk of the Peace for Kesteven and C. Sharpe* (65 L. T. Rep. 618; 1 Reg. Cas. 25) decided this.

Joseph Walton, Q.C. and *W. H. Butler*, on behalf of the objector, in support of the rule *nisi*.—The whole question is involved in the question as to whether the so-called elector was entitled to his vote or not. His right to vote depended upon the performance of a condition precedent, viz., that he should select the qualification for which he desired to retain his vote in proper form as required by the Acts. Until this has been done he is still a "claimant," and therefore the objector has a right of appeal under sect. 42 of the Act of 1843, as one who has made objection to another person as not entitled to have his name inserted in the list of voters.

MATHEW, J.—I am of opinion that there is no right of appeal in this case. Sect. 42 of the Registration Act 1843 (6 & 7 Vict. c. 18), provides for appeals where a person has made a claim to have his name inserted on the list, or where he has made an objection to another person as not entitled to have his name on the list, or where the person's name has been expunged from the list, but that section has not provided for a right of appeal in a case such as the present, where objection has been taken to the form used by a qualified elector, in selecting the place for his qualification. It is said that subsequent legislation has given this right to appeal, but I cannot find that the Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26) gives this right. Sect. 28 only provides against the entries of double qualifications by the barrister "starring" the duplicate qualification, and gives no right of appeal; and sect. 5, sub-sect. 1, of the Registration Act 1885 (48 Vict. c. 15) is a very similar enactment, providing as to double entries in parliamentary boroughs, and in that Act there is no provision for an appeal. The objection here is to the elector's right to select in respect of one of his qualifications, not an objection to either, or both, or any of his qualifications. The revising barrister overruled the objection that was taken. This was a matter entirely between the revising barrister and the elector. The revising barrister received from the elector a notice in writing on a form selecting the entry which he wished retained for the purpose of voting. The revising barrister was not bound to let the objector see this notice, and still less was he bound to allow a formal objection to it.

CHARLES, J.—I am of the same opinion. The right of a voter to appeal from a revising barrister is still governed by sect. 42 of the Registration Act 1843 (6 & 7 Vict. c. 18), and a voter can still object to a name being inserted on a list if he gives notice to the revising barrister in court, and on an objection under this section an appeal lies, but here it is sought to object to a person

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who has already been placed upon the list, and further it is sought to object to the option which an elector has, as to where he shall vote, after being duly qualified. It is sought to treat the elector as though he was not on the list at all. A person on the list for more than one qualification is to be treated as if his name was not upon the list at all. When the revising barrister finds two names upon the list he is to inquire whether it is the same person; if it is, he is to "star" one of the names. If the person however gives notice as to which qualification he selects, the revising barrister is to "star" the qualification which the elector does not select. It is said that sect. 42 of the Act of 1843 authorises any voter to appeal, and to come and say that he objects to such notice. I am of opinion that the objector cannot do this. The duly qualified elector cannot be deemed to be a "claimant," and no elector had the right to object to his notice of selection.

Rule for a mandamus discharged.

Solicitors showing cause against the rule, *Pritchard, Engelfield* and *Co.*, for *Barrell, Rodway*, and *Co.*, Liverpool.

Solicitors in support of the rule, *Crowders* and *Vizard*, for *G. J. Lynsky*, Liverpool.

Nov. 7 and 8, 1894.

(Before Charles and Wright, JJ.)

Reg. v. The London County Council; *Re* The Empire Theatre. (a)

Local government — County council — Licence — Music and dancing — Licencing committee — Appeal to council—Bias of councillor—Validity of proceedings—Bias—Administrative or judicial functions of council—Writ of certiorari *or* mandamus.

A committee of the London County Council for hearing and determining applications for music and dancing licences, recommended to the council the renewal of such licence upon certain conditions. The council affirmed the recommendation of the committee.

The applicant applied for a rule for a mandamus *to compel the county council to rehear, or for a* certiorari *to quash the resolution of the county council on the ground that P. (one of the councillors) had previous to the application being made, attended a meeting to which he had been invited, and at which meeting some of those who opposed the renewal of the licence were present, and the evidence that was to be adduced before the committee was discussed. P. in an affidavit stated that he took no part in the discussion other than by telling the meeting the course of the procedure to be taken to oppose the licence being renewed. It did not appear that P. in any way other than by his vote affected the resolution of the council.*

Held, that the rule for a mandamus *must be discharged, as sufficient bias had not been shown to disqualify the councillor from acting upon the council.*

Quære, *per Wright, J., whether the rule as to interest applicable to purely judicial bodies is applicable to proceedings of administrative bodies, exercising functions, involving something of a judicial character.*

(a) Reported by T. R. Bridgwater, Esq., Barrister-at-Law.

Application for a *mandamus* to compel the London County Council to rehear and determine a resolution which had been passed at a meeting of the county council. The application also asked for a *certiorari* to quash the resolution of the county council, but the arguments proceeded upon the application for a *mandamus*.

The committee of the London County Council for hearing and determining applications for the granting or renewal of music and dancing licences, recommended to the county council the renewal of a music and dancing licence upon certain conditions.

The county council affirmed by a resolution of the majority of the council the recommendation of the committee.

The application was made upon several affidavits, alleging that certain members of the council and of the licensing committee had been present at meetings where proceedings were instigated in order to obtain the recommendation of the committee, and the confirmation of that recommendation by the council; but the only important question was whether one of the councillors, a Mr. Parkinson, had been present at those meetings, whether he had at any of those meetings instigated proceedings, or had so mixed himself up with the litigation as to disqualify himself from sitting upon the council and voting upon the motion.

Finlay, Q.C. and *Avory* showed cause.—The facts in the case of *Reg.* v. *The London County Council; Ex parte Akkersdyke, Ex parte Fermenia* (66 L. T. Rep. 168; (1892) 1 Q. B. 190) are very different from those of the present case. There some members of the licensing committee who had voted in that case against the licence being renewed, instructed counsel to appear before the county council to oppose the application, and some of those members subsequently attended the meeting of the council, but took no further part in its deliberations. The utmost that can be said against Mr. Parkinson is that he attended a meeting of strong partisans, and heard what they had to say, and told them of the procedure to be taken to oppose the licence. He did not originate the proceedings as was the case in *Reg.* v. *Gaisford and another (Justices)* (66 L. T. Rep. 24); *Leeson* v. *General Council of Medical Education and Registration of the United Kingdom and Marshall* (Ct. of App.) (61 L. T. Rep. 849; 43 Ch. Div. 366) is a case in favour of the county council, also *Reg.* v. *Farrant* (57 L. T. Rep. 880; 20 Q. B. 58). It would be laying down too strong a rule to say that Mr. Parkinson's action had vitiated the proceedings; even if it had, the proceedings were not judicial proceedings, because the meeting of the county council for granting these licences under 25 Geo. 2, c. 36, s. 2, has been held in the case of the *Royal Aquarium and Summer and Winter Garden Society Limited* v. *Parkinson* (Ct. of App.): (66 L. T. Rep. 513; (1892) 1 Q. B. 431) not to be a "court." The rule therefore ought to be discharged.

Sir *H. James*, Q.C., *Poland*, Q.C., and *Gill*, in support of the rule.—The action of Mr. Parkinson has vitiated these proceedings. It is not a question of pecuniary interest, but one of bias. It is a question whether he was really biassed or whether he was probably biassed. Mathew, J.

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in *Reg.* v. *Justices of Cumberland; Ex parte Midland Railway Company* (58 L. T. Rep. 491), on page 493, said, "The rule of law is that where a magistrate takes such an interest in the subject matter of the litigation as to make a real bias reasonably probable, he is disqualified from sitting as a magistrate," and Smith, J. on page 494, quoting from the rule laid down by Blackburn, J. in the case of *Reg.* v. *Rand* (L. Rep. 1 Q. B. 230), said, "This is the point, 'wherever there is a real likelihood that the judge would from kindred or any other cause have a bias in favour of one of the parties, it would be very wrong in him to act.'" [The first part of the judgments of Field, J. in *Reg. on the prosecution of F. D. Palmer* v. *The Justices of Great Yarmouth* (8 Q. B. Div. 525), of Mathew, J. in *Reg.* v. *Gaisford* (*ubi sup.*), and of Stephen, J. in *Reg.* v. *Farrant* (*ubi sup.*), were also cited in support of the rule.] A distinction has been drawn between the bias of persons sitting on a strictly judicial tribunal and on one not strictly judicial. Although this meeting of the London County Council for hearing these applications was decided in the *Royal Aquarium and Summer and Winter Garden Society Limited* v. *Parkinson* (*ubi sup.*) not to be a "court" entitling members to immunity for words spoken, the council nevertheless were bound to act judicially in the sense of fairly and impartially.

Cur. adv. vult.

Charles, J.—This was a rule obtained on the part of a Mr. Edwardes, calling upon the London County Council to show cause why a *mandamus* should not issue commanding them to rehear and determine an application for a licence for music and dancing to the Empire Theatre, and there was another rule also for a writ of *certiorari* to bring before the court an order of the council for the purpose of such order being quashed. The arguments addressed to us were mainly addressed to the rule for a *mandamus* to hear and determine. [After setting out the facts in the case his Lordship went on to say:] There can be no doubt that the London County Council in hearing an application for a licence were discharging a judicial duty. The question of the capacity or character in which they act on such an occasion was fully considered by the court in the case of *Reg.* v. *London County Council; Ex parte Akkersdyke, Ex parte Fermenia* (66 L. T. Rep. 168; (1892) 1 Q. B. 190), in which Smith, L.J. delivered the judgment of the Divisional Court, and said that the proceedings before the council were really an original hearing on an application to renew a licence, and on that hearing they had before them the report of their committee, and he went on to say on page 170, L. T. Rep. that in their judgment (Lord Coleridge, C.J. and Smith, J.) the London County Council were adjudicating as to whether a man is or is not to be deprived of his licence, "to use the words of Cotton, L.J. in *Leeson* v. *The General Council of Medical Education* (61 L. T. Rep. 849; 43 Ch. Div. 379), 'though not in the ordinary sense judges, they have to decide judicially as to whether or not the complaint made is well founded,'" and in their judgment when so acting they were not emancipated from the ordinary principles upon which justice is administered in the kingdom, and which are, as it has been said, founded on its very essence. In the present case there is no controversy that that is the position of this large tribunal, of I believe upwards of 100 members present. But, be the number small or great, it has been decided, and it is clear that in determining whether a licence shall be granted or not they are dealing with a matter on which they have a judicial duty, and they must, therefore, govern themselves by the principles which govern magistrates and judges on matters which come before them. Now one of those principles which must guide a person in a judicial position is that he must not be both accuser and judge. If there is on a tribunal anybody who is an accuser, and who, although he is accuser, acts also as judge, his presence on that tribunal is fatal to its jurisdiction, and it is of no importance that had he been absent the decision would have been the same. The mere presence of a person who is accuser and judge vitiates the decision of the tribunal. That was the principle on which *Reg.* v. *The London County Council; Ex parte Akkersdyke* was decided. In that case some of the councillors sitting to hear and determine had instructed counsel to oppose the application, and the court held that the presence of these members vitiated the decision. They, therefore, granted a *mandamus*, the principle being that some of the members of the council were accusers as well as judges. [His Lordship referred at length to the allegations in the affidavits in the present case against several members of the council being accusers, as well as judges, but, he said, these allegations had completely failed.] It is alleged that there remains enough in the case, as it stands, to vitiate the proceedings. It is said, granting that the other accusations have failed, still another member of the council—Mr. Parkinson—attended on the meeting of the council and had so conducted himself and so mixed himself up with the litigation as to disqualify him from sitting and voting on the matter; and therefore we have to inquire whether, in fact, the case is brought within the principles which regulate the administration of justice. One principle is that anybody is disqualified to act on any judicial matter in reference to which he has any pecuniary interest or any real bias. This is undoubtedly the law, but the bias which disqualifies must be in connection with the litigation in question. For example, preconceived opinions—though it is unfortunate that a judge should have any—do not constitute such a bias, nor even the expression of such opinions, for it does not follow that the evidence will be disregarded. What, then, is the bias which disqualifies? It is explained in the judgment of Blackburn, J. in the case of *Reg.* v. *Rand* (L. Rep. 1 Q. B. 230; 35 L. J. Mag. Cas. 157) that it must be a real bias. He said, "wherever there is a real likelihood that the judge would, from kindred or any other cause have a bias in favour of one of the parties, it would be very wrong of him to act; and we are not to be understood to say, that where there is a real bias of this sort, this court would not interfere." The mere possibility of a bias will not disqualify. Now, do the affidavits here bring Mr. Parkinson within the rule? It is plain that he did not do what it is alleged on information and belief that he had done. He had nothing to do with the notices of opposition, and though he was present at the house of the lady alluded to on the 21st Sept., at which four of the six objectors were present, what did he do when there? It would have been better if he had remained away. It

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was wrong to go there and likely to cast a doubt on his fairness in the discharge of his duty. But, unfortunately, he went there, and went upon the invitation of one of the opposers contained in a letter to which he refers in his affidavit, but which has not been produced. It has been urged that we ought to draw an unfavourable inference from that; but I do not think we can do so. However, when there, one of the opposers and witnesses discussed the evidence they proposed to give, and Mr. Parkinson said that, assuming the facts stated to be true, the matter ought to be laid before the committee; but he expressed no opinion as to what importance the committee would attach to them, and he did not settle the notices of opposition. He was not present at earlier meetings, and therefore it is unnecessary to enter into what then took place. All that appears as to Mr. Parkinson is that, at the instance of one of the opposers, he attended at a meeting at which the evidence the witnesses were to give was discussed. Did he so mix himself up with the proceedings as to disqualify him from acting on the council? I have anxiously considered the case, and am of opinion that the case is not made out against Mr. Parkinson of such a bias as would disqualify. The result, therefore, of the whole is this—that the charge, as originally made, entirely fails. The charge against Mr. Parkinson alone, of having so acted as to disqualify himself also fails, and the result is that both rules must be discharged with costs.

Wright, J.—There are two applications to be dealt with for the *mandamus* and for a *certiorari*, although the arguments turned upon the *mandamus*; but the question as to the *certiorari* is one of great importance upon this point—whether a *certiorari* is available as to a mere resolution, or decision of the council. The writ of *certiorari* is applicable to judicial proceedings of courts, but the county council is not a court, and its proceedings are not judicial. That was laid down in the case of the *Royal Aquarium and Summer and Winter Garden Society* v. *Parkinson* (66 L. T. Rep. 513, Ct. of App.; (1892) 1 Q. B. 431), and the court in *Reg.* v. *London County Council; Ex parte Akkersdyke* (*ubi sup.*) did not hold that such a proceeding was judicial, though they said it ought to be dealt with in a judicial spirit, and with a due regard to reason and justice. As to the application for a *mandamus*, no doubt that case is a sufficient authority to show that, where a bias has disqualified a member of a tribunal, such a remedy may be applicable. It may be doubted whether the principles as to interest are applicable, for this was not a case of pecuniary interest, nor were the proceedings those of a court, but it was a case of an administrative body exercising really administrative functions, though involving something of a judicial character. In the present case the resolution was passed by a substantial majority in a body of above 100 members; and the application ultimately related only to a single member—there not being the slightest reason to suggest that his vote or conduct had affected the result. I come, therefore, to the conclusion that, as a matter of common sense, the court should refuse to act unless satisfied, not only that there was probability of bias, but that there was a substantial case of suspicion or scandal attaching to the proceedings as a whole. And even assuming that the same rule is to be applied to such a case as to the judicial proceedings of a court, is enough shown in this case to warrant our interference? The only evidence in the original affidavit of the applicant was on "information and belief," and furnished no evidence against Mr. Parkinson, and the only evidence against him is in his own affidavit, which, however, only comes to this, that he attended a meeting at which the evidence to be given was discussed. That is not enough. Mellor, J. in the case of *Reg.* v. *Alcock; Ex parte Chiltern* (37 L. T. Rep. 831), said, "I know of no reason for saying that the expression of a man's opinion on any subject should render him unfit to adjudicate upon it." I concur, therefore, in the judgment delivered (except as to the proceedings being judicial), and I entirely concur in the result that the rules must be discharged with costs.

Rules discharged.

Solicitor showing cause against the rule, *Blazland.*

Solicitors in support of the rule, *Lewis* and *Lewis.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Nov. 6 and 7, 1894.

(Before the President (Sir Francis Jeune) and Bruce, J.)

The Argo. (a)

Practice—Salvage—Affidavit of value—Admission of evidence as to value—County Court Rules 1892 (*Order XXXIX. b.*), *rr.* 95, 96, 97.

Where in an action for salvage in the County Court the plaintiff, having failed to demand an appraisement, disputes the value of the res *as stated in the defendant's affidavit of value, and tenders evidence as to the value, it is for the judge to exercise his discretion as to the admission or non-admission of such evidence.*

By rules 96 *and* 97 *of the County Court Rules the value of the* res *in a salvage action ought, as a general rule, to be proved by affidavit or appraisement, and not by evidence at the trial, though,* semble, *there may be exceptions to this rule.*

This was an appeal by the defendants in a salvage action from a decision of the judge of the Hull County Court. The plaintiffs, the owners, master and crew of the steam trawler *Retriever*, claimed 150*l.* for salvage services performed by them to the smack *Argo*, her cargo and freight. The *Argo* was not arrested. The defendants paid 75*l.* into court in settlement of the claim, and filed an affidavit stating the value of the *Argo* in her damaged condition at not exceeding 140*l.*, and the price realised by the sale of her cargo of fish at 42*l.* 15*s.* The plaintiffs wrote declining to accept the affidavit as to value, and the defendants thereupon wrote asking them to give notice if there was any intention to dispute the estimate at the trial. At the trial the plaintiffs tendered evidence as to the value of the *Argo*. The defendants objected, but the judge held that, subject to granting an adjournment if required, he was bound to let in the evidence, on the ground that the jurisdiction of the County Courts was a mere creation of Acts of Parliament and orders, and

(a) Reported by Butler Aspinall, Esq., Barrister-at-Law.

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had no inherent rights of its own as to procedure like those attaching to the proceedings in the High Court, and the words of rule 96 of the County Court Rules 1892 (Order XXXIX. *b*) were in his opinion solely connected with the question of arrest, and as the rule did not say in positive words that the County Court judge was not to let in further evidence at the hearing, he felt bound to admit it. The judge decided that the value of the vessel and the fish salved was 320*l.*, and awarded the plaintiffs an eighth for salvage services, and added 40*l.* for loss of fish through absence from the fishing ground, making 80*l.* in all; the 80*l.* to include the 75*l* in court, and allowed costs.

The defendants appealed.

The County Court Rules 1892 provide:

Rule 95. Where in an Admiralty action the amount sued for is paid into court, together with costs, or the security completed, or the plaintiff requires it, the registrar shall deliver to the party applying for the same an order directed to the high bailiff of the court, authorising and directing him, upon payment of all costs, charges, and expenses, attending the custody of the property, to release it forthwith.

Rule 96. Notwithstanding the last preceding rule, the property in an Admiralty action for salvage shall not be released, except with the consent of the plaintiff, until its value has been agreed or an affidavit of value filed on behalf of the party seeking the release, unless the court or the judge shall otherwise order.

Rule 97. If the plaintiff is dissatisfied with the value mentioned in the affidavit filed under the preceding rule he shall be entitled to have the value ascertained by appraisement, and for such purpose shall file a præcipe. The costs of such appraisement shall be in the discretion of the court.

Sir *Walter Phillimore* (*Nelson* with him), for the defendant, in support of the appeal.—No appraisement was sought for, and it was not competent for the judge to receive evidence as to value in the face of the affidavit. The doctrine of appraisement has latterly been most strictly adhered to, and we submit the rule now is that a salvor dissatisfied with the affidavit must in all cases seek for an appraisement. The new rules of 1892 were intended to meet the case, which the old rules did not do. The tender was adequate, the judge should not have awarded costs:

The Lotus, 47 L. T. Rep. 447; 4 Asp. Mar. Law Cas. 595; 7 P. Div. 199;
The Emu, 1 W. Rob. 15.

Butler Aspinall for the respondents.—The County Court Rules do not apply to the question of how the value of the salved property is to be determined for the purpose of estimating the amount of the award. Order XXXIX. *b*, is confined to cases of arrest, and release upon adequate bail being given. The rules under consideration are grouped together under the heading of "Release of Property," and rule 96 in express terms refers to release. This ship never was arrested. The mere fact that the High Court sees fit to adopt a practice of proving values by affidavit or appraisement, is no ground for saying that the County Court must follow the same practice. The value is an important issue in the action, and the court may inform itself how it pleases. The ordinary way of proving facts is by *viva voce* evidence. Even assuming the court should think the rules to apply, all that is said is that a plaintiff may ask for appraisement. It merely gives him a right, and if he does not avail himself of it, the court is not fettered as to how it shall be informed of the value of the salved property. In this particular case no injustice was done the defendants. They were offered an adjournment, but elected to go on and offer evidence. The judge, having heard their evidence, has not believed it.

The PRESIDENT.—In this case the sum of 75*l.* was tendered and paid into court, and there was an affidavit as to the value of the vessel, fixing her value at 140*l.* No agreement was come to as to the value, and no appraisement was asked for by the plaintiffs; but it would seem from the notes of the learned judge that after a time, on the 22nd Nov., the solicitors for the plaintiffs wrote to say that the defendants could not expect them to accept the affidavit of value. To this the defendants replied, "If you intend to dispute the affidavit of value we must ask you to give notice, so that we may be ready at the trial." I think the result really was that no formal notice, at any rate, was given; but, when the trial came on, evidence was tendered to show a value greater than the value in the affidavit. The learned judge considered whether or not he ought to receive the evidence, and he held undoubtedly that he was bound to receive it. He heard it, and came to a conclusion which put the value of the vessel considerably higher than 140*l.* The rules which apply to this case are 95, 96, and 97, of the County Court Rules 1892. [The learned Judge read these rules and proceeded:] I do not think it necessary to compare these rules with the earlier rules. I agree that the main difference is the addition of rule 97, which made it absolutely clear that the plaintiff had the right of appraisement if he was dissatisfied with the value in the affidavit. Nor do I think it necessary to compare these rules with the rules of the High Court, because the rule of the High Court is not a perfect expression of the law on the subject, since it is intended to apply to the well-known practice of the High Court. These rules stand as the code under which the County Court is to be governed. It is contended by Mr. Butler Aspinall—and in doing so he followed the view which presented itself favourably to the learned judge—that those words of rule 96 were connected solely with the subject of arrest. I am unable to agree with that view. They refer to arrest in a certain sense, that is to say, that notwithstanding the release as provided for under rule 95, in one case the release is not to take place until the value has been agreed upon, or an affidavit of values filed. In that sense the rule is connected with release, but it appears to me clear that the power and effect of the rule is not exhausted, or intended to be exhausted, merely in reference to the release. To my mind it points clearly to another effect of the rule, viz., its effect in providing something which shall be of value at a subsequent period, namely, at the trial. It is quite clear that in one case, salvage, which is the one case where it is very important to have the value, notwithstanding that the full amount may be paid into court and security for costs given, it is provided that release shall not be allowed until the value has been determined by affidavit, by agreement, or by appraisement. Now why is that provision made? Clearly, it seems to me, for the purpose of determining what the value of the *res* is to be taken to be at the trial. Having got so far, it appears to me clear that a plaintiff who is

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dissatisfied with the affidavit, ought to demand an appraisement. It appears to me clear that in every ordinary case—I do not quite like to go so far as to say in every case—the judge ought to insist upon the value being determined either by affidavit if uncontested, or by appraisement if contested. I do not go so far as to say that the judge is bound, because there may be circumstances in which the court has power to go beyond an appraisement, or even where there is no appraisement, to try the value of the *res*. I am not saying that no such case is possible, but the rules appear clearly to me to point to a regular course to be pursued, and it appears to me a very wise provision which insists as a regular practice that there shall be in case of dispute an appraisement. It is obvious that not only is that following as closely as possible what is the practice in the High Court, but I think it is extremely important that the value of the *res* shall be determined at the moment when it may best be determined, and in a way which is economical, rather than be left to the disputed evidence of experts at the trial. I think, therefore, that the rules point to the course which ought to be followed in, I think I may say, practically every case. Now what has happened in this case? The learned judge's view, as expressed in the judgment he has delivered, clearly was that he was bound to take the evidence; and, as I have said before, his reason was that he thought rule 96 was solely connected with release. I am bound to say that the learned judge was mistaken in that course. So far from being bound to accept the evidence, it is a question whether or no, in the circumstances, he ought not to have refused the evidence. For this purpose I think it is sufficient to say that the learned judge clearly did not exercise the discretion which he ought to have exercised as to whether, in the particular case, he ought not to have held the plaintiff by the affidavit. The learned judge did not exercise that discretion, and therefore I think we are bound to consider the matter, and to exercise the discretion which he should have exercised. Exercising that discretion in all the circumstances of the case, it seems to me clear that the evidence ought not to have been gone into. The learned judge ought to have said that the rules gave ample opportunity to the plaintiff of challenging the affidavit if he chose; that he had not chosen to avail himself of those rules; that, under the circumstances, no injustice would be done by holding him bound by the affidavit; and that, on the contrary, injustice would be done to the defendant by taking the evidence. Therefore, I think, he ought to have held the affidavit conclusive evidence. The learned judge did not do so. He went into the evidence. That raises another question. Assuming that the judge was right in going into that evidence, ought one to say that his conclusion was not right? I would observe that the only evidence given by the plaintiff was the evidence of a person interested; and the evidence on the other side was the evidence of several witnesses, one at least of whom was disinterested, and another connected with the insurance. I am quite unable to come to the conclusion that the learned judge was right in taking the higher value, and if it were necessary, I should be prepared to say that the value of the affidavit was really the value. On that ground, therefore, I should be prepared to say that the value taken by the learned judge was too high. There are thus two grounds: first, that the learned judge ought to have held the plaintiff bound by the affidavit; and, secondly, that on the evidence taken, the value was put too high by the learned judge. I think the proper value on which the salvage award should be based ought to be taken to be about that given in the affidavit. The result obviously is, that inasmuch as the learned judge, in taking the higher value, thought that 80*l.* was the proper amount to be awarded, if he had considered that the true value of the vessel was only 140*l.* he would, beyond all question, have deemed 75*l.* sufficient. Therefore I think that was sufficient, and under those circumstances the decision of the learned judge must be varied by declaring that the amount of the salvage award does not exceed the amount tendered.

BRUCE, J. concurred.

Sir *Walter Phillimore* applied for costs.

The PRESIDENT.—I think you should have all costs after the date of tender.

Appeal allowed. Leave to appeal refused.

Solicitors for the appellants, *Pritchard* and *Son*, for *A. M. Jackson* and *Co.*, Hull.

Solicitor for the respondents, *F. W. Hill*, for *Laverack* and *Son*, Hull.

House of Lords.

Nov. 22 and 23, 1894.

(Before the LORD CHANCELLOR (Herschell), Lords MACNAGHTEN and DAVEY.)

GUARDIANS OF SCULCOATES UNION *v.* HULL DOCK COMPANY.

HULL DOCK COMPANY *v.* GUARDIANS OF SCULCOATES UNION. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Poor rate—Docks—Rateable value—Docks in several parishes — Apportionment — Railway — Prohibition against letting—Hypothetical tenant.

The Hull Dock Company owned and occupied various docks, wharves, and warehouses, forming one system of docks, under one management, situated in several different parishes in the appellant union. Accounts were kept showing the expenses and earnings attributable to the part of the property situated in each parish.

Held (affirming the judgment of the court below), that the rateable value of the property in each parish ought to be ascertained upon the principle of taking the profit-earning capacity of the portion of the property in each parish, not by taking the value of the whole property and apportioning it according to the water area of the docks in each parish.

Reg. *v.* Hull Dock Company (18 *Q. B.* 325) *not followed.*

Mersey Docks *v.* Liverpool (26 *L. T. Rep.* 868; *L. Rep.* 7 *Q. B.* 643) *approved and followed.*

The dock company had on their property railway and tramway lines and junctions communicating with the lines of an adjoining railway company.

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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but they were prohibited by statute from letting such lines or from taking tolls in respect of them.

Held (reversing the judgment of the court below), that the amount which a hypothetical tenant might have given for such lines, but for the prohibition, ought not to be taken into account in determining their rateable value.

London County Council *v.* Churchwardens, &c., of Erith (69 *L. T. Rep.* 725; (1893) *A. C.* 562) *explained.*

THESE were cross-appeals from a judgment of the Court of Appeal (Lord Halsbury, Lopes and Kay, L.JJ.), reported in 70 L. T. Rep, 742; (1894) 2 Q. B. 69, who had varied an order of the Divisional Court (Mathew and Collins, JJ.) on a case stated by an arbitrator on an appeal by the Hull Dock Company to Quarter Sessions against assessments to the poor rate, and rates made on the basis of those assessments. The special case is set out at length in the report in the court below. Two questions arose on the case: first, whether the assessments of the docks, which were situated in several parishes of the Sculcoates Union, should be arrived at by ascertaining the whole rateable value, and dividing it between the different parishes in proportion to the water area in each parish, as contended for by the parochial authorities, or by calculating the actual profits earned in each parish, as contended for by the dock company; secondly, whether certain railways belonging to the company, for the use of which they were forbidden by a private Act to take tolls, were to be assessed according to the amount actually earned, or upon the rent which a hypothetical tenant might give for them but for the statutory prohibition. The Divisional Court decided in favour of the dock company on both points, and the Court of Appeal affirmed their judgment on the question of the principle on which the docks should be assessed, but reversed it on the question of the assessment of the railway, Lord Halsbury dissenting on this point. Both parties appealed to the House of Lords.

Balfour Browne, Q.C. and *R. Cunningham Glen*, for the guardians, appellants in the first appeal, argued that the principle of assessment contended for by the dock company was practically impossible to carry out, and relied on the old case (*Reg.* v. *Hull Docks Company*, 18 Q. B. 325), which really decided the point in favour of the contention of the guardians. They also cited

Mersey Docks v. *Liverpool*, 26 L. T. Rep. 868; L. Rep. 7 Q. B. 643;

North and South-Western Junction Railway Company v. *Brentford*, 57 L. T. Rep. 429; 18 Q. B. Div. 740;

Reg. v. *Staffordshire Waterworks Company*, 54 L. T. Rep. 782; 16 Q. B. Div. 359.

Bosanquet, Q.C. and *Marchant*, for the dock company, were not called upon on this point.—For the dock company, in the cross-appeal, they urged that the judgment of the majority in the Court of Appeal went upon a misunderstanding of the judgment of the House of Lords in *The London County Council* v. *Churchwardens of Erith* (69 L. T. Rep. 725; (1893) A. C. 562), and that the view taken by Lord Halsbury of that case was the correct one. They also cited

Altrincham Union v. *Cheshire Lines Committee*, 15 Q. B. Div. 597.

Balfour Browne, Q.C. and *R. C. Glen* supported the judgment of the Court of Appeal.

At the conclusion of the arguments their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell).—My Lords: These are two cross-appeals, the parties to the appeal being the Guardians of the Poor of the Sculcoates Union and the Dock Company of Kingston-upon-Hull. The first appeal raises the question as to the principle which ought to be applied in the assessment of docks belonging to the Kingston-upon-Hull Dock Company and occupied by them, which are in different parishes. The dock company are the owners and occupiers of a number of docks. Some of these docks, and some only, are in the appellants' union. The appellants maintain that the proper method of ascertaining the rateable value of the docks in their parish is to ascertain what are the earnings of the whole dock system—what is the expenditure necessary to produce those earnings, then having arrived in that way at the profits earned by the dock company upon the whole of their system, to distribute those earnings amongst the different docks in proportion to the water area in the particular parishes. The respondents assert that this is not the proper mode of arriving at the rateable value, that the proper method is to ascertain what are in fact the profits earned by each part of the system, by the particular hereditament in each parish, and that the profits thus earned by the hereditament in the particular parish enable you to arrive at the rateable value. The only question left to the court is the choice between those two methods. I say this because there have been some criticisms addressed to your Lordships upon the details of the method adopted and contended for on the part of the respondents. I do not think that your Lordships are in a position to deal with such questions as those, because really the form in which the case is stated, and the question left for the court, leaves only a choice between the appellants' method or principle, and the respondents' method or principle. If the respondents' method or principle, speaking broadly, be the correct one, then it seems to me to be impossible to give judgment for the appellants, even if there has not been complete accuracy or propriety in the working out of that method. No doubt some of the criticisms upon the method employed by the respondents were properly addressed to your Lordships by the learned counsel for the appellants, because they were designed to show that it was impossible to arrive at any satisfactory result by the adoption of the respondents' principle or method, and that, therefore, you were driven to adopt the appellants' principle or method. Looking at the rateable matter apart from any authority, I take certain propositions to be absolutely clear—first, that you are to ascertain the rateable value of a hereditament in a particular parish by regarding that hereditament and ascertaining what that hereditament would let for in its then condition, such as it then is, to a tenant from year to year. There are no doubt cases in which it is impossible to deal with the hereditament found in a particular parish by itself. It is not such as to be capable of being let to anybody by itself; its only value is as part of a system or undertaking. In that case, although of course you have to ascertain the

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rateability of that particular hereditament in that parish, it is impossible for you to arrive at its true rateable value except by regarding the entire system and asking what a tenant from year to year would give for it considered as a part of that system. Of course the question what he would give for it from year to year as a part of that system involves the consideration of the whole system, and the earnings and profits made by the whole system, and some distribution of them among the various parts which make up that system. But the present case is really not one of that description at all. The question is as to the amount at which certain docks ought to be rated which would have a rateable value if the whole of the rest of the dock system were extinguished to-morrow. They would still be docks, they would still be capable of being used as docks, and certainly a tenant from year to year would be willing to pay a rent for them as docks. They are capable of consideration, and their rateable value is certainly capable of conception without any reference to the general undertaking, as a part of which, in fact, they are at present used. What has therefore to be determined is what a tenant from year to year would give for these particular docks; and the parishes are no doubt entitled to insist that in making that inquiry you have here a subject-matter which has an enhanced value by reason of its adaptation to a commercial purpose—that you are not merely to rate it as so many square feet of water or land, but that you are to rate a dock, and the question is what a tenant from year to year would give for that dock. Now, I cannot think that where you have a system of docks of different dimensions, adapted to different purposes, in a different local situation, although the distance between them may not be great, they are to be regarded as a homogeneous whole, such that the earnings of the whole if distributed according to the water area will probably give the earnings of every part. It does not follow that the larger the dock the greater would be its profit, because you cannot consider the matter independently of all the considerations to which I have alluded—its adaptability to a particular trade, its local situation and other circumstances. It seems to me, therefore, that theoretically the method contended for by the appellants is the wrong one. I quite feel the force of the arguments they have addressed to your Lordships—very able arguments—with a view of showing that, although it may not be theoretically accurate, it is the best practical measure of the value of a dock in a particular parish. That was the conclusion arrived at by the Court of Queen's Bench in *Reg.* v. *Hull Dock Company* (18 Q. B. 325), but there all the learned judges admitted that it was not the plan which ought to be adopted if you were able to ascertain what were the earnings of the docks in the particular parishes, that you only resorted to it from necessity because it was not possible to ascertain the earnings of the particular docks and so arrive at the rateable value. At a later date the case of the *Mersey Docks and Harbour Board* v. *The Overseers of Liverpool* came before the courts, and the Court of Queen's Bench, differently constituted no doubt from the court which decided the *Hull Docks* case, held that the method which had been sanctioned in the *Hull Docks* case was not to be applied in the case of the Liverpool and Birkenhead Docks. The learned judges there came to the conclusion that the method which the Queen's Bench had pronounced theoretically incorrect but only practically employed because it was impossible otherwise to arrive at the rateable value, was a wrong one, and they considered that there was no real difficulty in arriving at substantially the true result by looking to see what proportion of the dock earnings was attributable to a particular part of their dock system, dependent as that would be upon the amount of traffic which went to one set of docks as compared with another. In the *Hull* case, Lord Campbell, C.J., in the course of the argument, suggested that the question would have been the same if the docks had not been altogether on the Humber, but had been some on the Humber and some on the Tyne. That was the very question, or the sort of question, which had to be considered in the *Mersey Docks* case, except that the docks were on the same river, but the river there was a mile broad. But between the *Mersey Docks* case and the case now before your Lordships I am unable to see the slightest distinction. If we decide this case as the appellants ask us to do, we inevitably overrule the *Mersey Docks* case. I am not prepared to do so. I think the decision in the *Mersey Docks* case was right, and I am quite ready myself to adhere to it in all respects. It is argued that in the present case the vessels pay the dock company for the use of the whole docks, because they may go into any dock they please, and in many cases they may go into more than one dock, namely, into one to load and into another to unload. That is perfectly true, but it seems to me none the less true that you do substantially arrive at what is earned at a particular dock by ascertaining what vessels go there, whether it be to load or to unload. No doubt it is perfectly true that if the business of the dock company were so conducted that they purposely diverted traffic into one dock which otherwise would have come, were the convenience of the ship alone considered, into another dock, and so centralised the traffic in one or more docks and denuded the others of the traffic, then the number of vessels loading or unloading in particular docks would no longer indicate the capacity for earning of the various docks. To follow the method adopted by the respondents would no doubt then lead to a wrong result. But there is no such case made here at all. There are no facts found in the case pointing to the conclusion that the distribution of the traffic amongst the docks is regulated by anything else except the convenience of the public, and the suitability of the docks to the particular traffic, whether by reason of locality, appliances or otherwise. Therefore I see no reason to suppose that the distribution of the traffic is not really, as matters at present stand, an indication of what is the earning capacity of the docks respectively. Well, that being so, I do not think that there is any difficulty in applying the principle which, even in the *Hull* case, was said to be a sound principle if it were capable of application. No doubt you cannot arrive at an absolutely accurate result, whatever principle you adopt. That I freely admit; you can only at the utmost roughly approximate to it; but I think that you are more likely to approximate to it, and that you can feel confident that you will approximately reach the true results by adopting the

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method contended for by the respondents, whilst on the other hand the method contended for by the appellants seems to me to have an inherent vice which will almost inevitably lead you wrong in the great majority of cases, though in a certain number of cases no doubt you might thereby reach the same conclusion. It was said that one of these docks was partly in one parish and partly in another, and that there you were driven to take the water area. I quite agree that there are some other cases where either the water area or some method of that sort must be applied, because you are dealing with expenditure or receipts which cannot be attributed to a particular part of the system, but which must in some way or other be spread over the whole. There is one other point which I ought to notice. It is said that the method employed by the respondents takes no account of the use of some of these docks as a means of passage from one dock to another, which is part of the facilities of the dock for which the total payment made by a vessel which uses two docks, and a third for the purpose of passing from one to the other is made. No such point as this seems to me to be really raised in a manner which will enable it to be decided in this case. That is what I have called one of the details connected with the respondents' method of proceeding, but it involves no principle. There is no doubt that in such a case a part of the payment made by the vessel is made for the convenience of passing through the intermediate dock, but, of course, if you were to take from the payment a certain sum in respect of that passage you would diminish *pro tanto* what would be allotted to the docks in which the ship loaded and unloaded, and it is by no means clear that by omitting this altogether you do not arrive, having regard to the chances of traffic, at much the same result as you would if you were to take it into account. That depends upon the extent to which the vessels go from one dock to another; and between what docks that traffic flows. But I think it unnecessary to say more upon that point, because it is not really now before your Lordships. All that this House has at present to do is to decide between two rival methods and to determine which of them is the correct one. I do not think I need trouble your Lordships further upon this point. For the reasons which I have given I think the judgment appealed from must be affirmed.

CROSS APPEAL.

My Lords: The point raised in the cross appeal is an entirely different one. Along the wharves of the dock company there run certain tram or railway lines. They are, of course, part of the wharf or dock system, and, being in the same occupation, there is not to be a separate rating of the railway or tram line. The existence of that railway or tram line is simply an incident of the wharf or quay, and its existence is to be taken into account in rating the wharf or quay. You do not rate that piece or strip of land upon which the rails rest separately from the wharf or quay along which they run; it is all one rateable hereditament rated together. Now, of course, in taking into account the earnings of the dock company, the railway accommodation forms one of the elements from which those earnings proceed. But for those railway lines traffic would not come so readily to the dock, ships could not be so readily loaded or discharged, and fewer ships probably would come there. The consequence is that those railway lines no doubt by their existence promote and augment the earnings of the dock. Well, so far their enhancement of the value of the land—that is to say, the increase of value which the wharves have in respect of those lines being upon them instead of their being absent—is taken into account, and is necessarily involved in the consideration of what the docks are earning. But it is said that in addition to that these railways might earn for the docks a larger sum—that all the earnings which now flow into their exchequer might be received, and in addition to that something more might be obtained by reason of these lines. No doubt, if it could be established that they might earn more than they do, and only earn less because the company choose to forego a sum which they have only to hold out their hands to receive, it might, of course, be perfectly fairly argued, as the respondents on this appeal have argued, that, in considering what was the rateability of this property, what a tenant from year to year would give, you were to come to the conclusion that he would give something more than the actual earnings or profits (the surplus of earnings over receipts), inasmuch as he has only to come into occupation to make them greater at his own will. I should not for a moment dissent from that argument if it could be established in point of fact. The fact that the particular occupier chooses to forego a profit which he has only to hold out his hand to receive of course cannot exclude that source of profit from consideration when you are asking what a hypothetical tenant would give. But in the present case the only company, so far as appears, that has a junction with these docks is the North-Eastern Railway Company, and by an Act passed by the Legislature no tolls can be demanded by this dock company for the passage of traffic over their lines. The words are very general. Now under these circumstances the question as I understand left by the arbitrator is this: If tolls can legally be exacted, then some money might be received either from the North-Eastern Company or from some other tenants; but if tolls cannot be legally exacted no such sum can be received. That I understand to be the question put, or rather the finding is put in that form, and then the question is: Supposing that no tolls could be got because they cannot legally be exacted, nevertheless are you to add something to the rating already arrived at, on the ground that the railway demands some addition? I cannot myself think that it is possible, with all deference to those who have thought otherwise, to arrive at any but one conclusion upon the point, and I think that the view of the learned judges in the court below who have decided in favour of the respondents in this appeal has resulted from a misapprehension of the decision of this House in the Erith case (*London County Council* v. *Churchwardens, &c., of Erith*, 69 L.T.Rep. 725; (1893) A.C. 562). I agree altogether with what Lord Halsbury said upon this point in the court below. We are dealing here with a profit-bearing undertaking. The parishes do not ask that the land shall be valued merely as land, or land covered with water, but they say, "These are docks with wharves, railways, and all the adjuncts and appliances, and it is as docks capable

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of earning a profit that they ought to be rated. You are to find out what a tenant from year to year in view of the profits earned would be likely to give, and upon that principle they have been rated." Then it is said, "But they would earn more profit than they are earning, and therefore you ought to suppose that a hypothetical tenant would give more." But if the Legislature have said they shall not earn these suggested further profits because they shall not charge tolls, how can it be established as a matter of fact that they could earn more? It appears to me that, if you are to disregard such statutory restrictions as these, you might just as well say that a railway company ought not to be rated only according to the tolls which it receives—ought not to be rated even according to the tolls which it could by law receive within its maximum, but that you ought to disregard its statutory maximum, and see what a tenant from year to year would give for the railway if he could charge any tolls which he pleased. I do not think there is any foundation for such a proposition. It is supposed to be involved in the decision in the *Erith* case. The *Erith* case and all the cases there dealt with were cases of a totally different character. They were cases in which the argument had been used that, inasmuch as the particular occupier, who was the only person who would give anything considerable for the land, could not make any profit out of it from the very nature of the circumstances under which the hereditament was employed, therefore either it had no rateable value, or else in estimating its rateable value you were bound to regard the actual tenant as not being within the category of hypothetical tenants. That was the question raised there, and all that was said about profits and about the land being "struck with sterility" by the statute, and so on, was said in relation to a case of that description where the argument was either that the land was not rateable, or that you were to exclude from amongst the possible tenants the actual tenant. I took care to guard myself as I thought, in the opinion which I delivered, against being supposed to deal with the class of cases now before your Lordships, because I said: "There is no doubt a certain class of cases in which the amount of profit which can be earned by the occupation of a hereditament is very material in ascertaining the sum at which it should be assessed. In the case of gasworks, waterworks, and other industrial undertakings where a hereditament is enhanced in value by its connection with a profit-earning undertaking, the profits earned and the shares of those profits attributable to any particular hereditament have to be taken into account, and in such cases as these" (that is wherever profits have to be taken into account) "any restrictions which the law has imposed upon the profit-earning capacity of the undertaking must of course be considered." I agree with Lord Halsbury in thinking that the present case comes exactly within the class of cases which I had in view when I used those words, in which I expressly said that in my opinion any restrictions put by the Legislature on the profit-earning capacity of the undertaking were to be taken into account. Now, the present is just one of those cases. For the reasons which I have given it is clear that there is no question about taking into account the dock company as one of the hypothetical tenants, there is no question of excluding the dock company, because it cannot become a tenant. In the present case the dock company is taken into account, and its earnings are taken into account in considering hypothetical tenants and what a hypothetical tenant would pay. But the question is whether, having taken it into account, and having considered it, you are to consider the profits which it might earn if a state of things existed which does not exist, or whether you are to consider the profits which it can earn under the only conditions under which it is allowed to earn profit at all. It seems to me that the latter is the state of things which must be taken into account, and that any other course would lead not only to absurdities but to the gravest injustice as regards the rating that is imposed. In the *Erith* case I pointed out that where you came to the conclusion that the actual owner or occupier would pay a higher rent than anybody else was likely to pay, even there, taking the occupier into account in considering what a hypothetical tenant would give, you were not to fix the amount higher than you thought that tenant would pay. It has been ingeniously pointed out that, although it may be that the dock company could not charge tolls to the North-Eastern Railway, they did, in fact, receive a sum of money from them for a considerable time. Well, during that time it may be that it would have to be taken into account. But the case finds that for a year or two before this question arose they had not been receiving it, and the question left to us is: What is to be done where a toll cannot be legally exacted? Then it is further suggested that there might be other railway companies who might have running powers over the North-Eastern system but would not be the North-Eastern Railway Company, and that the 53rd section of the Act is confined to a prohibition of requiring tolls from the North-Eastern Company—that therefore tolls could be required from these other companies if they ran on to these dock lines, and that therefore this is a matter which ought to be taken into account. Well, if all those facts could be established, very likely the contention of the respondents might be well founded. But the question does not really arise here. In order to ascertain whether there were any foundation for it, one would have to see under what circumstances other companies could come over these lines: and one would then have to consider whether under those circumstances the prohibition of sect. 53 would apply. But we have not to consider any such point, the only question left upon this part of the case as I understand it being whether, supposing the dock company cannot exact tolls, nevertheless you are to take into account as adding to the rateable value the sum which might be obtained by letting this railway. For these reasons, my Lords, I think that in this case the appeal must be allowed, with the usual result.

Lord MACNAGHTEN.—My Lords: I concur.

Lord DAVEY.—My Lords: I agree that the first appeal entirely fails. Speaking for myself, I do not see any great question of principle which is involved in this appeal. What your Lordships have to ascertain in the best way you can is the rent which a hypothetical tenant from year to year will pay for the rateable hereditament. The profits or earnings of the occupier who carried on a valuable business upon that hereditament only

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come in as a measure—or more or less accurate measure—of what you after all have to ascertain, namely, the rent which the premises would command from a hypothetical tenant. But those profits or earnings must be the profits or earnings of the rateable hereditament. It may be that in some cases the profits or earnings of the rateable hereditament are so mixed up with profits derived from the beneficial use of other hereditaments, from trade carried on upon other hereditaments in common with the rateable hereditament, that it is impossible to separate the rateable hereditament which has no profit-earning value apart from other hereditaments, and that in those cases it may be proper, as affording the best estimate you can make, to take the profits of the whole undertaking and then apportion them according to the respective areas of the hereditaments in question, or according to some other principle. But it is obvious that you are only using what has been called in the present case "the water-area principle" as a means of ascertaining the profits or earnings which are attributable to the particular rateable hereditament, as having been earned from the beneficial occupation of the rateable hereditament and the trade carried on by it. Now not only in the *Mersey Docks* case, to which the Lord Chancellor has referred, but also in the *Hull Dock* case itself we are told that you are not to resort to the proportional or what has been described as the water-area method of ascertaining the profits of the rateable hereditament unless it is necessary to do so. The proper mode is, so far as you can, to ascertain the rateable value by means of what is called the parochial system, I think inaccurately, for the reason which I have already mentioned, that what you have to ascertain is the profits or earnings derived from the beneficial occupation of the hereditament itself, and the proportional method is only a means to that end. But upon the facts which are stated in the present case I am wholly unable to come to the conclusion that there is any such necessity as should compel the court to adopt the proportional or water-area method in this case; and in my opinion it would be extremely unjust to do so, because it may be that the docks in one parish, either from their superior situation or from their superior appliances, or from their situation relatively to the requirements of some particular trade, or for some similar reason, are more resorted to, and therefore have a greater profit-earning capacity than the docks forming another part of the undertaking of the dock company; and it seems to me that where such is the case, where there is an inequality in profit-earning capacity between different docks forming part of the undertaking, it would be unjust to increase or to diminish the rates of either parish by the mere proportional method. I am therefore of opinion that the first appeal fails.

CROSS APPEAL.

With regard to the second appeal, I will only say this, that Mr. Balfour Browne in his arguments seemed to me to wish to have it both ways. He desires, and he is entitled to have, the rateable value of the hereditaments within his union enhanced by the fact that they are capable of being employed, and are employed for the purpose of carrying on a beneficial business. But, on the other hand, he desires to ignore and altogether repudiate the statutory conditions upon which alone that business can be carried on by the dock company upon the premises. But it is not necessary to say much upon this appeal, because it is obvious from Lopes, L.J.'s judgment that the learned judges who formed the majority in the Court of Appeal would not have decided in the way they did had they not felt themselves bound by something which was said in the course of the judgment delivered in the *West Ham and Erith* case. I am of opinion that the learned judges misunderstood what was said by the Lord Chancellor in that case—that they overlooked the passage in the *Erith* case to which Lord Halsbury referred, which has now been referred to by the Lord Chancellor, and that that being so we are only deciding in accordance with their own opinion, which they would have expressed had they not laboured under this misunderstanding, when we decide that the second appeal should succeed.

In the original appeal, judgment appealed from affirmed, and appeal dismissed with costs.

In the cross-appeal, judgment appealed from reversed, the respondents to pay the costs here and in the courts below.

Solicitor for the guardians, *J. W. Sykes*, for *Chatham* and *Son*, Hull.

Solicitors for the company, *Chester, Mayhew, Broome*, and *Griffithes*, for *T. Holden*, Hull.

Nov. 23 and 27, 1894.

(Before the LORD CHANCELLOR (Herschell), Lords MACNAGHTEN and DAVEY.)

LEMMON v. WEBB. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Nuisance—Trees overhanging neighbour's land—Right to cut—Notice.

If a man's trees overhang his neighbour's land his neighbour may cut off the overhanging branches back to the boundary without giving notice to the owner of his intention to do so.

A man cannot acquire a right to let his trees overhang his neighbour's land, either by prescription or under the Statutes of Limitation.

Judgment of the Court of Appeal affirmed.

THIS was an appeal from a judgment of the Court of Appeal (Lindley, Lopes, and Kay, L.JJ.), reported in 70 L. T. Rep. 712. and (1894) 3 Ch. 1, who had reversed a judgment of Kekewich, J., reported in 70 L. T. Rep. 275.

In 1869 the appellant purchased a property called Malquoits, situated near Guildford, in the county of Surrey, and comprising about twenty-one acres, and in 1879 he purchased another estate, called Ewhurst Place, of about 106 acres, the boundaries of which marched with those of Malquoits. In 1881 the appellant sold Malquoits to the respondent. At the time of the purchase by the respondent of the latter property there were growing on the boundary of the two estates, but upon the land of Ewhurst Place, a number of large timber trees, the branches of which overhung the land and soil of Malquoits. The respondent,

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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without giving any notice to the appellant, proceeded to lop off the branches of the trees that overhung his land, whereupon the appellant instituted the present proceedings with the object of obtaining a declaration that the respondent was not entitled to cut any branches of the appellant's trees which overhung the respondent's land when such overhanging had continued for many years, at all events without notice; and for an injunction to restrain the respondent from cutting the branches, and for damages. The action was heard before Kekewich, J., who gave judgment for the plaintiff, and ordered the respondent to pay the appellant the sum of 5*l.* damages and costs. The respondent having appealed, the Court of Appeal reversed the decision of Kekewich, J., and gave judgment for the respondent.

Warmington, Q.C. and *R. F. Norton*, for the appellant, argued that the action of the respondent was an injury to the amenity of the appellant's estate and an interference with his property. The trees had been for more than fifty years in the position in which they were, overhanging the respondent's land. If it had been a case of a bow-window built out over a neighbour's land the appellant would by this time have acquired an easement, and the branches of trees are evident, so as to lay the foundation of an easement. Trees overhanging an highway are regulated by statute, and the surveyor of highways must give notice, and get an order from the justices before he can cut them, which raises a presumption that a private owner ought also to give notice. There is no authority on the point, except a dictum of Best, J., in the case of *Lord Lonsdale* v. *Nelson* (2 B. & C. 302) which is not reported by any authority. [The LORD CHANCELLOR.—That case, and also *Jones* v. *Williams* (11 M. & W. 176), upon which Kekewich, J. seems to have relied, do not appear to me to apply to this case.] The general principle is, that you cannot abate a nuisance on another man's land without giving notice. See also *Pickering* v. *Rudd* (1 Starkie N. P. 56; 4 Camp. 219); *Norris* v. *Baker* (1 Roll. 393); *Penruddock's* case (5 Rep. 100 b), which seems to be the same as the case in Jenkins' Sixth Century *Cas.* 57, p. 260, and decides that a writ of *Quod permittat prosternere* to abate a nuisance would not lie without notice. For that writ see Fitzherbert's Nat. Brev. The earliest recorded case of it is in the Book of Assize, f. 260, where trees obstructed a river.

Marten, Q.C. and *J. Bradford*, who appeared for the respondent, were not called upon to address their Lordships.

At the conclusion of the argument for the appellant, their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell).—My Lords: The question raised by this appeal is a very short one, namely, whether where branches of trees overhang the soil of another person, the person whose soil they overhang is entitled to remove those branches without notice to his neighbour on whose side of the boundary the trees grow. It is not disputed that, if such notice be given, and if the neighbour do not remove the boughs, the person whose land they overhang would be entitled to do so. That is subject to the questions raised on the Prescription Act and the Statute of Limitations, which I will deal with in a moment. This, of course, involves an admission that, against the will of the owner of the land, the neighbour cannot insist that the boughs shall remain there, the only question being whether he is entitled to notice so that he may remove the boughs himself, or whether the person complaining of them may remove them. As regards the right, the difference does not seem to me to be one of extreme importance. In the present case, I think it is extremely probable that the plaintiff would not have removed the boughs, and that the defendant would have removed them after all. Nevertheless if, in point of law, the person complaining of them can only remove them after notice, then the plaintiff in this action would be entitled to recover. It might be a reasonable provision of the law that such notice should be required, but whether it would be any great protection to the owners of trees near the boundary of their neighbour's land may be doubted. It might be very reasonable that there should be some law regulating the rights of neighbours in respect of trees which, if planted near the boundary, necessarily tend to overhang the soil of a neighbour. It may be, and probably is, generally a very unneighbourly act to cut down the branches of overhanging trees unless they are really doing some substantial harm to the neighbour. The case is a very common one. Such trees constantly do overhang, and it certainly might call for the intervention of the Legislature if it became at all a common practice for neighbours to exercise what may be their legal rights in thus cutting off what would frequently be a considerable portion of the trees which grow on the other side of their boundary. But the question is whether there is any authority for the proposition that notice must be given by the owner of the land before thus removing the encroaching boughs. In support of the proposition that notice is requisite not a single authority has been cited. Now it is certain that the boughs of trees have overhung, and that those whose land they have overhung have removed them on many occasions. Actions in respect of such removal have occurred from time to time, the point at issue generally being whether they overhung the land or not, that is to say, whether the soil over which the branches were spread was the soil of the one person or the other; but I never heard it suggested in any of those cases (and certainly I can remember more than one within my own experience) that notice ought to be given to the adjoining owner before the boughs could be removed. Now, what are the only authorities to which appeal has been made? They are cases where a nuisance has existed on neighbouring soil, where the person complaining of the nuisance could only get rid of it by going on to the soil of his neighbour; and there, no doubt, it has been held that he cannot justify going on to the soil of his neighbour to remove the nuisance, except in the case of emergency, unless he has first given his neighbour notice to remove. That is because his act involves an interference with his neighbour's soil—involves a trespass. But those cases, of course, are quite distinguishable from the present case where the act does not involve a trespass, but what is complained of is an encroachment on the soil of the man who removes the boughs, and what he does in getting rid of the encroachment is done on his own land, and, therefore, *primâ*

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facie needs no excuse so far as the place where he is doing the act is concerned. The present case, therefore, seems entirely distinguishable from those; and the question whether there are any cases in which such a notice may be necessary does not arise here. The question is whether such a notice is necessary prior to the removal of boughs overhanging a man's own land. The only dictum that can be found on the subject is a dictum of Best, J. in the case of the *Earl of Lonsdale* v. *Nelson* (2 B. & C. 302, at p. 311), a case which, of course, is not in point, inasmuch as there the court had to determine whether the defendant could do acts upon his neighbour's land which involved considerable interference with his rights of property; but Best, J. says: "Nuisances by an act of commission are committed in defiance of those whom such nuisances injure, and the injured party may abate them without notice to the person who committed them; but there is no decided case which sanctions the abatement by an individual of nuisances from omission, except that of cutting the branches of trees which overhang a public road, or the private property of the person who cuts them." There is, therefore, that dictum of Best, J. on the point; but what seems to me more important is, that there is no dictum whatever to be found to the contrary, nor any decided case, and really we should not be interpreting the law, we should be making the law—and making the law not by the application of old principles to meet a new case, but making the law by laying down conditions and limitations for the exercise of rights in a class of cases which has existed so long as the growth of trees and boundaries between neighbours have existed. Therefore, it seems to me to be a case in which it is out of the question that we should lay down any law beyond that which, so far as we can find, has been regarded as the law in times gone by. It seems to me, therefore, that there is no warrant for saying that notice was requisite. Then, as regards the question whether the plaintiff has acquired any right by reason of the length of time these trees have overhung, I think it is impossible to say that he has either acquired a right to the land over which they hang or to their overhanging under the Statutes of Limitation. The trees, of course, grow from time to time, and their state each year is different from what it was the year before. The same remark applies to the suggestion that a prescriptive right has been obtained. The tree of to-day is not in the condition in which it was twenty years ago. It would be idle to suggest that the right gained at any time was the right to have the tree there in the condition in which it was twenty years ago, and that it was open to the adjoining owner to put back the tree into the condition in which it was twenty years ago, because it is only a right to what has remained for twenty years that is gained by prescription, and the exercise of such a right would, of course, be almost always, if not always, completely destructive of the tree. It seems to me impossible to say, in a case of this description, that a right is gained either by the Statute of Limitations or under the ordinary law of prescription. Those points, indeed, were very faintly urged (and one can quite understand why) by the learned counsel for the appellant. They rested their appeal mainly on the allegation that the appellant was entitled to notice before the defendant did the acts complained of, and I think they have not established the proposition for which they contended. Then, it was said there had been some small trespass. The learned judge who tried the case said he did not think that was of importance, and it is obvious that this action was not brought on that account—it was brought to try the question of right between the parties. Your Lordships would not enter on an inquiry of that description now. It would make no difference whatever in the costs of the action, because that was not the substantial question to be tried, and it is not suggested, of course, for a moment that there were any damages that could be more than nominal. Under these circumstances I move your Lordships that the judgment appealed from be affirmed, and the appeal dismissed with costs.

Lord MACNAGHTEN.—My Lords: I am of the same opinion. I think it is clear that a man is not bound to permit a neighbour's tree to overhang the surface of his land, however long the space above may have been interfered with by the growth of the tree. Nor can it, I think, be doubted that, if he can get rid of the interference or encroachment without committing a trespass, or entering upon the land of his neighbour, he may do so whenever he pleases, and that no notice or previous communication is required by law. That, I think, is the good sense of the matter; and there is certainly no authority or dictum to the contrary. Whether the same rule would necessarily apply to the case of trees so young that the owner might remove them intact if he chose to lift them, or to the case of shrubs capable of being transplanted, may perhaps be worthy of consideration. That, however, is not the case here. It is admitted that the trees here are of great age, and the only possible remedy was by cutting or lopping the offending branches. I am therefore of opinion that Mr. Webb has not exceeded his legal right, and that the appeal must be dismissed.

Lord DAVEY.—My Lords: In this case the only question which is submitted to your Lordships is whether the defendant (the respondent in the present appeal) was within his rights in taking upon himself to cut the branches of certain trees so far as they overhung his land; or whether, before taking that step, he ought to have given notice to the appellant of what he proposed to do. Now your Lordships are asked, in a question affecting real property, to lay down a proposition which, so far as I can see, has no authority in support of it; indeed, the authorities, so far as they go, seem to me to be opposed to any such idea. It is true that it is the law that, where a person desires to abate a nuisance which can only be abated by going on the land of the person from whom the nuisance proceeds, he must give notice of his intention to do so. That seems to me to be reasonable, because his act of going upon his neighbour's land is *primâ facie* a trespass, and I can understand that he should be bound to give notice of his intention to do that which would be *primâ facie* a trespass before doing it. But in the cases of which the present is an example, where a man proposes to abate a nuisance exclusively by doing acts upon his own land without going upon the land of his neighbour from whom the nuisance proceeds, the same

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reasoning does not seem to me to apply. Now the appellant's counsel very fairly admit that they have no authority directly in point; but they base a very ingenious argument upon the case of *Lonsdale* v. *Nelson* (2 B. & C. 302). They say that Best, J. there lays it down that cutting the trees which overhang your land is an exception from the general rule that nuisances of omission cannot be abated without notice to the person from whom they proceed. Well, stopping there, if we are to adopt Best, J.'s judgment as stating the law, it is really an authority against the appellant. But the learned counsel for the appellant went on to say that there is really no authority except the dictum of Best, J. (which is not binding as an authority upon your Lordships' House) for the exception. It was naturally asked what was the authority for the rule from which this is supposed to be an exception; and I confess that, notwithstanding the evident industry which the learned counsel for the appellant have bestowed upon the case, they have not satisfied my mind that there is any authority for the rule from which Best, J. is supposed to have treated the case of trees as an exception. Whether that rule exists or not I know not; at least beyond this, that no authority has been cited to us in favour of that proposition. But *Lonsdale* v. *Nelson*, so far as it goes, is an authority against the appellant, because, if the rule exists, then we have the authority of Lord Wynford for saying that the case of trees is an exception from it. My Lords, the dictum of Croke, J. (1 Roll. 394) seems to me to be against the appellant: "If the boughs of your tree excresse en mon terre, jeo poio eux succider mes jeo ne poio justefier le succider de eux devant ils excresse en mon terre pur timor de l'excresser": that is to say, if the boughs of your tree encroach upon my land I may cut them. He says not a word about notice. Therefore so far as that goes it is an authority against the appellant. Then, my Lords, it appears to me that the case of *Pickering* v. *Rudd* (1 Starkie N. P. 56) is also an authority against the appellant. In that case the defendant managed, by an arrangement of poles, and scaffolding, and ropes, to cut away so much of a Virginian creeper planted on the plaintiff's land as encroached upon his land. There was no allegation that notice had been given, and no point was made either way, of notice having been given or not having been given. So far as that case goes, it is an authority against the appellant, because it was held there by the court that the defendant was justified in cutting away so much of the Virginian creeper as encroached upon his land; and although, no doubt, every point was taken in that case that could be taken, nothing was said about the necessity for any notice beforehand. Then *Penruddock's* case (5 Rep. 100 *b*) does not seem to me to assist the appellant at all, because the point which was decided in that case was, whether a writ of *Quod permittat prosternere* would lie against the alienee of the person who had levied the nuisance, and the judges in that case said this: "It was moved in the King's Bench, if the feoffee might abate the nuisance as the feoffor himself, and as well in the hands of the feoffee who did not the nuisance as in the hands of the tort-fesor himself; and if the feoffee of the house to which the nuisance was made might do it (if he might do it) before he had some special prejudice, as in the dropping of the water, or if he ought to stay till he had special prejudice. And Popham, C.J. held that in both cases the feoffee might abate the nuisance, and that before any prejudice, for it is reasonable that he should prevent his prejudice and not stay till it be done, which was granted by the whole court." It is quite true that it was held that in that case the writ *Quod permittat prosternere* would not lie against the feoffee of the person who levied the nuisance without notice to him; but from the facts of that case it is perfectly obvious that what had to be done in order to abate the nuisance, which would involve the removal of a portion of the defendant's house, could only be done by going on the land. Therefore, I do not think that *Penruddock's* case affords any authority to the learned counsel for the appellant for the proposition which they have submitted to your Lordships' House. I think it sufficient, therefore, to say that no authority has been cited to this House for the appellant's proposition; and the authorities, so far as they go, are rather against it than in favour of it; and when we come to look at the reason of the thing I entirely agree with what has fallen from my noble and learned friend on the woolsack, that there is no such obvious consideration of justice as would induce this House to lay down, for the first time, the proposition contended for by the appellant.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Broughton, Nocton, and Broughton.*

Solicitors for the respondent, *Walter Webb and Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, Nov. 5, 1894.

(Before the LORD CHANCELLOR (Herschell), LINDLEY and SMITH, L.JJ.)

KEMP *v.* WRIGHT. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Building society—Deed of dissolution—Alteration of rights and liabilities of members—Withdrawing unadvanced members — Advanced members—Advances repayable by instalments—Immediate payment of balances owing—Building Societies Act 1874 (37 & 38 *Vict. c.* 42), *ss.* 14, 32 *—Building Societies Act* 1894 (57 & 58 *Vict. c.* 47), *s.* 10.

The priority of repayment of members of a building society who have given notice of withdrawal may be abrogated by an instrument of dissolution executed pursuant to the Building Societies Act 1874, *s.* 32, *without an alteration of the rules of the society.*

So held by Kekewich, J.

An instrument of dissolution does not alter the right of the borrowing members of a building society to continue paying their instalments in accordance with the terms of their respective

(*a*) Reported by J. H. BAKEWELL, and E. A. SCRATCHLEY, Esqrs., Barristers-at-Law.

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mortgage deeds; and they cannot be compelled to pay up immediately the balances due from them in respect of their advances.

So held by the Court of Appeal (reversing the decision of Kekewich, J.).

Brownlie v. Russell (48 *L. T. Rep.* 881; 8 *App. Cas.* 235) *explained and distinguished.*

Sect. 10 *of the Building Societies Act* 1894 *is retrospective in its operation, and applies to societies in course of dissolution at the time of the passing of the statute.*

THE Charing Cross "Model" Building Society was a terminating building society, and was incorporated on the 20th Dec. 1887 under the Building Societies Act 1874.

On the 12th Dec. 1873, at a meeting of the members of the society, it was resolved that the society should be wound-up voluntarily by means of an instrument of dissolution, a draft of which was read to and amended by the meeting.

By an instrument of dissolution, dated the 1st Jan. 1894, made pursuant to the Building Societies Act 1874, s. 32, and signed by not less than three-fourths of the members, holding not less than two-thirds of the number of shares in the society, it was (*inter alia*) agreed as follows:

Clause 4. After payment of the claims of creditors, the funds and property of the society shall be applied as follows: (1) In payment of the costs and expenses of and incidental to the dissolution. (2) In payment to the members of the amounts standing to their credit in the books of the society, or in case of deficiency then in payment to the members rateably in proportion to the amounts standing to their credit as aforesaid. (3) In payment of the sum of 10*l.* as compensation to the holder of each share in respect of which no appropriation has been made. (4) The surplus (if any) shall be divided among the members rateably in proportion to the amounts standing to the credit of the members respectively in the books of the society.

Clause 5. For all the purposes of this instrument the term "member" shall mean and include all members of the society, whether they shall have given notice of withdrawal or not, and members who have given notice of withdrawal shall have no preference or priority over members who have not given such notice.

Material rules of the society were as follows:

2. The object for which this society is established is to raise funds by the subscriptions of its members, to advance to them upon the security of freehold, copyhold, or leasehold property by way of mortgage . . .

6. Should it at any time be deemed expedient to make any alteration, addition, or rescission of or to these rules, a special general meeting may be convened, and the course to be adopted . . . shall be determined by a majority of those present. Members shall receive seven clear days' notice of any special general meeting.

25. After a member has mortgaged property to the society, he shall first pay the premium (if any), then repay the principal by monthly instalments at the rate of 6*l.* per share per annum. He shall then (except in cases where the subscriptions have been transferred to repayment account) pay at the same rate the balance of subscriptions due upon the shares in respect of which the advance was made, in order to make up the subscriptions to one-third of the sum advanced. . . .

30. Members may receive back their subscriptions on unappropriated shares after the society has been established five years, or if admitted after such time, one year from the date of admission. . . . Subscriptions shall be returned in full to the withdrawing members in the order in which notice is given, and paid out of the repayments.

31. Any member having mortgaged property to the society to secure an advance may redeem the same at any time by payment of the principal, and such other moneys as may be due upon or in connection with the shares in respect of which the advance was made, in order to make his subscriptions up to one-third of the sum advanced, and receive back his deeds. He shall then, at the termination of the society, receive back his subscriptions as per rule 34. . . . Should any member desire to redeem and receive his deeds without paying up his shares as aforesaid, then he shall pay interest at the rate of 2½ per cent. per annum, calculated upon the yearly balances, and have the amount paid in as subscriptions returned to him.

34. At the termination of the society the members shall have their subscriptions returned in full, together with their share of the net profits.

No resolution was passed by the members of the society for the alteration of rule 30.

Sect. 32 of the Building Societies Act 1874 provides as follows:

A society under this Act may terminate or be dissolved . . . (3) by dissolution with the consent of three-fourths of the members holding not less than two-thirds of the number of shares in the society, testified by their signatures to the instrument of dissolution. The instrument of dissolution shall set forth . . . (*d*) the intended appropriation or division of the funds and property of the society. . . . The instrument of dissolution . . . shall be binding upon all the members of the society.

This was an action by the trustees appointed by the instrument of dissolution for the purpose of determining the rights and liabilities of the members of the society.

The question as to the effect of the instrument of dissolution upon the rights of members who had given notice of withdrawal was first argued.

On the 10th May 1894 the action came on for trial before Kekewich, J.

W. D. MacConkey for the plaintiffs.

F. Thompson, for the defendant Jessie Wright, a withdrawing member who had given notice of withdrawal, and had also signed the instrument of dissolution.

J. Rutherford for the defendant William Scholefield, a member who had not received any advance or appropriation, and had not given any notice of withdrawal.—The instrument of dissolution is binding on all withdrawing members, whether they signed it or not; they are all members within sect. 32 of the Act:

Sibun v. *Pearce*, 62 L. T. Rep. 388; 63 L. T. Rep. 123; 44 Ch. Div. 354;
Building Societies Act 1874, s. 32, sub-sect. 3 (*d*).

The instrument of dissolution has the same effect as an alteration of the rules, which would be binding on the withdrawing members:

Barnard v. *Tomson*, 70 L. T. Rep. 306; (1894) 1 Ch. 374;
Pepe v. *City and Suburban Permanent Building Society*, 68 L. T. Rep. 846: (1893) 2 Ch. 311.

F. Broadbridge for Sarah A. Gamlin, a member who had given notice of withdrawal, but had not signed the instrument of dissolution.—The priority of withdrawing members can only be affected by an alteration in the rules:

Auld v. *Glasgow Working Men's Building Society*, 56 L. T. Rep. 776; 12 App. Cas. 197.

T. R. Hughes for the defendant William Holyoake, an advanced member who had given a mortgage to the society.

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Kekewich, J.—Before the date of the deed of dissolution, the defendant Sarah Ann Gamlin had given a notice of withdrawal under rule 30, which provides, among other things, that "subscriptions shall be returned in full to the withdrawing members in the order in which the notice is given, and paid out of the repayments." The result is, that at that date this defendant was entitled to be paid out of such money as was available for that particular purpose, subject to the claims of those who had given notices of withdrawal of an earlier date than her own, but before all others whose notices were subsequently given. Thereupon she took what may be described as a vested interest in the funds available for repayment of the subscriptions of withdrawing members. It is no light matter to defeat a vested interest of that kind, and before deciding that such interest is defeated, the court must be perfectly clear that the contract permits such a course, or that the Legislature has interfered with the ordinary contractual rights and introduced some paramount provision. The contract only goes to this: that the rules may from time to time be altered. It has been decided in a great many cases that a withdrawing member who has not been paid off is still a member for the purpose of the ascertainment and determination of his rights, including the question whether a dissolution shall take place. In the case of *Bradbury* v. *Wild* (68 L. T. Rep. 50; (1893) 1 Ch. 377), which was recently argued before myself, all the authorities were considered. In that case I merely applied the law to the particular facts before me; but many cases, and amongst others *Rosenberg* v. *Northumberland Building Society* (60 L. T. Rep. 558; 22 Q. B. Div. 373) were cited in reference to the position of a withdrawing member. It is clear that such a member is a member for the purpose of new rules, and if new rules are made within the ambit of the constitution of the society, those rules are binding on the withdrawing member, notwithstanding that they prejudice the vested interest of such member. That seems to me to be now settled. But Mr. Broadbridge says, "I do not dispute that; but I say that there are no new rules, and therefore I am not bound in that way." Well, that is so, and it is not necessary to go into that branch of the law except for one point which, I think, arises under sect. 32 of the Building Societies Act 1874. That section provides that "a society under this Act may terminate or be dissolved upon the happening of any event declared by its rules to be the termination of the society." I wish to point out that, if the existing rules of any given society do not provide for the termination of the society on the happening of any specified event, those rules are capable of alteration; and if the Legislature had intended that the rules, and the rules alone, should govern the contractual relations of members in the event of dissolution, it would have left those relations to be determined by the rules. But the section proceeds, "by dissolution in manner prescribed by its rules." That means the rules as they exist or happen to be altered. That must be implied; and again on that I say that, if the Legislature had intended that everything should be done by the rules, nothing would have been easier or simpler than to have left it for the society to make its rules to meet the occasion. The Legislature provides for dissolution in an entirely different way: "By dissolution with the consent of three-fourths of the members holding not less than two-thirds of the number of shares in the society, testified by their signatures to the instrument of dissolution." That is an addition to dissolution according to the rules. In other words, as it seems to me, the Legislature has said in effect: "And every society shall for this purpose have a rule incapable of alteration, that if members, not being less than three-fourths of the whole number and holding not less than two-thirds of the number of shares, shall consent to a dissolution, such consent being testified by their signatures, then the society shall be dissolved notwithstanding that the written or printed rules of the society do not provide for any such event." The terms of the sub-section seem to me, I must not say substituted for the rules, but added to them as a necessary adjunct which is henceforward to be found in every set of rules, implied by legislative enactment. It is not denied that, if the variation of the rights of members which is now objected to had been effected under the rules, it would have been sound, and no complaint could have been made. Why, then, should it not be capable of being done under legislative enactments such as I have mentioned? I think that a withdrawing member is as much liable to the Parliamentary rule as to the private rules of the society; and, this having been done under the Parliamentary rule, I think that the defendant for whom Mr. Broadbridge appears is bound.

The question whether or not the members who had mortgaged property to the society were bound to pay up at once the balances due from them was next argued.

The common form of the society's mortgage provided that, "if the mortgagor should pay to the society all subscriptions, fines, and other moneys which according to the rules for the time being of the society should from time to time become payable in respect of the said shares, and should observe and perform all the said rules, and also the covenants hereinafter contained," the society would indorse a receipt for the mortgage moneys; and the mortgage contained a covenant that if the mortgagor should make default the whole of the subscriptions and payments should immediately become payable.

The same counsel appeared for the respective parties.

The following cases were cited during the argument:

Brownlie v. *Russell*, 48 L. T. Rep. 881; 8 App. Cas. 235;
Tosh v. *North British Building Society*, 11 App. Cas. 489;
London Provident Building Society v. *Morgan*, 69 L. T. Rep. 595; (1893) 2 Q. B. 266;
Scottish Property Investment Company Building Society v. *Boyd*, 12 Court Sess. Cas. 4th Series, 127.

Kekewich, J.—This case is, I think, decided by authority, and there is no place for any criticism or hesitation on my part. *Brownlie* v. *Russell* (*ubi sup.*) must, I think, be regarded as an authority of general application, and as laying down the law governing all cases which fairly come within its scope; and if *Brownlie* v. *Russell* lays

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down the law, which I think it does, there is no occasion for me in the present case to go further than that authority. The case of *Tosh* v. *North British Building Society* (*ubi sup.*) cannot be said to carry the matter further than *Brownlie* v. *Russell*; but the value of it, as an authority for my guidance, is, that I find there an expression of opinion which, if not strictly contemporaneous with *Brownlie* v. *Russell*, followed closely upon it, and has this advantage, that it was given by the Lord Chancellor of the day who took part as counsel in the argument in *Brownlie* v. *Russell*. I do not know where I could look for a better statement as to what was decided in *Brownlie* v. *Russell*; and, if I can get a clear statement in that way, I do not think I ought to go any further. Lord Herschell, referring to that case, says this: "In *Brownlie's* case it was held that after a winding-up an advanced member could not take advantage of the rule enabling him to withdraw, because his right to act under that rule ceased by reason of the order for winding-up; but it was held that the winding-up order created a kind of compulsory withdrawal of all the members who were at that time advanced members of the society, and compelled them to repay the amount which was still due upon their advances, but did not substantially alter their position or their rights, or render them at all different from what they would have been if they had been withdrawing under the rules." When you examine that language, it is clear that the position of the advanced member is substantially altered to this extent, that the winding-up operates to make an immediate withdrawal under the rules. The advanced member still withdraws under the rules, though he does so by reason of the compulsion introduced by the winding-up; and here we have an instrument of dissolution which is equivalent to a winding-up. That being so, I do not think it necessary or proper to go into the matter further. The case of *London Provident Building Society* v. *Morgan* (*ubi sup.*), decided in the Divisional Court, is very instructive, and not the less so because the learned judges went into all the cases which had any bearing upon the point which they intended to decide. It is noticeable that in some of the cases, including that of *Re Britannia Permanent Benefit Building Society* (65 L. T. Rep. 196; (1891) W. N. 123), and the case which preceded it of *Re Middlesborough, Redcar, and Saltburn Building Society* (58 L. J. 771, Ch.) before Stirling. J., the question was not whether the advanced member was liable to pay up at once, but whether he was liable as a contributory, or was merely a debtor, who, for the purpose of the winding-up, was to be treated as a stranger to the society. That is not the question which occurs here. The question is, whether he is liable to make repayment now. I think that he is so liable.

From the second judgment of Kekewich, J. the defendant William Holyoake now appealed.

Cozens-Hardy, Q.C. (with him *T. K. Nuttall*) for the appellant.—Two questions arise on this appeal: First, whether under the Building Societies Act 1874 and the rules of the society, which is now being dissolved in accordance with the instrument of dissolution, the advanced members who have given mortgages to the society, can be compelled, as was decided by Kekewich, J., to repay forthwith the balances due from them in respect of their advances instead of by instalments pursuant to the terms of their respective mortgage deeds; secondly, assuming that Kekewich, J. was right in his decision on that point, then whether the case is affected by sect. 10 of the Building Societies Act 1894. With regard to the first question, it is perfectly clear that under the mortgage deeds there is no obligation on the mortgagors to pay otherwise than by instalments; and there is nothing in the instrument of dissolution to vary that obligation. There is no principle upon which a contract for a loan repayable by instalments can be varied simply by means of a voluntary dissolution, as in the present case. The case of *Brownlie* v. *Russell* (48 L. T. Rep. 881; 8 App. Cas. 235), upon which Kekewich, J. relied, is not really in point. The subject-matter of dispute in that case was entirely different. The society was being wound-up by the court, and the contention of the plaintiff, the advanced member, was that, notwithstanding the winding-up, he was entitled te redeem on certain terms. The liquidator said that the plaintiff was bound to go on repaying, and the only question was as to the terms on which he was entitled to redeem. All the observations of the learned lords were addressed to that, and there was no question as to his being compelled against his will to pay up at once. That point was never discussed in argument. [The LORD CHANCELLOR referred to *Tosh* v. *North British Building Society* (11 App. Cas. 489.] That case carries the matter no further. Nor is *London Provident Building Society* v. *Morgan* (69 L. T. Rep. 595; (1893) 2 Q. B. 266) an authority against my contention, as it was based entirely on the distinction which exists where there are outside creditors to be paid, and where there are not. On the other hand, the case of *Scottish Property Investment Company Building Society* v. *Boyd* (12 Ct. Sess. 4th Series, 127) is a direct authority in favour of the view which I support. There the court distinguished *Brownlie* v. *Russell* (*ubi sup.*), and held that, there being no outside creditors unpaid, an advanced member could not be compelled, on the society going into liquidation, to repay his loan otherwise than by instalments, as stipulated in his bond. With regard to the second question, I submit that, notwithstanding the decision of Kekewich, J., sect. 10 of the Building Societies Act 1894 has the effect of relieving the advanced members from any liability to pay except according to the terms of their respective mortgage deeds. It is retrospective in its operation, and although that Act was passed on the 25th Aug. 1894, some months after the date when the decision of Kekewich, J. was pronounced (May 10, 1894), it must be taken to affect that decision. Sect. 10 enacts that, when a society under the Building Societies Acts "is being dissolved or wound-up," an advanced member shall not be liable to pay the amount payable under the mortgage or other security or rules, except at the time or times and subject to the conditions therein expressed. The section came into operation immediately after the passing of the Act. That section was passed to protect the advanced members of any building society which is being dissolved at the time of the passing of the Act, and therefore applies to this society. The enactment is not confined to societies the dissolution of which

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commences after the section came into operation:

Quilter v. *Mapleson*, 47 L. T. Rep, 561; 9 Q. B. Div. 672.

[He was stopped by the Court.]

Frederic Thompson for the respondent Jessie Wright.—As to the first question, sect. 32 of the Building Societies Act 1874 declares what proceedings shall be necessary for the termination or dissolution of a society, among which is dissolution with the consent of three-fourths of the members holding not less than two-thirds of the number of shares in the society testified by their signatures to the instrument of dissolution. [The LORD CHANCELLOR.—What is there in that section which turns a sum due at a particular date into a sum due now? Why should the rights of the advanced members be altered?] The instrument of dissolution operates as a compulsory redemption, and consequently an advanced member can be called upon to pay the same amount as would be due from him if at the date of the instrument of dissolution he had sought to redeem his advance:

Brownlie v. *Russell* (*ubi sup.*).

[The LORD CHANCELLOR.—That may be the effect of a winding-up order. But to say that a certain number of members, chiefly the holders of unadvanced shares, can constitute themselves a *vis major* is a strong proposition. A winding-up order is an act of the court, and may be a *vis major*.] The majority binds the minority under the Act of Parliament, and in that sense is a *vis major*. [The LORD CHANCELLOR.—All that *Brownlie* v. *Russell* (*ubi sup.*) lays down is, that an advanced member may redeem in accordance with the rules of his society. Take it as you will, *Brownlie* v. *Russell* does not touch the present case.] Then, as to the second question, I submit that sect. 10 of the Building Societies Act 1894 only applies to a case where a winding-up or a dissolution in substance takes place after the passing of the section. In this case the instrument of dissolution was dated the 1st Jan. 1894. Kekewich, J.'s judgment was pronounced in the following May. The Act was passed some months later, and it can never have been intended to overrule an order previously made. The effect would otherwise be to make a judgment, right at the time it was pronounced, wrong afterwards. The case of *Quilter* v. *Mapleson* (*ubi sup.*) is clearly distinguishable from this case.

W. D. MacConkey, for the respondents, the plaintiffs, took no part in the argument.

No reply was called for.

The LORD CHANCELLOR (Herschell).—With all respect to the learned judge in the court below, I am quite unable to agree with the conclusion at which he has arrived. It is not necessary to discuss the question whether the effect of a winding-up order is as extensive as is contended for by the respondents. This is not the case of a winding-up, but of an instrument of dissolution. By sect. 32 of the Building Societies Act of 1874 the dissolution of a society may take place with the consent of three-fourths of the members holding not less than two-thirds of the number of shares in the society. By such consent a society may be dissolved against the will of the minority. In this case the requisite majority have agreed to the dissolution of the society. That was purely a matter for the shareholders—a matter in which the majority of the members could bind the minority. What they can bind them to is a dissolution. The instrument of dissolution is to set forth certain matters mentioned in sect. 32, sub-sect. 3. There is no provision further than that for determining the rights of members on a dissolution, or that they should be other than those provided for by the rules of the society which created the contract between the members. The contention is that, whereas certain members of the society are advanced members—*i.e.*, they have obtained advances from the society and have covenanted to repay those loans according to the rules, that is to say, by instalments—upon a dissolution under an instrument of this character their liabilities are immediately altered, and they become bound to pay up their debts, not by instalments, but all at once. There is nothing in the section to indicate anything of the sort. There is nothing in the deed itself to say that this was to be the effect of the deed of dissolution. But it is said that this has been held in *Brownlie* v. *Russell* (*ubi sup.*) to be the effect when the court makes a winding-up order; and that therefore it must also be so when the dissolution is the act of the members. That is a consequence which I am not able to follow or to see the force of. A winding-up order is the act of the court; it is a *vis major*, however it be procured. All the parties have a right to be heard on it; a minority likely to be affected by the result would be entitled to appeal to this court in opposition to an order which would benefit one class of members at the expense of another. But is it to be said that, where a dissolution is agreed upon by the majority, the minority are to be at their mercy? According to the contention of the respondents and the judgment of Kekewich, J., a majority who may consist entirely of unadvanced members may dissolve the society, and bind the whole of the advanced members to liabilities they have never undertaken. Unless there is distinct authority in favour of that proposition I should decline to assent to it. It is clearly unjust, and I find nothing in the provisions of the Act with respect to the deed of dissolution to support it. The proposed division of the funds and property of the society is to be set out in the deed, and the liabilities and assets of the society are to be stated. Amongst those assets are the liabilities of the members of the society, and the same sums would be included in the funds and property to be divided. But there is nothing to affect the covenants in the mortgages to pay by instalments or to make the loans immediately repayable. Therefore I think that the instrument of dissolution did not operate in that way to the prejudice of the advanced members. The point raised under the statute is also a good one, though it is perhaps unnecessary to go into that after the opinion which I have just expressed. The society is being dissolved, and is not yet completely dissolved. It cannot be disputed that the words "is being dissolved" in sect. 10 of the Building Societies Act of 1894 in the sense in which they are used in that statute must apply to this society. The Legislature has said that in such a case advanced members are only to pay according to the contract contained in their respective mortgages. The only answer made is, that the legislative enactment came into force some months after the commencement of

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the dissolution, and therefore does not apply. But, inasmuch as these advanced members have not yet completed the payments in accordance with their respective contracts, the Act must have been intended to apply to them. I see no reason why effect should not be given to the obvious intention of the Legislature. The appeal must be allowed.

LINDLEY, L.J.—I am of the same opinion. If a man borrows money and stipulates to repay it by instalments, the majority of the members of his society would obviously have no right under any intelligible principle of law to compel him to pay the whole sum straight off. If they have any such right it must be given by statutory enactment. It is said that, if this were a winding-up under the Companies Act of 1862, the advanced members could be compelled to do so, and that the court did this in *Brownlie* v. *Russell* (*ubi sup.*). I do not think that that case went so far, but if it does the matter has been set right by the recent Building Societies Act of 1894. Sect. 32 of the Building Societies Act of 1874 draws a distinction between dissolution and winding-up. But what we are dealing with is a dissolution, and not a winding-up. It appears to me that there was some misapprehension as to the point decided in *Brownlie* v. *Russell* (*ubi sup.*), but, in my opinion, apart from the point under the Building Societies Act of 1894, the decision of Kekewich, J. was wrong.

SMITH, L.J.—Kekewich, J. arrived at the conclusion on this case by holding that a deed of dissolution was equivalent to a winding-up order of this court. There is no authority to support that view, and after what has been said I need add nothing. On the other point, under sect. 10 of the Building Societies Act of 1894, I read that as meaning that after the 25th Aug. 1894, no matter what any court has said about dissolution or winding-up, from and after that day when any society is being dissolved or wound-up no advanced member shall be called upon to pay his debt otherwise than according to his contract.

Appeal allowed.

Solicitors for the appellant, *Halses* and *Co.*, for *J. F. Read*, Liverpool.

Solicitors for the respondents, *Alfred Stephenson*, Liverpool; *R. J. Jones* and *Co.*, Liverpool.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

May 9, 23, *and July* 28, 1894.

(Before STIRLING, J.)

Re PETER MALAM; MALAM *v.* HITCHENS. (*a*)

Tenant for life and remainderman—Capital and income—Option to trustees of will, shareholders in a company, to take half of a dividend in new shares—Application of proceeds of sale of such shares.

P. M. by his will gave all his property to trustees upon trust to sell the same and invest the proceeds of sale, and pay the income thereof to his wife during life or widowhood, and after her death to divide the corpus between the persons therein mentioned, with power to postpone conversion. The testator at the time of his death in 1889 *was the registered holder of twenty ordinary shares in a company. In* 1893, *in pursuance of special resolutions, the directors offered to shareholders a number of ordinary shares of the value of* 10*l. on which* 2*l.* 10*s. was to be paid, and proposed to issue dividend warrants for one half of the dividend then about to be declared, with the consent of the shareholders to apply the other half in the payment of the* 2*l.* 10*s. per share on the new issue, or to pay it in cash to the shareholders who declined the allotment. The allotment offered to the trustees of the testator's will was, according to the quotations at the time of the allotments, worth* 19*l.* 10*s., being a premium of* 17*l. They treated it as the property of the tenant for life and renounced their right in her favour. Accordingly fourteen shares were allotted to her.*

After the death of the tenant for life these new shares were sold.

Held, on the facts, that the company intended to distribute its accumulated profits in dividends so far as the special resolutions purported to sanction such a division; that, on the principle of Rowley *v.* Unwin (2 *K. & J.* 138), *the proceeds of sale of the new shares ought to be applied in payment, first, of the dividend to which the tenant for life was entitled, and the balance ought to be applied as capital moneys of the trust.*

Bouch *v.* Sproule (57 *L. T. Rep.* 345; 29 *Ch. Div.* 635; 12 *A. C.* 385) *discussed and applied.*

ADJOURNED SUMMONS.

Peter Malam, by his will dated the 4th June 1885, gave all his property to his trustees in trust to convert the same into money, and invest the proceeds in any investments authorised by law for trust funds with power to vary such investments at their discretion, and to pay the income to his wife during widowhood, and after her death or second marriage to divide and pay the corpus between and to the persons therein mentioned or referred to. The testator then empowered his trustees to postpone the conversion of any part of his property for so long as they should think fit, and directed that the income of the unconverted property should, from the time of his death, go in the same manner as the income and the proceeds thereof would have been applicable if the same had been converted.

Peter Malam, the testator, died on the 27th March 1889, and his will was proved on the 26th April following. The testator's widow died early in the present year. Brunner, Mond, and Co. was a company limited by shares and incorporated under the Companies Acts. At the time of the testator's decease the capital of the company was 1,500,000*l.*, divided into shares of 10*l.* each, and the testator was the registered holder of twenty such shares. These twenty shares were in May 1889 transferred into the names of the trustees of the testator's will, and were still remaining in their names. On these shares the sum of 7*l.* per share had been paid up. In June 1890 the capital of Brunner, Mond, and Co. was increased by the issue of 7 per cent. preference shares of 10*l.* each, of which five were allotted to the trustees of the testator's will. These shares were fully paid up. The company was very prosperous, and for some

(*a*) Reported by JOHN SANDERSON, Esq., Barrister-at-Law.

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years previous to 1893 had declared dividends of 50 per cent. on its ordinary capital.

Art. 6 of the articles of association of the company was as follows:

The surplus profits of each half year, after paying the said preference dividend, shall belong to the holders of the remaining (or ordinary) shares in proportion to the number of shares held by them respectively and according to the amount for the time being paid up or credited on such shares. The dividend to preference shareholders being first secured, all questions as to the disposal of the surplus profits shall be determined by the votes of the holders of ordinary shares.

Art. 29 K. declared that the directors might invest any of the moneys of the company, not immediately required for the purposes thereof, upon such securities and in such manner as they might think fit, and might from time to time vary or realise such investments.

A special resolution of the company was passed on the 20th Feb. 1893 and confirmed on the 16th March following, in these terms:

That the articles of association be altered and added to in manner following:

Art. 3 B. The nominal capital of the company shall be increased to 2,000,000*l.* by the creation of new shares.

(*a.*) The directors may at their discretion issue any number of shares up to the nominal amount of unissued capital for the time being of the company, including unissued capital hereinbefore authorised, and may issue such shares from time to time as ordinary shares or in such proportion of preference and ordinary shares, and as regards the increase of capital hereby authorised, for such nominal amount per share, being 10*l.* or any smaller sum, and with or without premium, as the directors shall from time to time determine.

(*b.*) The directors may at their discretion offer to both or either classes of shareholders and on such terms and at such prices, but not at a discount, as the directors shall from time to time determine, fully or partly paid up ordinary and preference shares, in payment of the whole or part of any dividend for the time being payable to those shareholders who accept the offer so made.

Art. 3 C. The company may from time to time subdivide the shares of any of them.

On the 9th Aug. 1893 the chairman of the company addressed to each of the shareholders the following letter:

Acting upon the special resolution passed on the 20th Feb. last, and confirmed on the 16th March last, the directors propose to offer to allot at par to both ordinary and preference shareholders, a number of ordinary shares of the nominal value of 10*l.*, on which 2*l.* 10*s.* per share is to be paid to rank for dividend from the 1st July 1893. The directors propose to issue to the shareholders dividend warrants for one-half of the dividend to be declared at the half-yearly meeting, and with the consent of the shareholders to apply the other half in payment of the 2*l.* 10*s.* per share on the new issue. In respect, therefore, of each sum of 2*l.* 10*s.* of dividend dealt with, each shareholder will receive one ordinary 10*l.* share with 2*l.* 10*s.* paid thereon. In case of fractions of 2*l.* 10*s.* it is proposed that the shareholders shall be entitled to the benefit of one-tenth of an ordinary share for each complete 5*s.*, and any excess will be paid in cash. As portions of shares cannot be dealt with on the share register, it will be necessary for each shareholder entitled to fractions either to sell them or to buy as many as will make up a share. The secretary will in due course send out letters of allotment in a convenient form and he will up to the 30th Sept. next be authorised to give a letter of allotment for a new share in exchange for the requisite number of fractions. Those who do not wish to avail themselves of the allotment of the new issue, will receive the balance of their dividend to be declared at the half-yearly meetings immediately on returning their allotment letters to the secretary with a notice to that effect. The directors reserve to themselves the right to pay in cash the above balance of dividend, and to cancel the allotment in cases where the shareholder does not send in an acceptance of the allotment before the 30th Sept. 1893.

Simultaneously there was sent out the half-yearly report which was as follows:

The balance-sheet and profit and loss account certified by the auditors and now presented show a balance to the credit of profit and loss account on the working of the half-year ended on the 30th June 1893 of 251,219*l.* 7*s.* 10*d.*, which with the amount of 172,754*l.* 13*s.* 10*d.* brought forward from the previous half-year makes a total of 423,974*l.* 1*s.* 8*d.*

The directors propose to deal with the above balance as follows:—

	£.	s.	d.
Dividend on the preference capital at 7 per cent. per annum	15,323	8	9
Dividend on the ordinary capital at 100 per cent. per annum	316,250	0	0
Amount to be written off patents account	2,500	0	0
Balance to be carried forward	89,900	12	11
	£423,974	1	8

The directors particularly invite the attention of the shareholders to the accompanying circular as to proposed new issue of shares.

Appended was the balance-sheet and profit and loss account.

Among the items of property and assets set out in the report (amounting in the whole to 2,009,515*l.* 17*s.* 4*d.*), were investments of 331,810*l.* 18*s.* 7*d.*, and cash in bank and in hand 130,298*l.* 18*s.* 5*d.*

At a meeting held on the 21st Aug. 1893 a dividend on the ordinary capital was declared at the rate of 100 per cent., and on the preference capital at the rate of 7 per cent.

Another circular dated on the same day was also sent to each shareholder including the trustees of the testator's will, which was as follows.

I beg to hand you herewith the letter of allotment in your favour of shares in this company, and I take the opportunity to state shortly the courses open to you. You can accept the allotment of shares, in which case it is absolutely necessary you should return the letter of allotment to me before the 30th Sept. next with the memorandum of acceptance indorsed, duly signed, and the directors will then apply the balance of your dividend declared to-day towards payment of the amount due on the new shares, and will issue to you a share certificate with that amount paid on the shares. Or, if you prefer not to accept the allotment, and inform me to that effect, and return me the allotment letter with the memorandum of acceptance unsigned, the allotment will be cancelled, and the above balance of your dividend will be forwarded to you. Or, you may sell your right to an allotment, in which case the buyer from you will stand in your place and under the same conditions and the above balance of your dividend will be paid on the new shares for his benefit. In the absence of any communication from you before the 30th Sept., the directors reserve to themselves the right to treat your silence as an election on your part not to accept the allotment and the directors may act as if you had declined the allotment. In case fractions of a share are allotted to you, you can either return the allotment letters and receive their par value, or sell them, or buy other

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allotments of fractions to make up a complete share, which will be dealt with as mentioned above. As it is possible you may have had no experience of allotment letters issued under somewhat similar circumstances, I may add for your guidance that, owing to the company's shares being at a considerable premium, the allotment letters have a much greater value than their par value, and that the company's brokers, Messrs. T. and T. G. Irvine, of 7, India-buildings, Liverpool, and Messrs. Sheppards, Pellys, Scott, and Co., of 57, Old Broad-street, London, will be pleased to negotiate the sale or purchase of allotment letters of shares or fractions.

The allotment offered to the trustees of the testator's will was of fourteen and three-tenths shares, which were quoted at the time of the allotment at 19*l.* 10*s.* per share, being a premium of 17*l.*

The trustees treated the allotment as the property of the tenant for life and renounced their right to the shares in her favour, and fourteen shares were accordingly allotted to her by the company in Oct. 1893.

This was a summons taken out by the persons entitled under the testator's will to the corpus of his estate, subject to the interest of the testator's widow, to determine the question (among others) whether the new shares allotted or offered to the trustees of the testator's will, or the proceeds of sale of these shares, or any and what proportion thereof respectively, ought to be treated as capital or income of the testator's estate.

C. E. E. Jenkins for the plaintiffs.—The allotment of the new shares must be treated as capital, the tenant for life having possibly a charge for the amount of the dividends appropriated. A similar point arose in *Re Tindal, deceased* (9 Times L. Rep. 24). There the new shares were held to be capital which was to be applied for the benefit of all the beneficiaries. In this case there were not two distinct transactions as in *Re Northage; Ellis* v. *Barfield* (64 L. T. Rep. 625; (1891) W. N. 84; 60 L. J. 488, Ch.). There has been no payment here by the tenant for life as in *Rowley* v. *Unwin* (2 K. & J. 138), and the tenant for life accordingly has no lien. In these circumstances the trustees were, we submit, wrong in treating the allotment as dividend and assigning the new shares without consideration to the tenant for life. *Bouch* v. *Sproule* (57 L. T. Rep. 345; 29 Ch. Div. 635; 12 A. C. 385) does not appear to cover the circumstances of the present case. Robinson, V.C., in a case of *Re Gurney* (Liverpool Mercury, March 17, 1894), decided that a tenant for life of shares in this company under a will was entitled to the full dividend, and that the balance of the proceeds of sale of the allotment of new shares was capital.

Graham Hastings, Q.C., and *H. Terrell* for the trustees.—The case is governed by *Bouch* v. *Sproule*. When you have a dividend declared it all goes to the tenant for life, whether it is in shares or in cash, unless it is converted into capital. Here the company has not capitalised the dividend. The inquiry is one of fact. If the dividend had been received in cash, it would have been handed over to the tenant for life, and similarly it ought to be when it is paid in shares. The question here is not as to the equity between tenant for life and remainderman. There is a dividend of 100 per cent. and that is all. See *Re Alsbury; Sugden* v. *Alsbury*, 63 L. T. Rep. 576; 45 Ch. Div. 237.

The case in Kay and Johnson (*Rowley* v. *Unwin*) is not applicable here. It was a case of the creation of a new allotment. There the tenant for life was entitled to say, You have taken my income and you must return it to me. In *Re Northage; Ellis* v. *Barfield* (*ubi sup.*) no such point as this was decided. In *Re Tindal* (9 Times L. Rep. 24) there was no declaration of dividends at all; *Re Barton's Trust* (17 L. T. Rep. 594; L. Rep. 5 Eq. 238) resembles *Re Tindal* in this. The facts in the case before Robinson, V.C. are very imperfectly stated. The question in all these cases is whether the company have capitalised the dividend. See the judgment of Lord Herschell, L.C. in *Bouch* v. *Sproule* (57 L. T. Rep. at p. 349; 12 A. C. at p. 397). In that case the Lords found that the company intended to and did capitalise the undivided profits. Applying the principal of *Bouch* v. *Sproule* here, the shares were dividend and not capital. The new shares represent an investment by the tenant for life. In *Re Northage; Ellis* v. *Barfield* (*ubi sup.*), the company did not intend to pay a dividend at all.

J. W. Clydesdale for the personal representative of the tenant for life.

Jenkins in reply.—The argument is based on a fallacy. While the trustees are holding shares a benefit is declared to persons holding shares, not to the tenant for life. There is no specific right in the tenant for life to say whether she will take cash or shares. I submit she is not entitled to the dividend *qui* dividend.

Cur. adv. vult.

July 28.—STIRLING, J. delivered a written judgment as follows:—The question which I have to decide on this summons is whether new shares in Brunner, Mond, and Co. Limited, allotted or offered in Aug. 1893 to the trustees of the testator's will, or the proceeds of the sale thereof, or any and what proportion thereof respectively, ought to be treated as capital or income of the testator's estate. [His Lordship then stated the facts of the case and proceeded:] It is contended by the persons entitled to the corpus of the testator's estate that the trustees erred in renouncing their right to the shares in favour of the tenant for life, and that these new shares either form part of the testator's estate, or, at all events, that they do so subject to the payment to the tenant for life of the amount of the dividends to which she would have been entitled if the option of taking the shares had not been exercised. The general principle applicable is thus stated in *Bouch* v. *Sproule* (57 L. T. Rep. 349; 29 Ch. Div. 653; 12 App. Cas. 397): "When a testator or settlor directs or permits the subject of his disposition to remain as shares or stock in a company, which has the power either of distributing its profits as dividend, or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under him the testator or settlor in the shares, and consequently what is paid by the company as dividend, goes to the tenant for life, and what is paid by the company to shareholders as capital or appropriated as an increase of the capital stock in the concern enures to the benefit of all who are interested in the capital." It was further laid down by the House of Lords in the same case, that in considering whether a company has distributed its accumulated profits as dividends or converted

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them into capital, regard must be paid both to the form and substance of the transactions, and that House upon the question of fact came to a conclusion different from that of the Court of Appeal, and held that shares allotted under circumstances which have a resemblance to those of the present case, were an accretion to the corpus of the testator's estate to no part of which the tenant for life was entitled. The principle of law laid down is binding on me. The decision on the question of fact is not, unless indeed the facts be substantially the same, and in my judgment there are material differences between the facts of the present case and those which were dealt with in *Bouch* v. *Sproule*. In the first place the company had, in the present case, assets not actually employed in the business amply sufficient to pay the whole dividend declared in cash. The amount required for the dividends was 331,573*l.* 8*s.* 9*d.* Among the assets are "cash in the bank and in hand," 130,298*l.*; "debts owing to the company," 146,899*l.*; and investments (by which I understand investments made in pursuance of art. 29K.), 331,810*l.* 18*s.* 7*d.* Consequently, by application of part only of the cash and a realisation of part only of the investments, the dividends declared might readily have been paid. Again, the resolutions passed in Feb. 1893 point to an increase of capital to the extent of 500,000*l.*, which much exceeds the whole dividend declared; not to speak of only one half of the dividend being declared on the ordinary shares. Those resolutions further contemplate the offer of the new capital to shareholders in payment, as it is called, of the whole or part of any dividend. I do not think it was intended to capitalise any existing assets of the company under the guise of first declaring a dividend and then issuing new shares to existing shareholders; the object was to give any shareholder who might desire it the opportunity of increasing his holding in the company (that being a benefit) and to do so in a way which would at once secure to the company the desired increase of capital without putting the shareholders under an obligation to find the money out of their own pocket. It was in pursuance of the powers conferred by these resolutions that the directors purported to act in Aug. 1893, and the conclusion at which I arrive on the first question of fact is, that the company by the resolutions passed on the 21st of the month did really intend to distribute its accumulated profits in dividends, to the extent to which those resolutions purported to sanction such a division. In my opinion, therefore, the tenant for life was, on the principle laid down in *Bouch* v. *Sproule* (*ubi sup.*), entitled to the dividend declared by those resolutions. It is said, however, that she was entitled not merely to this, but to the shares allotted in respect of dividend. Those shares were not, however, in the first instance allotted to her, but to the trustees. The option of determining whether the offer of those shares should be accepted or not lay with the trustees and not with the tenant for life. I apprehend that, under the circumstances of the case, it was their duty to accept the shares, and Lord Watson appears to have been of that opinion in *Bouch* v. *Sproule* (57 L. T. Rep. at p. 351; 12 A. C., at p. 404). The question then is, on whose behalf is this option to be exercised? on behalf of the tenant for life only, or of all the persons interested? If an offer were made to the trustees unconnected with payment of any dividend, the option would have to be exercised on behalf of all beneficiaries, and if the instrument creating the trust did not authorise the retention of the shares, it would be the duty of the trustees to sell them and deal with the proceeds of sale as capital. See *Rowley* v. *Unwin* (2 K. & J. 138). In that case new shares designated "quarter shares" were allotted to trustees of a marriage settlement in respect of shares standing in their names. They accepted the allotment and paid the calls on the shares out of the separate income of the wife. The trustees afterwards sold the new shares and invested the proceeds in consols, and it was held that the stock so purchased was subject to the trusts of the settlement as corpus. Lord Hatherley said in giving judgment (3 K. & J. 141): "With regard to the eighteen quarter shares there can be no doubt that such shares notwithstanding the calls were paid out of the wife's separate income, followed the trust. They became subject to the trusts of the settlement as corpus. It is analogous to the case of a tenant for life renewing leasehold property, and advancing money for the fine due on the renewal. A tenant for life, under such circumstances, would only have a charge on the property for the amount so advanced. I must declare that the stock purchased with the proceeds of sale of the eighteen quarter shares is subject to the trusts of the settlement, the plaintiff having a lien thereon for the amount of calls paid out of her separate income." In the present case the dividend was declared and the option offered simultaneously; but still it seems to me that the principle laid down in *Rowley* v. *Unwin* is applicable, and that the proceeds of sale should be applied in payment, first, of the dividend (to which the tenant for life is entitled by reason of the acts of the company), and the balance ought to be applied as capital; and this appears to have been the view taken by North, J. in *Re Northage*; *Ellis* v. *Barfield* (64 L. T. Rep. 625; 60 L. J. 488, Ch.; (1891) W. N. 84), and Chitty, J. in *Re Tindal* (9 Times L. Rep. 24). It was indeed held by the Court of Appeal in *Bouch* v. *Sproule* (*ubi sup.*), that the tenant for life was entitled to the shares. I find, however, no approval of this view in the House of Lords, and Lord Bramwell expressly dissents from it. Since the argument I have (at my own request) been furnished by the parties with statements of the prices of these shares as given in the Liverpool weekly official share lists, from which it appears that so soon as the old shares were quoted ex-dividend (including the option as to new shares) there was a very considerable fall in the price of the old shares which continued up to the date of allotment; the depreciation somewhat exceeding the price of the new shares. If it be the fact as stated by one of the parties that there was a rise in the spring in anticipation of such an allotment, it does not seem to me to affect the result. I am of opinion therefore, that the tenant for life was not entitled to any portion of the proceeds of sale beyond the amount of the dividend.

Solicitors: for the trustees, *Indermaur* and *Brown*, for *Gardner* and *Son*, Manchester; for the plaintiffs *Taylor*, *Hoare* and *Taylor*, for *A.* and *J. E. Fletcher*, Northwich; for personal representatives of the tenant for life, *W. B. Glasier*, for *W. Bancroft*, Northwich.

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Thursday. Nov. 8, 1894.

(Before STIRLING, J.)

DEBNEY *v.* ECKETT. (*a*)

Will — Leaseholds—Expenses of repair, whether payable out of corpus or income.

T.D. by his will gave (inter alia) *the residue of his leasehold property upon trust, out of the rents to pay certain annuities, with a proviso that before any payment on account of the annuities his trustees should, out of the rents and profits, pay all the costs, charges, and expenses incurred by his trustees in performing the trusts of his will, the annuities, if necessary, abating proportionately. And the testator gave the corpus of the residue of his property as therein mentioned.*

After T. D.'s death portions of his leasehold property were from time to time sold in an administration suit and the proceeds paid into court. In 1892 *the trustees, in compliance with a notice from the lessors, executed repairs to some of the unsold leasehold property, the cost of which exceeded the value of the residue of their term.*

Held, that the cost of repairs was payable out of the income, and not out of the proceeds of sale of leaseholds standing in court.

THIS was an adjourned summons in an administration action, raising (among others) the question whether the costs of certain repairs to leasehold property of a testator ought to be paid out of funds in court, being proceeds of sale of other leasehold property of the testator, or must be borne by the income of the leasehold estate.

Thomas Debney by his will, dated the 5th Jan. 1841, bequeathed (*inter alia*) all the residue of his leasehold houses and property whatsoever and wheresoever to his trustees upon trust to receive the rents and profits thereof, and to pay thereout certain legacies and annuities, and he directed his trustees, before making any payments on account of the said annuities, to discharge and pay out of the said rents and profits "all the costs, charges, and expenses incurred by my said trustees in the performance of the trusts of this my will," and in case there should not remain after such payments as last mentioned, a sufficient balance to pay all the annuities in full, he further directed that the said annuities should abate proportionately and be paid *pro ratâ*, and after the death of all the annuitants the testator gave the corpus of the residue as therein mentioned.

The testator died in the year 1841 leaving considerable leasehold property.

In the year 1850 a suit was commenced in the Court of Chancery for administration of the testator's estate, and portions of the leasehold property were subsequently sold from time to time and the proceeds paid into court.

In the year 1892 the lessors of certain leasehold property of the testator still remaining unsold gave notice to the trustees of the will to put the property in repair in accordance with the covenants in their lease.

The trustees accordingly executed the necessary repairs at a cost greater than the value of the residue of the term of the lease.

There was an intestacy as to the ultimate gift of the corpus of the testator's residue. The residue comprised no real estate, and it therefore passed to the next of kin.

(*a*) Reported by J. SANDERSON, Esq., Barrister-at-Law.

The plaintiff, an annuitant under the will, on behalf of herself and the other annuitants, now asked by the present summons that the costs of the repairs effected by the trustees should be paid out of the proceeds of sale of the testator's leasehold estate now in court.

Grovenor Woods, Q.C. and *Methold* for the summons.—The expenses incurred here are extraordinary expenses. The expression in the will, "costs, charges, and expenses incurred by my said trustees," relates only to the ordinary and periodical expenses incurred about the trust. It would not be right to throw this burden on the income, amounting as it does to a sum greater than the value of the leasehold property itself:

Re Courtier; *Cole* v. *Courtier*, 55 L. T. Rep. 574; 34 Ch. Div. 136; 56 L. J. 350, Ch.;

Re Baring; *Jeune* v. *Baring*, 67 L. T. Rep. 702; (1893) 1 Ch. 61.

Arthur Morton for the next of kin.—The expenses here are ordinary and arise under the lessees' covenants. They ought to be borne by income. The cases cited by the applicants are distinguishable, for in both of those cases the gift of the leaseholds was to trustees upon trust for the respective tenants for life without more. The gift here is charged with the payment of costs, charges, and expenses, as was the case in *Re Baring* in respect of the residue. That part of Kekewich, J.'s judgment therefore favours the contention of the trustees.

Graham Hastings, Q.C. and *Fooks* for the trustees.

STIRLING, J.—I think these expenses are payable out of income. It was the duty of the trustees to keep the property in good repair, from time to time paying for such repairs out of rents and profits, the annuities abating if necessary. The fact that the repairs have all been done at one and the same time does not affect the question as to what fund ought to bear them. If the property had been in a dilapidated state at the death of the testator, that might have made a difference, bearing in mind the decision in *Re Courtier*; but there is nothing to show that that was the case. Under these circumstances I am of opinion that the case falls within the judgment of Kekewich, J. in *Re Baring*; that the expression, "costs, charges, and expenses incurred by my said trustees in the performance of the trusts of this my will," includes the cost of repairs of this nature, and consequently I shall make no order on this part of the summons.

Solicitors: *Johnson* and *Masters*; *Hughes* and *Sons*.

July 11, 12, 17, 18, 19, 24, *and Aug.* 11, 1894.

(Before KEKEWICH, J.)

ELIOT *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF THE CITY AND COUNTY OF BRISTOL. (*a*)

Lands—Title—Parish—Corporation—Possession and acts of ownership—Presumption of grant—Rent—Quit rent or rentcharge.

Where a feoffee of parish lands alleged that from the time of legal memory a churchyard had been vested in the feoffees upon trust for the vestry, subject to a rentcharge of 3*l.* 6*s.* 8*d.*, *and that the*

(*a*) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

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corporation had been tenants of the vestry at a rent of 150l. per annum since 1838, which tenancy had expired, and claimed a declaration accordingly:

Held, that there were two exceptions to the general proposition that long-continued and uninterrupted possession and acts of ownership must be referred to a good title, namely, first, the title itself must be good at law; secondly, there cannot be made a presumption contrary to proved fact; that it was possible to presume a grant to feoffees in trust, which might properly and legally enure for the benefit of the parish: but that as a fact a conveyance dated the 18th May 1627 passed the fee of the churchyard to the corporation, and that the plaintiff held the land as tenant of the corporation at a yearly rent of 3l. 6s. 8d., and the court could not infer that this small sum was a quit rent or rentcharge, and the case of Reynolds *v.* Reynolds (12 *Ir. Eq. Rep.* 172) *did not apply.*

THE plaintiff in this action was the Rev. William Eliot, vicar of Holy Trinity, Bournemouth, who sued in his capacity of surviving feoffee of the parish lands of St. James's, Bristol, of which church he was sometime incumbent. The action was substantially that of the vestry. The defendants were the Corporation of Bristol. The action was brought to determine the title to a piece of land now used and known as the Haymarket, but formerly part of St. James's churchyard. The plaintiff alleged that from the time of legal memory, that is to say since 1189, the year of the accession of King Richard I., such land had been vested in feoffees upon trust for the vestry, subject to a rentcharge of 3l. 6s. 8d. per annum, and that the corporation had been tenants of the vestry at a rent of 150l. per annum since 1838, which tenancy had expired.

The corporation pleaded that the parish held the land in question as their yearly tenants at the yearly rent of 3l. 6s. 8d., that they themselves were sub-tenants of the parish at the yearly rent of 150l., that such tenancy and sub-tenancy had expired, and that the corporation were entitled to the land in fee simple.

It appeared that the Benedictine priory of St. James, Bristol, was founded by Robert Earl of Gloucester, who died in 1147, and made a cell to Tewkesbury Abbey.

About 1175 William Earl of Gloucester granted in frankalmoign to the church of St. James the annual fair which he then had at Bristol.

Early in the fourteenth century the church had become parochial as well as conventual, and the proctors, that is, the churchwardens, began to let the churchyard where the fair was held.

On the Feast of St. Andrew (47 Edw. 3 (1374) a deed was entered into between the Abbot (Chesterton) of Tewkesbury, the prior (De Norton) of St. James, Bristol, and the parishioners, providing that the parishioners should have increased services and further parochial rights in the church, and, in particular, specifying that a holy-water clerk (*clericus aquæ bagulus*) should be appointed and endowed with (*cum*) a moiety of the profits of the fair.

For the vestry it was contended that this provision, coupled with the letting by the churchwardens, pointed to the fair being previously the property of the parish.

The corporation, on the other hand, submitted that the effect of the deed was a grant by the religious houses to the parish.

For nearly two centuries the parish went on letting the churchyard, and exercising acts of ownership over it, until the dissolution of the monasteries under Henry VIII. The Abbey were the rectors, and provided all the parochial ministrations in the church, there being no vicar.

In 1543 the King by letters patent granted to Henry Brayne, a London citizen, the house, and site of the dissolved priory, together with the lay rectory and advowson, subject to the provision of a chaplain's stipend to serve the church. The lay rectory and advowson descended from Henry Brayne to Sir Charles Gerrard, by whom it was sold to the corporation of Bristol in 1626.

The evidence showed that ever since 1570 the payment was made of 3l. 6s. 8d. (five marks) a year, sometimes with, but more often without, a couple of capons by the parish to the lay rectors, this payment being variously described in the accounts and receipts as "tithes," "chief rent," "fee farm rent," or simply "rent."

In the time of Sir Charles Gerrard there appeared to have been a lease granted of the rectory to the parish, which lease continued after the purchase by the corporation, and consequently the parish nominated the chaplain or minister during its continuance. It appeared that until the augmentation by Queen Anne's Bounty the living was a donative. It is now a perpetual curacy.

A series of litigations in the Star Chamber and the Courts of Chancery and Queen's Bench took place between the lay rectors on the one side and the parish on the other, and in 1681-83, on a bill in Chancery by the corporation against the parish to try the title to the fair profits, the Lord Chancellor (Nottingham) directed an issue to be tried at the Bristol Assizes; but the corporation neglected to proceed with it.

After the coming into operation of the Municipal Reform Act 1835, pursuant to that Act, the corporation under a conveyance of the 10th June 1839, sold and conveyed the advowson to Mr. John Scandrett Harford, whose trustees are the present patrons.

There appeared to be a question whether or not such conveyance passed the lay rectory; but, for the purposes of the present action, it was admitted by the vestry that the continuous receipt by the corporation of 3l. 6s. 8d. had given them a possessory title to the rent, whether composition for tithes or not.

In 1838 the corporation, who under the provisions of a local Act had power to abolish the fair, with the consent of the owners, entered into negotiations with the vestry for the lease of the land, which it was finally agreed was to be at 150l. per annum for a term not to exceed ninety-nine years, and it was said, expressly admitted the title of the "churchwardens, vestry, and feoffees." No lease, however, was executed; but the corporation had ever since paid the parish the yearly rent of 150l., receiving from the latter 3l. 6s. 8d. per annum.

Warmington, Q.C., *Henry Terrell*, and *Thurnam* for the plaintiff.—From 1838 until the 29th Sept. 1893 the defendants have been in possession of the land as equitable lessees of the plaintiff at a yearly rent of 150l. We contend that the parish of St. James have acquired an indefeasible title

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under the Statute of Limitations. Then from the year 1570 the plaintiff or his predecessors have paid to the defendants the sum of 3*l.* 6*s.* 8*d.*, and we say that the payment of this small fixed sum is evidence of a quit rent, or chief rent, or composition for tithe, and not of an annual tenancy:

Doe d. Whittick v. *Johnson*, Gow, 173;
Attorney-General v. *Stephens*, 6 De G. M. & G. 111;
Attorney-General v. *Lord Hotham*, 1 T. & R. 209.

The court should presume a lost grant:

Goodman v. *Mayor of Saltash*, 48 L. T. Rep. 239; 7 App. Cas. 633;
Haigh v. *West*, 69 L. T. Rep. 165; (1893) 2 Q. B. 19.

As to frankalmoign:

Law Quarterly Review, vol. 7, 354;
Greenslade v. *Derby*, 18 L. T. Rep. 463; 3 Q. B. 421.

Cozens-Hardy, Q.C., *Renshaw*, Q.C., and *Ingpen* for the defendants.—The payment of 3*l.* 6*s.* 8*d.* began as an annual rent service in 1570, and the annual tenancy has continued ever since. The various litigations have been futile and prove nothing. Then, as the corporation have been in possession by their tenants, the Statute of Limitations has no operation. If necessary we are entitled to set up as a defence that the arrangement of 1838 was entered into under a mistake as to our true legal position:

Clark v. *Adie*, 36 L. T. Rep. 923; 2 App. Cas. 423.

As to perpetual curacies:

Steer's Parish Law, 5th edit., p. 78;
Bingham v. *Bingham*, 11 Ves. sen. 126;
Jones v. *Clifford*, 35 L. T. Rep. 937; 3 Ch. Div. 779.

Warmington, Q.C. in reply.—From the fourteenth century to 1893 the parish have been in posssesion of the land through their tenants, the corporation, and during that period have taken all the rents and profits of the property:

Doe d. Manton v. *Austin*, 9 Bing. 41.

Payment of a small annual sum is no evidence of tenancy:

Reynolds v. *Reynolds*, 12 Ir. Eq. Rep. 172.

As to Steer's Parish Law:

Duke of Portland v. *Bingham*, 1 Haggard's Consist. Rep. 157, 162.

Cur. adv. vult.

Aug. 11.—KEKEWICH, J. delivered the following written judgment:—The real difficulty of this case consists in the fact that, during at least the greater part of the long period over which our investigations have extended, neither of the contending parties appears to have appreciated their rights, and certainly have not asserted them in precise or tangible form. The plaintiff, on behalf of the parish of St. James, Bristol, says that the piece of land in question, which it is convenient to style "the churchyard," has from time immemorial been their property, subject only to an annual charge of the character of a quit-rent of 3*l.* 6*s.* 8*d.*, and that it has been vested from time to time in the feoffees of the parish lands. Yet until the 10th July 1839 it was never specified in any conveyance, and this, notwithstanding that the parcels comprised in the successive deeds are set out with painful accuracy and without any sweeping clause which might pass property not particularly described. Observe, too, that the churchyard is frequently mentioned in these deeds, and once at least as the boundary of land conveyed, so that it cannot be regarded as not present to the successive draftsmen. Observe, further, that, when the churchyard is at length conveyed by specific description, there is no recital to explain this novel addition to the parcels which is made at the far end of the first schedule to the conveyance of the 10th June 1839 in terms strongly contrasting with the precision of the descriptions preceding and following it. Therefore the plaintiff who treats a paper title as a weakness in the defendants' case cannot rely on any such title as a source of strength to his own. What he does rely on is a presumption of right which he says ought to be made in favour of long-continued possession and many and frequent acts of ownership. It is not easy—indeed, I am not sure that it is possible here—to distinguish between possession and acts of ownership. That the plaintiff and his predecessors in title, representing the parish, have been in physical possession of the churchyard is true, and that they have exercised divers acts of ownership is equally true; but the acts of ownership are just those which would be justified by and be consequent on, possession; and it seems to me that the two alleged grounds of presumption must really be treated as one. So long as the annual fair was maintained, it probably would not have been competent to the parish, or any other owner of the churchyard, to exercise any further acts of ownership therein than were exercised by the parish for more years than there is any occasion to reckon, and one need not specify them. In addition, however, they did some things, such as granting the right to make openings into the churchyard, which equally point to legal proprietorship of the land and enhance the weight of the others. It is forcibly urged that the court ought, if possible, to find a legal origin for such long-continued and uninterrupted acts, and it is hardly necessary to refer to cases to support that argument. The judgments of Charles, J. and the Court of Appeal, in *Haigh* v. *West* (69 L. T. Rep. 165; (1893) 2 Q. B. 19) afford convenient and potent illustrations of the law on this point, but, of course, only developed or applied the authority of other cases which were cited or noticed. There seem to me to be two definite exceptions to the general proposition that long-continued and uninterrupted possession and acts of ownership must be referred to a good title. First, the title itself must be good in law. That may be illustrated in this manner: If the proper inference from the facts, and merely as a matter of fact, were that there was at some time a grant to the inhabitants of a parish, that inference could not properly be made, because such a grant would not be good in law. In *Goodman* v. *The Mayor of Saltash* (48 L. T. Rep. 239; 7 App. Cas, 633) the House of Lords avoided this difficulty by presuming a grant to certain unknown persons in trust for the benefit of those who could not take directly. But the pains which their Lordships took to make the presumption in this manner shows that it could not have been done otherwise. Secondly, there cannot be made a presumption contrary to proved fact. Presumption is intended to supplement or take the place of proof, and cannot hold good against it. It is, of course,

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possible, in dealing with a complicated state of facts, and of conflicting evidence, oral or documentary, to hold one proof to be negatived by another, and certain facts to be incompetent to outweigh others of a different character; but if, on a thorough review of all the facts, the court arrives at a conclusion of proof, it is impossible, in my opinion, to establish a presumption against it. The plaintiff's case does not, I think, offend against the first of these exceptions. In other words, it is possible here to presume, as in *Goodman* v. *The Mayor of Saltash*, a grant to feoffees in trust which might properly and legally enure for the benefit of the parish, and no more need be said under this head. The second exception raises a question of greater difficulty, which must be discussed more at length; and for this purpose I now proceed to examine the facts which constitute the defendants' title. To clear the way and to explain what might otherwise appear to be an omission, let me here state that I have been unable to derive any material assistance from the divers proceedings, whether in the Star Chamber, the Court of Chancery, the Court of Queen's Bench, or elsewhere, which were mentioned and commented on in the course of the argument. Those proceedings are interesting, and are closely connected with the matter in hand, and as one reads them one naturally expects them to be, in the result, of the greatest utility towards the determination of the question now falling for decision; but, after studying them again since the conclusion of the argument, I am satisfied that it is impossible to rely on them as really determining, or even indicating the proper determination of that question. A similar remark is applicable to the deed of 1374. It is a curious and interesting document, and it may be capable of the interpretation which the plaintiff endeavoured to attribute to it; but I do not see my way to adopting that interpretation as necessarily correct, and from any other point of view it decides nothing. It is beyond doubt, and was practically admitted, that the defendants have a paper title. In other words, they produce conveyances extending over a long series of years and operating to pass the property in question to those through whom they claim and themselves. This title can be traced back to a grant from the Crown on the dissolution of the monasteries; but it is sufficient now to refer to the deed of the 18th May 1627, the contents of which refute the suggestion that what has passed to the defendants is not the ownership in fee of the churchyard, but something essentially different, such as a rectory or advowson. The deed of the 18th May 1627 is a conveyance by Sir Charles Gerrard to certain persons who undoubtedly represented the city of Bristol. It purports to convey divers properties described in general terms "together with all that ground or churchyard within the said city of Bristol commonly called or known by the name of St. James's Churchyard, and also all and every the rents, pensions, or yearly payments hereafter following—that is to say, 3*l.* 6*s.* 8*d.* and one couple of capons due and payable by and upon one demise or grant made of the said churchyard and tithes of the rectory of St. James's aforesaid for divers years yet to come." There is a covenant by Sir Charles Gerrard against incumbrances, from which is specially excepted a lease or grant of his, of which ten years were yet to come, of the rectory or parsonage of St. James's reserving payable the sum of 3*l.* 6*s.* 8*d.* and one couple of capons. There is also an allusion to the same lease in the covenant for further assurance, where it is described as the said lease before excepted of the churchyard and tithe. It is open to observation that these references to the lease are not altogether in the same language, and, like the receipts and other documents presently to be mentioned, are vague in their statements of the subject-matter, but the covenants must necessarily relate to the parcels, and there the description is sufficiently precise. Of all the interesting and important documents, numerous as they are, to which reference has been made, the most interesting and important of all are the receipts produced by the plaintiff and the entries in the parish books connected with them. It is by no means clear that the annual sum of 3*l.* 6*s.* 8*d.* was paid for the first time in 1570; but it was then paid in respect of a new lease which may or may not have been the first demise of the premises comprised therein. Notwithstanding that receipts are missing for occasional years, it may be accurately said that this annual sum has, without doubt, been paid year by year from 1570 until now. One must inquire by whom, to whom, and in respect of what this payment has been so made. That it has been paid by the parish is perfectly clear; and that it has been paid to the defendants and their predecessors in title is also clear. But observe further, that those who have received it are the persons who, according to the paper title above mentioned, were for the time being entitled to the churchyard, and that it was first paid to the defendants when the churchyard was first conveyed to them. This points to the inference that the payment was made to the defendants and their predecessors in title in respect of that which was so conveyed, especially as the origin of the payment is traced to a lease granted by him who for the time being represented their title. But it is not entirely a matter of inference. It appears that what may be called the original lease was of "the churchyard, privie tithe, tithes of orchard, gardens," &c.; and, notwithstanding some strange varieties in the description of the property in respect of which the payment was made—varieties which it is extremely difficult to understand or explain—there has been for three centuries a constant reference to the churchyard as being part of, and I think the predominant part of, the property for which the 3*l.* 6*s.* 8*d.* was payable and paid. It seems to me that, in a case like this, while endeavouring to attribute due weight to every fact, and not daring to leave alone a word of possible importance treated by itself, yet one must not allow slight varieties of language, or additions not directly affecting the substance, to warp conclusions which are otherwise fairly deducible from documents or admitted or proved facts. Neglecting, therefore, after full consideration, smaller items, these three facts are, to my mind, prominent in the history of this case—first, that the parish has been in possession of the churchyard for upwards of three centuries; secondly, that during that period they have paid an annual sum of 3*l.* 6*s.* 8*d.* in respect of it; and, thirdly, that this annual sum has been paid to those who have shown a title to the land. Add to this that there is evidence in the documents of the original lease of 1570 having been from time to time renewed; and that, apart from other re-

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newals by their predecessors in title, one new demise was granted in 1684 by the defendants themselves, and then you have advanced a long way towards the conclusion that the plaintiff holds the land as tenant of the defendants at an annual rent of 3*l.* 6*s.* 8*d.* Two arguments on the part of the plaintiff require notice here. First, it is said that receipts for 3*l.* 6*s.* 8*d.* only avail to prove that these sums were actually paid, and do not prove that they were paid for rent. It does not, I think, lie in the mouth of the plaintiff to say this. He, representing the parish, produces a large number of receipts in which the 3*l.* 6*s.* 8*d.* is stated to have been paid, not only as rent but as rent for the churchyard; and, although this form is not constant, it occurs too often and is too consistent with the tenor of the receipts generally and the other facts of the case to leave this point open. Next it is urged that the annual sum of 3*l.* 6*s.* 8*d.* cannot have been paid, and must not be treated as having been paid, as rent in the sense of rent-service, because it is proved that the land has for a long time past yielded profit far in excess of that sum; and that, in face of great improbability of a freeholder accepting what must have been a mere nominal rent, the court ought to infer that this annual payment was paid as a quit rent or rentcharge: (see *Doe* v. *Johnson*, 1 Gow, 173, and *Reynolds* v. *Reynolds*, 12 Ir. Eq. Rep. 172.) The answer to that is, that the facts leave no room for such inference. It is strange, indeed that for so long a period so small a sum should have been accepted as the rent of this valuable land, and it is impossible to say whether this is attributable to ignorance, unwillingness to disturb a long-continued arrangement, connected as it was with the fair, which may have been deemed a public purpose, or any other cause; but we know the origin of the rent, and it is, to my mind, impossible now to hold that the payment which was commenced and continued on the footing of rent as between landlord and tenant has been converted, without any apparent contract or reason, into a payment of a different character. It is desirable here to notice one matter hitherto omitted for the sake of convenience, but which otherwise might be thought to have been forgotten. The original lease reserved, in addition to the 3*l.* 6*s.* 8*d.*, the render of a couple of capons yearly. This appears to have frequently fallen into abeyance, and one can easily understand how that part of the bargain may have been allowed to pass unfulfilled, even though the payment of money was insisted on. But it is referred to in the documents with sufficient frequency to show that it was always treated as part of the bargain still subsisting, and it is therefore valuable in assisting one to trace the continuity of the history. It may be important from other points of view, but I will not attempt to pursue the matter further. The plaintiff contends that, notwithstanding these several conclusions against him, and independently of any facts or inferences on which those conclusions depend, he has a good title under the Statute of Limitations, asserting that the possession of the defendants, as his tenants, under the lease, determined by notice on the 29th Sept. 1892, must be regarded for the purpose of the statute as his own. For this assertion there is authority; but it must be borne in mind that, during the whole period, and notwithstanding the lease by the plaintiff to the defendants, the rent of 3*l.* 6*s.* 8*d.* has been recognised as payable and has been paid by the plaintiff to the defendants. It is impossible, I think, for the plaintiff successfully to urge in face of that acknowledgment that the possession of the defendants gives the plaintiff a title against them. It is immaterial for this purpose to consider on what terms the plaintiff now holds of the defendants, but it may be as well to clear up this point. Their holding is that of a tenant to whom an expired lease was formerly granted, and he continuing in occupation must be deemed to hold as from year to year upon the terms of the lease so far as applicable. This yearly tenancy has placed difficulties in the defendants' way. If, pending any one of the expired leases, the defendants had accepted the position of tenant to the plaintiff for a term not exceeding the period unexpired under such lease, the grant to the defendants would have operated by way of sub-demise, and there would, I conceive, have been no difficulty in their asserting their title to the freehold, which would not have been inconsistent with such subdemise. But, by accepting a lease which, though only from year to year, was not conterminous with the plaintiff's interest, they precluded themselves from disputing their lessor's title; and here again one encounters the confusion to which I adverted at the commencement of this judgment, created by the ignorance of the parties of their respective rights. The lease of 1838 having expired, I see no reason why the defendants should not now assert their paramount title, and that they should not be debarred from doing so by a lease which has ceased to exist commends itself to my judgment as sound in principle, and is directly confirmed by the statement of the law by Lord Blackburn in the House of Lords in *Clark* v. *Adie* (2 App. Cas., at p. 435). To this it is replied that the defendants are holding over, and that they cannot be allowed to assert their title without first giving up possession. Authority was cited for this proposition—*Doe* v. *Austin* (9 Bing. 41), and see the judgment, p. 45—and it may be conceded to be generally true. But here the tables are turned. The possession of the plaintiff is the possession of the defendants; and, notwithstanding that the latter are holding over, it would, I think, be a monstrous consequence of any such rule to say that they are not at liberty to assert that title. Moreover, if my conclusions from the documents and facts are sound, the defendants were in legal possession prior to the lease of 1838, and if they are bound to yield up possession before taking proceedings, that possession must be yielded to themselves. This reduces the argument to an absurdity. The order will be in some such form as this: The court, being of opinion that the defendants have established a freehold title to the premises in question, subject only to the yearly tenancy of the plaintiff at the rent of 3*l.* 6*s.* 8*d.* and a couple of capons, enter judgment for the defendants. The plaintiff must pay the costs.

Solicitors: *Guscotte, Wadham,* and *Co.*, for *Chilton* and *Green-Armytage*, Bristol; *Robins, Hay, Waters,* and *Lucas*, for *D. Travers Burges*, Bristol.

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Wednesday, Nov. 21, 1894.

(Before KEKEWICH, J.)

CHILTON *v.* THE PROGRESS PRINTING AND PUBLISHING COMPANY LIMITED. (*a*)

Copyright—Newspaper—Infringement.

Where C., the proprietor of a weekly sporting newspaper, which was registered at Stationers' Hall, stated every Monday the names of horses likely to win particular races on each day during the week, and the defendants in a daily paper stated the names of horses selected by C. as likely to win particular races on each day:

Held, that the words published by the defendants, and complained of by the plaintiff, were not in law the subject of copyright, and there must be judgment for the defendants with costs.

THIS was an action brought by the plaintiff, Charles Chilton, to restrain the defendants from infringing the plaintiff's copyright in a journal called *Chilton's Special Guide.*

The plaintiff, who lives at Manchester, in July 1893 began to print and publish a sporting journal, which he called *Chilton's Special Guide.* On the 9th Oct. 1893 he registered the copyright at Stationers' Hall, and obtained a certificate of registration. The journal was published every Monday morning during the racing months—that is, from March to the end of November. The plaintiff in each number stated what horses in his opinion were likely to win races during the week, and in particular, under the heading "One Horse Selections," he placed the name of one horse likely to win the race in which it was engaged, and the day of the week. Thus, in the issue of Monday, the 13th Aug., appeared "Tuesday—Keelson; Wednesday—Priestholme." The plaintiff, in addition to his own knowledge of the horses, employed agents at the great racing centres, and travelling agents to attend the various race meetings. The price of *Chilton's Special Guide* was one shilling.

The defendant company carry on the business of publishers in London, and every day on which a race meeting was held published a paper at the price of one penny, called *Sporting Snips.*

About the beginning of Aug. 1894 the defendants began to insert in *Sporting Snips*, under the heading "The Specials—One-horse finals," the horse selected by the plaintiff as likely to win its race that day. Thus, on Tuesday, the 14th Aug., there appeared in *Sporting Snips*, "The Specials—One-horse Finals." "Chilton—Keelson," and on Wednesday, "Chilton—Priestholme."

On the 3rd Oct. 1894 the Vacation Judge refused a motion for an interim injunction, but ordered the action to be set down for trial at once without pleadings.

The evidence showed that the circulation of the plaintiff's paper averaged upwards of 8000 weekly during April, May, June, and July, and less than 5000 during August, September, and October.

The defendants' particulars of objection were as follows: (1) That the words published by the defendants, and complained of by the plaintiff, are not in law the subject of copyright. (2) That the publication of the said words is not any infringement of the plaintiff's copyright in *Chilton's Special Guide.* (3) That the defendants have not been guilty of any fraud, or fraudulent misrepresentation. (4) That the plaintiff has not suffered any damage or injury.

Warmington, Q.C. and *Waggett* for the plaintiff.—The defendants' objection No. 1 is no defence. The plaintiff's work is copyright. As to objection No. 2, the defendants have taken that which is the result of the plaintiff's labour, expense, and reputation. A new recipe invented by a cook is a perfectly proper subject for copyright. As to objection No. 3, no fraud is alleged: and, as to No. 4, we have evidence that the plaintiff has suffered damage:

Walter v. *Steinkopff*, 67 L. T. Rep. 184; (1892) 3 Ch. 489;
Bramwell v. *Halcomb*, 3 My. & Cr. 737;
Kelly v. *Morris*, 14 L. T. Rep. 222; 1 Eq. 697;
Trade Auxiliary Company v. *Middlesbrough and District Tradesmen's Protection Association*, 60 L. T. Rep. 681; 40 Ch. Div. 425;
Ager v. *P. and O. Steam Navigation Company*, 50 L. T. Rep. 477; 26 Ch. Div. 637.

Marten, Q.C. and *Gatey*, for the defendants, were not called on.

KEKEWICH, J.—The argument of the plaintiff is really this, that the court ought to stay this publication, although what is taken from the plaintiff's publication is exceedingly small by itself, and in proportion to the entire paper insignificant. To that argument I entirely accede. There are many authorities on the subject. It is not the number of letters or words that are copied. It is not the weight or intrinsic value that the court regards. There is this: The plaintiff claims a copyright, and the defendants seek to infringe the plaintiff's copyright. I will assume without further inquiry upon the certificate of registration that the plaintiff has a copyright in this publication. That copyright he is entitled to have protected by means of proceedings and an injunction in a proper case. What is the copyright? I read from the Act of 1842. It is construed to be "the sole and exclusive liberty of printing or otherwise multiplying copies of the said work to which the said word is herein applied." The defendants are not multiplying or printing, or otherwise multiplying his paper, or any substantial part of it, either in quantity or quality. They are publishing to the world the fact that the plaintiff, who may have a great reputation, and a well-earned one, for selecting the probable winners of horse races, prophesies that a certain horse will win in a certain race. What is the object of the plaintiff's publication? To tell all who pay for it, in the first instance, that his opinion is so and so on a given race. Is that private, or is it in any sense confidential? Is there anything to prevent the man who has paid his shilling reading it out at the club, telling everybody he meets in the train, or handing the paper one by one all round in a crowded carriage? Is there anything to prevent his writing to all his friends and suggesting their acting on this valuable advice, and may he not do that by the aid of a typewriter or private printing machine, if he has one? It seems to me that there is nothing to prevent it. What is done is done with a view to enable all those whom it may concern, and who get hold of this information, to avail themselves of it, and of course to have the advantage of the plaintiff's judgment in such matters.

(*a*) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

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and who are anxious to know in good time what his view is, so as far as possible to anticipate, or if not to anticipate, to benefit by his paper as soon as possible after the plaintiff's issue. If they choose to wait I see no reason why these defendants, or any newspaper, or any number of them, may not publish the fact that Mr. Chilton selects one particular horse, when as a matter of fact other persons, who may not be equally good judges, select other horses. The defendants do not even follow the form of the announcement. I have before me the plaintiff's publication of the 13th Aug.: the particular passage is headed "One-horse Selections." I do not know whether anybody will suggest that there is any literary composition in the words "one-horse selections" which is entitled to protection. And then there comes, Tuesday, Wednesday, Thursday, and Friday in one column, with the horses against each in the next column. The defendants do not publish that; they have not even a "One-horse Selection," if that was even a subject of copyright. They have a selection of certain horses, and, instead of having the four days in one column, and the selected horses in the other column, they have the different papers, including Mr. Chilton's, in one column, and the horses selected by the different people, including Mr. Chilton, in another column. This paper is published Wednesday, the 15th Aug., and I suppose it was intended to point to the probable winner in a particular race on that particular day; I do not know what race it was. That is a piece of intelligence which it was intended to publish, and which it seems to me might fairly be published. One may conceive a number of illustrations; but no great advantage can be attained by applying an analogy to any. Supposing that for "the event," I believe that is the right term, which is to take place to-morrow (the election of the London School Board), and which interests a good many persons in the metropolis, one of the papers of the day, being well informed, chose or thought it right to state who were likely to be the candidates elected or successful, might not another paper of this evening or to-morrow morning say that such and such paper selected these candidates, and that therefore this party or the other party would be likely in that view to obtain the majority? I might multiply that to any number of instances with reference to events of less or greater importance as the case might be; but one instance shows the drift of my mind. I cannot conceive here that there is anything which is properly the subject-matter of copyright. It may or may not be worth while to observe on the exact form of the objection No. 1. It seems to me that the objection was a good one at any rate when read with objection No. 2, and that it hits the point, and that there is here no case for copyright, and therefore there will be judgment in this case with costs, including the reserved costs of the motion for the defendants.

Solicitors: *Chester* and *Co.*, for *Crofton* and *Craven*, Manchester; *John Amery Parkes.*

Wednesday, Nov. 21, 1894.

(Before WILLIAMS, J., sitting as an additional Judge of the Chancery Division.)

Re BLAZER FIRE LIGHTER LIMITED. (*a*)

Company — Winding-up — Rates — Business premises—Occupation by liquidator—Caretaker—Beneficial occupation.

The liquidator of a company is bound to pay in full the rates becoming due in respect of the company's premises after the commencement of the liquidation, where such premises are retained by him with a view either of obtaining a better price or of avoiding a loss.

In default of such payment liberty to distrain ought to be granted.

The decision in Re Watson, Kipling, and Co. (49 *L. T. Rep.* 115; 23 *Ch. Div.* 500), *in so far as it draws a distinction between rent and rates, cannot be regarded as law after the decision in* Re National Arms and Ammunition Company (52 *L. T. Rep.* 237; 28 *Ch. Div.* 474).

THIS was an application in the winding-up of the Blazer Fire Lighter Limited, by the Vestry of St. Mary, Islington, to discharge an order restraining them from levying a distress on the company's premises in respect of certain rates which had been made by them after the date of the commencement of the winding-up.

The company occupied for the purposes of their business certain leasehold premises at 232A, York-road, in the parish of St. Mary, Islington, for which it had paid rates since March 1891.

On the 2nd March 1894 the company passed an extraordinary resolution for a voluntary liquidation, and appointing a liquidator. At that date the company had for some time ceased to carry on its business.

The liquidator shortly after his appointment took possession of the company's premises, and placed them in charge of a caretaker, who remained in possession solely in order to prevent trespass upon or injury to the property, and not with a view of carrying on the business of the company or of selling it as a going concern, though the liquidator intended as soon as possible to sell the premises and the plant. No profit or benefit whatever was derived by him on behalf of the company from retaining such possession; but, on the contrary, the cost of preservation was incurred.

On the 24th March 1894, after the commencement of the winding-up, the vestry made a poor rate, a lighting rate, a general rate, and a sewers rate for the half-year ending the 29th Sept. 1894, payable in two portions on the 2nd April 1894, and the 2nd July 1894 respectively.

In April 1894 the vestry's collector left a demand note for 3*l.* 2*s.* 4*d.*, being the first portion of the rates, with the caretaker, and in July a demand note for 3*l.* 2*s.* 4*d.*, being the second portion of such rates.

On the 29th May 1894 the liquidator was served with a magistrate's summons for the amount of the rates. The liquidator opposed this summons; but an order was made for the payment of the rates forthwith, and the vestry threatened to distrain for the amount thereof on the company's premises.

On the 20th June the liquidator applied to

(*a*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

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Romer, J., who was then sitting for Williams, J., for an order restraining the vestry until further order from levying a distress upon the property for the payment of the rates. His Lordship made an order on the undertaking of the liquidator to be personally answerable for damages.

The premises and plant were sold by the liquidator on the 6th Sept. 1894.

The present summons asked that this order might be discharged, and that the liquidator might be ordered to pay the applicants 6*l.* 6*s.* 6*d.*, or such damages as the court should be of opinion that they had sustained by reason of the order. The summons was adjourned into court to be treated as a motion.

It appeared from the evidence of the vestry's collector that, when he called for payment of the rates in April and June, there was sufficient plant upon the premises, if distrained upon, to raise the amount of the rates.

Chester Jones for the vestry.—The liquidator having in this case chosen to retain possession of the premises with a view of avoiding loss to the company, is bound to pay the rates levied in respect of them in full. Such possession is equivalent to a beneficial occupation:

Re International Marine Hydropathic Company, 28 Ch. Div. 470.

The vestry would be entitled to recover against a liquidator in respect of his occupation of the company's premises in any case in which, had the occupation been by an ordinary person, the premises would have been liable to rates:

Re National Arms and Ammunition Company, 52 L. T. Rep. 237; 28 Ch. Div. 474.

Occupation of premises by a caretaker will render them liable to rates:

Hicks v. *Dunstable Overseers*, 48 J. P. 326.

Re Watson, Kipling, and Co. (49 L. T. Rep. 115; 23 Ch. Div. 500) can no longer be regarded as law after the decision in *Re National Arms and Ammunition Company* (*ubi sup.*) in so far as it draws a distinction between rent and rates. He also referred to

Re West Hartlepool Iron Company; Ex parte West Hartlepool Improvement Commissioners, 34 L. T. Rep. 568.

J. G. Wood for the liquidator.—There has been no beneficial occupation by the liquidator in this case. No doubt, if an ordinary person had been in occupation of these premises, he would have been liable for rates. Here, however, the matter depends upon sects. 85, 87, and 163 of the Companies Act 1862, and the court will not, in the exercise of its discretion, allow the applicants to distrain after the commencement of a winding-up, but will leave them to come in and prove *pari passu* with the rest of the creditors of the company. The case is covered by the decision in

Re Watson, Kipling, and Co. (*ubi sup.*).

"Avoiding a loss" does not mean putting in a caretaker to keep things *in statu quo*, but occupying the premises for the purpose of carrying out contracts and making profits. Both *Re National Arms and Ammunition Company* (*ubi sup.*) and *Re International Marine Hydropathic Company* (*ubi sup.*) were cases in which the business of the company had been carried on. If the contention on the other side is correct, it would follow that in every case in which the liquidator did not immediately shut up the premises he would be liable for rates. I do not rely upon *Re Watson, Kipling, and Co.* (*ubi sup.*) as putting me in a better position than I should have been in if I had had to meet the claim of the landlord. No doubt, if a liquidator retains possession of the company's premises for the purpose of carrying on its business, he is bound to pay the rates in full. [WILLIAMS, J. referred to *Re Lundy Granite Company; Ex parte Heavan*, 24 L. T. Rep. 922; L. Rep. 6 Ch. 462.] *Re Oak Pits Colliery Company* (47 L. T. Rep. 7; 21 Ch. Div. 322), in which liberty to distrain was refused, is clearly in my favour. [WILLIAMS, J.—May I take it that the debt in respect of the rates was incurred entirely after the commencement of the winding-up?] Yes, that is so.

Chester Jones replied.

WILLIAMS, J.—I think that the parish authorities are entitled to have these rates paid in full. That is, in other words, I think they ought to be allowed to distrain for them, and that I ought under the circumstances to discharge the order restraining them from so doing, and to leave them to their rights on that basis. There has been a considerable difference of opinion in the various cases cited, and I do not think that any amount of legal ingenuity could maintain the proposition that all the judgments can stand together. I certainly give up that task. I am going to adopt the view of Bowen, L.J. in *Re National Arms and Ammunition Company* (*ubi sup.*). No later case than that has been cited to me. I do not say that that is a decision of the Court of Appeal in favour of the view I am about to take; but Bacon, V.C. had suggested in *Re West Hartlepool Iron Company* (*ubi sup.*), that the test of whether the rates were payable in full was whether there had been a beneficial enjoyment by the liquidator, mere possession or occupation not being sufficient. Upon that Bowen, L.J. says: "I wish to add that I am not satisfied that the test given by Bacon, V.C., in *Re West Hartlepool Iron Company* (*ubi sup.*) is the true one. I am disposed to think that the true test is, whether there has been a beneficial occupation within the ordinary meaning of those words in cases as to rating, and I wish to leave this question open in case it should ever call for decision." I intend to adopt that view. It is not contended here, and it could not be contended, that if that test is adopted there has been a beneficial occupation within the ordinary meaning of the term in the cases as to rating. I thought that possibly there might be a dispute as to that, so I referred during the course of the argument to the provisions of the rating statutes upon which there have been decisions as to what is a beneficial occupation. It is not, however, necessary to consider that point, as it is admitted that in this case there has been a beneficial occupation within the ordinary meaning of the words used in those statutes. Having said that I am going to adopt the view of Bowen, L.J., I should like to give the reasons which have led me to that conclusion. The Companies Acts take away the power of distress upon the property of a company after the commencement of a winding-up; but they give the court a discretion to allow the distress to go on. The question therefore is, whether the court should in its discretion allow it to go on in this case. It is admitted that the

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rate, in so far as it constitutes a debt, constituted a debt which was incurred after and not before the liquidation, so that it is not a case in which it can be said that the persons to whom the rate is due ought to come in and prove *pari passu* with the other persons who were creditors at the date of the liquidation. The vestry are creditors; they have become so since the commencement of the liquidation. I confess that I cannot see why a debt for rates should not be paid just as much as a debt for rent of premises or in respect of anything else which a liquidator thinks it necessary to acquire or use after the commencement of the liquidation. He may have to hire new premises, in which case he would have to pay the rent in full; or he may have to occupy the old premises, and keep the landlord out of possession. If he does that he would have to pay also. In either case, whether he acquires new premises or continues to hold the old ones, he would have to pay the rates in respect of the occupation which he has. Under these circumstances, I think that the test proposed by Bowen, L.J. is much the plainest and simplest, namely, has there been a beneficial occupation by the liquidator of these premises within the ordinary meaning of the words in the rating statutes? and it cannot be disputed that in this case there has been such occupation. Having said that, I wish to make one observation about the effect of the decision of the court as distinguished from the observations of the judges in *Re National Arms and Ammunition Company* (*ubi sup.*). It seems to me that, after the decision in that case, it is impossible to say that the decision in *Re Watson, Kipling, and Co.* (*ubi sup.*) can stand, in so far as it draws any distinction between rates and rent. I think that all the Lords Justices in *Re National Arms and Ammunition Company* (*ubi sup.*) decide that case on the basis that rates must for this purpose be dealt with as being upon the same footing; but even if this were a case of rent, Mr. Wood could not be heard to say that the rent would not be payable in full if there was only an occupation for the purpose of obtaining a good price, even though the premises might be used in the meantime for the storage of the plant and machinery of the company. Certainly, that does not seem to be warranted by anything laid down by Kay, J. in *Re Watson, Kipling, and Co.* (*ubi sup.*). He says there: "I am not satisfied that the question of the payment of rates should be determined on absolutely the same principle as that of the payment of rent due to a landlord, because there is this difference, as was pointed out by Mr. Rigby, and I agree that it is a substantial distinction; in the case of a landlord the company occupying his property are keeping him out of possession, and if the company have, and deliberately exercise, enjoyment of the property of the landlord, no doubt the rent ought to be paid in full." I should say that he means by that that, if the liquidator chooses to occupy premises while waiting to get a good price, he would have to pay the rent in full, and I do not think that Mr. Wood can rely upon that judgment in support of his argument. This case is really unarguable unless one is to fall back upon the test laid down by Bacon, V.C. According to that, mere possession or occupation is not sufficient to make the liquidator liable; but there must be some beneficial enjoyment also. It seems to me that, having regard to the subsequent cases, that case can no longer stand. In *Re Oak Pits Colliery Company* (*ubi sup.*) Lindley, L.J. says: "No authority has yet gone the length of deciding that a landlord is entitled to distrain for, or be paid in full, rent accruing since the commencement of the winding-up, where the liquidator has done nothing except abstain from trying to get rid of the property which the company holds as lessee." He does not, however, go the length of affirming the test laid down by Bacon, V.C. It seems to me that, if the liquidator deliberately chooses to occupy the premises because he thinks he may get a better price by waiting before selling them, and a loss to the company would be avoided by his so waiting, he must pay the rates in respect of his occupation in full. The order of the 20th June must therefore be discharged.

Solicitors: *William Lewis*; *H.* and *W. Priest.*

Nov. 21 *and* 22, 1894.

(Before WILLIAMS, J., sitting as an additional Judge of the Chancery Division.)

Re ISSUE COMPANY LIMITED; HUTCHINSON'S CASE; BETZOLD'S CASE; BENJAMIN'S CASE. (*a*)

Company—Winding-up—Director's qualification—Agreement to acquire qualification—Reasonable time for performance—No business done by company—Agreement to become member—Companies Act 1862 (25 & 26 *Vict. c.* 89), *s.* 23.

An agreement by a director to acquire qualification shares does not amount to an agreement to take shares within sect. 23 *of the Companies Act* 1862, *and does not become so merely by his acting as a director.*

The articles of association of a company provided that the qualification of a director should be the holding in his sole name of shares to a certain nominal value, and that his office should be vacated if he ceased to hold the requisite share qualification. A., B., and C. were appointed first directors, and accepted the office, and acted to some extent as directors; but none of them ever applied for shares, or were any shares ever allotted to them. The company never did any business, and did not go to allotment. Within a year of its incorporation the company was ordered to be wound-up, and the liquidator placed the names of A., B., and C. on the list of contributories in respect of their qualification shares. On a summons taken out by A., B., and C. to have their names removed from the list:

Held, that the agreement to be inferred on the part of A., B., and C. respectively, was an agreement to acquire the requisite number of qualification shares either from the company, or from outside persons, within a reasonable time; that such an agreement did not amount to an agreement to take shares within the meaning of sect. 23 *of the Companies Act* 1862, *and did not become so by their acting as directors; and, further, that having regard to the circumstance that the company never went to allotment, a reasonable time for acquiring such qualification shares had not elapsed at the date of the winding-up.*

Held, therefore, that their names ought to be removed from the list of contributories in respect of such shares.

(*a*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

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ADJOURNED SUMMONSES.

These were three summonses taken out by R. H. P. Hutchinson, A. Betzold, and J. K. K. Benjamin respectively, in the winding-up of the Issue Company Limited, asking that their names might be removed from the list of contributories in respect of certain shares.

The company was incorporated on the 16th March 1893, with a capital of 125,000*l*., divided into 25,000 shares of 5*l*. each, of which 5000 were preference, and 20,000 were ordinary shares.

The articles of association, so far as they are material to this report, were the following:

88. The directors shall be appointed by the signatories of the memorandum and articles of association, or a majority of them.

90. The qualification of every director shall be the holding in his sole name of shares or stock to the nominal value of 500*l*. at the least.

93. The office of director shall be vacated: (*d*) If he cease to hold the required amount of shares or stock to qualify him for the office.

Betzold and Benjamin signed the memorandum and articles of association as subscribers for one share each, and were together with Hutchinson and another person appointed first directors of the company on the 15th April 1893, and all accepted office. None of the applicants applied for shares, nor were any ever allotted to them in respect of their qualification as directors.

Four meetings only were held by the directors, viz., on the 24th April, the 5th Oct., the 18th Dec., and the 19th Dec. 1893. At the first meeting on the 24th April a resolution was passed allotting to the vendor certain fully paid shares in respect of the purchase money for his business. This resolution was, however, rescinded at the meeting of the 5th Oct.

The only business the company ever attempted to do was in connection with the formation of a company intended to be called the Cycle Union Limited. The attempt, however, proved abortive.

Hutchinson's name appeared in the minute-book as having been present at the first meeting, but this he denied. He resigned by letter on the 18th July 1893, and his resignation was accepted at the board meeting on the 5th Oct. Betzold and Benjamin attended all four meetings.

The company never issued a prospectus, and no shares were ever taken in the company beyond the seven shares in respect of which the signatories of the memorandum were liable. There was no register of shareholders.

In Dec. 1893 the company was ordered to be wound-up on the petition of a creditor in respect of salary, and the liquidator placed the names of the applicants on the list of contributories in respect of their qualification shares.

Channell, Q.C. and *Clarendon Hyde* for Hutchinson.—Hutchinson never acted as a director except so far as that is to be inferred from the fact of his signing the attendance book at the meeting of the 24th April 1893. He never applied for shares, and his name was never entered upon the register of shareholders of the company. In making out an agreement by a person to take shares in a company, it is a material fact that the name of such person is on the register. If it is on the register and remains there for a considerable time, even without the knowledge of such person, an inference arises that he has agreed to take the shares. It is settled law, (1) that a director may obtain his qualification shares either from the company or from the outside public; (2) that he is entitled to a reasonable time within which to acquire such shares; and (3) that the length of such time is regulated by the nature of the business of the company:

Re Columbia Chemical Factory Manure and Phosphate Works; Hewitt's case; Brett's case, 49 L.T. Rep. 479; 25 Ch. Div. 283.

He resigned on the 18th July 1893, and his resignation was accepted by the board. They also referred to

Re Bank of Hindustan, China, and Japan; Campbell's case, 29 L. T. Rep. 519; L. Rep. 9 Ch. 1;

Re Wheal Buller Consols, 58 L. T. Rep 823; 38 Ch. Div. 42.

Bramwell Davis for the liquidator.—Where the articles, as in this case, require a director to hold qualification shares and a person acts as director but fails to acquire the necessary qualification shares, the directors have an implied authority to put his name on the register in respect of such shares, and that authority I submit continues in the liquidator after the commencement of the winding-up:

Re Bread Supply Association Limited, 68 L. T. Rep. 434; W. N. 1893, p. 14.

The only distinction between that case and the present is, that here the resignation of the director was accepted, but that circumstance cannot, I submit, affect the question. [WILLIAMS, J. referred to *Re Printing Telegraph and Construction Company of the Agence Havas; Ex parte Cammell*, 70 L. T. Rep. 705; (1894) 2 Ch. 392] That case went upon its special facts. The company there wrote to the director after his resignation asking him to take shares. The question whether the resignation was sufficient was expressly left open by Kay, J. He also referred to

Re Anglo-Austrian Printing and Publishing Union; Isaacs' case, 66 L. T. Rep. 250, 593; (1892) 2 Ch. 158.

Channell, Q.C. in reply.—This case differs from *Isaacs'* case (*ubi sup.*), as here there is no article as in that case providing that, in the event of a director failing to obtain the necessary qualification shares within a prescribed time, he should be deemed to have agreed to take them from the company. [WILLIAMS, J.—It is by no means clear that the existence of that article was the *ratio decidendi*—at all events of the decision in the court below.] In *Re Portuguese Consolidated Copper Mines; Ex parte Lord Inchiquin* (64 L. T. Rep. 841; (1891) 3 Ch. 28) the director was actually on the register. *Re Bread Supply Association* (*ubi sup.*) is consistent with *Hewitt's case* and *Brett's case* (*ubi sup.*), because in the former case there appears to have been a good deal done by the directors, and the company had passed through a "critical period," and therefore a reasonable time having elapsed, the implied contract to take the qualification shares from the company took effect. If, however, that case is not distinguishable on this ground, it is inconsistent with the earlier authorities. But the question whether lapse of time so changes the nature of the agreement is still open, unless indeed *Re Wheal Buller Consols* (*ubi sup.*) has in effect decided it in favour of the director, as I submit it has.

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Charles Macnaghten for Benjamin.—Benjamin's position is precisely similar to that of the other applicants, and I claim the benefit of the arguments adduced on their behalf.

Bramwell Davis for the liquidator.—As to the business being in an inchoate state, I submit the company did a certain amount of work, and inasmuch as it was ordered to be compulsorily wound-up on a creditor's petition, it must be assumed that it had creditors. [WILLIAMS, J.—The question whether the directors are liable must ultimately turn on sect. 23 of the Companies Act 1862.] Undoubtedly. The test of whether a person is a member is whether he has agreed to become a member, and is on the register. I admit that in the present case there is no express agreement by the director to take the qualification shares. But directly a director acts he is bound to qualify. He is, however, allowed a reasonable time to acquire the necessary qualification shares. The law implies an agreement to take the shares, and that is an agreement within sect. 23. [WILLIAMS, J.—Unless you satisfy me that there is some authority in your favour, I am not prepared to hold that an agreement to acquire qualification shares is an agreement to become a member within sect. 23. If you have a complete agreement, I agree that the liquidator has authority to put a director on the list of contributories, and thus in a sense on the register. If once you have such an agreement it is not necessary that the director should be on the register before the date of the winding up. But here you have not such an agreement.] It is true that a mere agreement to qualify is not an agreement to take shares from the company, but directly a reasonable time has elapsed it becomes an agreement to take shares from the company, and the directors may put the director on the register. In *Hewitt's case* and *Brett's case* (*ubi sup.*) this point was expressly left open. In *Re Wheal Buller Consols* (*ubi sup.*) the question turned upon whether a reasonable time had elapsed. [WILLIAMS, J.—You want something more than a mere lapse of time.] There is more than that in this case. *Re Bread Supply Association* (*ubi sup.*) is an express decision in my favour. The facts there were identical with those in the present case. There was the same article, the same acting as director, and the same omission from the register. [WILLIAMS, J.—Resignation will not get rid of the liability to take shares.] Actual membership does not begin until entry upon the register. [WILLIAMS, J.—I do not agree. Where there is a completed agreement to take shares nothing more is necessary. Where the agreement is but unilateral, it amounts only to an offer to take shares.] If so, the offer continued up to the date of the winding-up. [WILLIAMS, J.—The judgment of Kekewich, J. in *Re Bread Supply Association* (*ubi sup.*) makes it plain that there was in that case a completed agreement. Assuming it to be an offer, the case does not help you.] The judgment of Kay, J. in *Ex parte Cammell* (*ubi sup.*) is in my favour. [WILLIAMS, J.—It is not plain that Kay, J., if left to himself, would have decided otherwise?] Lindley, L.J. treated the matter as if there was authority up to a certain time when the company declined to treat the director as a shareholder. *Ex parte Lord Inchiquin* (*ubi sup.*) shows that the Lord Justice thought that six weeks was a reasonable time for acquiring the necessary qualification shares. No doubt the question depends upon the circumstances of each particular case, and I ask the court to hold that under the circumstances of this case a reasonable time had elapsed.

WILLIAMS, J.—In this case there are several applications to remove the names of certain persons from the list of contributories. The cases differ a little in the facts, but so little that I will deal with the case upon general principles. In my view none of these gentlemen ought to have their names placed upon the list of contributories unless it can be made out that they have agreed to become members of the company, and I do not think that it can be made out that any of them have. The question what constitutes an agreement within sect. 23 of the Companies Act 1862, such as to make a man a member of a company has been frequently discussed, and there have been many decisions upon it. I do not propose to go through them one by one. Each one depends, and necessarily so, upon the facts there present. In some cases the courts have found that there was an agreement, and in others that there was not. I shall not go through them and distinguish this case from them, but will only try and see whether in this case these gentlemen have agreed to become members. There was no express agreement to become members. That is admitted. There was no application for, or allotment of, the shares to them. That also is admitted. The agreement, therefore, if there was one, must be an implied one. What agreement is to be implied from the facts in this case? It is said that these directors accepted the office of directors. That is not enough to constitute an agreement of membership. Then it is said that they accepted the office of director in a company whose articles contained a provision requiring the directors to hold a certain qualification in shares. I do not understand Mr. Bramwell Davis to contend on behalf of the liquidator that the mere fact of the acceptance of the office of director, coupled with the fact that the articles require this qualification, is sufficient to cause the court to infer an agreement of membership. Then what else have we? We have the fact that these gentlemen, or some of them (I think all), more or less acted as directors. Most of them clearly attended directors' meetings. Mr. Hutchinson signed the attendance book, from which it would appear that he had attended, but he says that such was not the fact. However, they all acted as directors, more or less. I do not understand Mr. Bramwell Davis to contend that these facts all taken together are in themselves sufficient to constitute a contract of membership. The real truth is, that the proper contract to be inferred from the facts is a contract to qualify, that is, to take the requisite number of shares either from the company or from outside persons within a reasonable time. That, I think, is the only contract which can be inferred from these facts, but that is not a contract of membership. What is said is this, that, assuming the contract to be merely a contract to qualify within a reasonable time, when that time has elapsed there will be a contract of membership. I do not agree with that contention. It appears to me that the most that can be said is, that at the end of a reasonable time the director must be taken as offering to take the shares. There is not a completed contract at that moment to take the shares, but at most an offer on the part of the director to take them.

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Something else may happen to fix it. It may be that his name is put on the register of shareholders, in which case his offer would be accepted; or there may have been a resolution for the allotment of the shares, in which case again his offer would have been accepted; or he might, after the lapse of a reasonable time, have done acts as a director which show that he assumed that his offer had been accepted. If both the director and the company act on that assumption, a completed contract may be obtained, but the mere lapse of time does not make a completed contract. It is said that *Hewitt's case* and *Brett's case* (*ubi sup.*) left that point open, and in that I agree. Cotton, L.J., in his judgment in that case, says: "There is a difference of opinion between the members of the court on the question whether the contract entered into by these directors to obtain a qualification does amount to an agreement to take shares within the meaning of the 23rd section, and in the view of this case in which we all agree it is not necessary to decide, and we think it better not to express any opinion on this point." I am holding here that the contract which has been entered into to qualify does not amount to an agreement to take shares within the meaning of sect. 23 of the Act of 1862. I agree with what Cotton, L.J. says, that it was not necessary in that case to decide that question, and I am not deciding it here upon the authority of that case; but I wish to point out that I am not doing so merely upon my own personal reasoning, but upon the judgments of the court in two subsequent cases to which I will presently refer, and which in my opinion show that the court has acted upon the assumption that the agreement to qualify which arises from the acceptance of the office of director, and acting as director of a company that has an article providing for the qualification of the directors in shares, does not amount to an agreement to take shares within sect. 23. The two cases which involve that decision are *Re Wheal Buller Consols* (*ubi sup.*) and *Re Printing Telegraph and Construction Company of the Agence Havas; Ex parte Cammell* (*ubi sup.*). I will deal with the latter case first. Let us see what were the facts there, and whether the conclusion at which I have arrived, viz., that an agreement to qualify is not an agreement to become a member within sect. 23, is involved in the decision. The articles in that case provided that the qualification of a director should be the holding of 200*l.* share capital; that the first directors should be allowed one month from the first general allotment of shares in which to acquire their qualification; and that the office of director, in the case of a first director, should be vacated if he failed to get the requisite shares within the prescribed period, or if he sent a written resignation. I pause there to observe that it is much easier to imply a contract where a finite time like one month is fixed for taking the shares, than where a director has an indefinite time—a reasonable time—to qualify. The facts of that case as stated by Lindley, L.J., were as follows: "Cammell was named as an original director in a prospectus issued shortly after the company was formed, and he attended one or two meetings during the first month of the company's existence. On the 29th March 1893, at a meeting at which he was not present, fifty shares were allotted to him and the other directors as their necessary qualification. On the 7th April another meeting was held, at which the minutes of the previous meeting were read. Cammell was not present at that meeting, but he was present at a meeting held on the 14th April, when the minutes of the 7th April were read. There was some controversy whether he knew of the allotment. Stirling, J. came to the conclusion that he did not, and I accept that conclusion. On the 29th April the month expired within which the original directors were bound to acquire their qualification shares. After the expiration of the month, and before there was any registration book of the company in existence, but after Cammell's name had been put on the allotment list, on the 29th March, in respect of the forty shares, the secretary sent to Cammell a form of application for these shares, which Cammell never signed, and which he ultimately returned. In the beginning of May Cammell wrote once or twice excusing himself from attending the meeting of the directors, and on the 7th May he sent in his resignation. On the 26th July Cammell, having then recently ascertained that his name was on the register of members, wrote to the secretary requesting to have his name removed. In September he received a notice of a call in respect of these shares, and in October proceedings were commenced against him to enforce the call. On the 1st Nov. he gave notice of motion to rectify the register by removing his name therefrom." I wish to point out that Cammell's refusal to sign the form of application and resignation of the office of director would not have been material if at that time there had already been a completed contract to become a member of the company, as a man who has entered into such a contract has become a member in one of the two modes pointed out by the Act. Cammell did not adopt one of such modes. The Court held (affirming the decision of Stirling, J.), that there was no constructive agreement on Cammell's part to take the shares; that the entry in the allotment sheet was not under the circumstances of the case a registration within the meaning of the Companies Acts; and that the directors had no authority to put his name on the register after his resignation. The material part of that holding was, that there was no constructive agreement on his part to take shares. There was acceptance of the office of director, the acting as such, and attendance at meetings. The case is a much stronger one than this, and there is one circumstance, which, if I may in all humility say so, might perhaps have led me to a different conclusion from that arrived at in that case. There had been an allotment to Cammell, and it might, I think, be well said that he, as a director, could not be heard to say that he was not aware of it. However I need not trouble about that. Lindley, L.J., in deciding the case, says: "Mr. Buckley contended that the article conferred on the company an irrevocable authority to put him on the register after the expiration of the month. I do not think we can spell out of the words of the articles any such authority. These articles are not as strong as the articles in *Isaacs' case* (*ubi sup.*), where such an authority was implied. I do not think that the fact that Cammell sent in his resignation is conclusive; but I am much impressed with this fact—that the company did not treat him as being a shareholder in respect of these forty shares on the 29th April, because the secretary of the company, instead of treating him as a share-

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holder, asks him on the 1st May to sign an application for shares. His resignation, coupled with the refusal to do that which the company had invited him to do—viz., sign the application for shares—is, in my judgment, sufficient to put an end to the authority of the company. The company, therefore, had no warrant for putting his name on the register on the 23rd May." All that which the Lord Justice there says would be wholly unnecessary if the mere fact of acting as a director, and the lapse of a reasonable time within which to qualify (in that case one month), would make a contract of membership. I therefore say that the judgment of Lindley, L.J., that there was no continuing authority to put Cammell's name on the register is conclusive that a contract to qualify which arises from the acceptance of the office of director, and acting as director of a company with an article providing for the qualification of the directors in shares, does not make a completed contract to take shares. That decision then decides the very point said to have been left open in *Hewitt's case* and *Brett's case* (*ubi sup.*), and it is plain that no completed contract to take shares by a director arises merely by the lapse of the definite time fixed for the taking of his qualification, and if that is so, it is plain that it will not arise from the lapse of an indefinite time. Then it is said that *Cammell's* case (*ubi sup.*) does not apply, because Cammell had definitely withdrawn from his office, while in the present case none of the applicants, except Mr. Hutchinson, has definitely withdrawn. It seems to me that there has been no exercise by the directors of their authority to put these gentlemen on the register, and the question whether or no a man is a member of a company must depend upon the circumstances at the time of the liquidation, and if he is not a member at that time he cannot be made so by any act of the liquidator after the commencement of the liquidation. That is the effect of *Cammell's* case (*ubi sup.*), and the same idea is involved in the judgment in *Re Wheal Buller Consols* (*ubi sup.*). I will not go through all the judgments, but when they are looked at it will be seen that they all involve that idea. Cotton, L.J., in his judgment in that case, says: "No case has ever decided that acting as a director amounts to an agreement to take the shares requisite for a qualification. There are cases where a director has been held not liable for the shares requisite to qualify him; there have in some cases been observations to the effect that acceptance of the office and acting as director may make a person liable as if he had taken the qualification, but no judge has ever acted on that view." Looking at the facts in that case, as stated in the head-note, we find that J. was elcted a director of the company, accepted the office, and attended meetings of directors for more than three months from his election, which was the time within which he ought to have acquired his qualification shares, but he never applied for, nor had allotted to him, any shares other than those for which he had subscribed the memorandum of association. The Court of Appeal held that the acceptance of the office of director and the continuing to act after the time by which the qualification ought to have been acquired did not amount to a contract by J. to take the additional shares requisite for his qualification. The decision was not based in the least degree upon a reasonable time not having elapsed, it assumed that it had elapsed, and it was held that the mere fact of acting as a director was not sufficient to constitute a contract of membership as opposed to a contract to qualify. I mention that, as I think that I ought to dispose of the case upon all the questions possible; but I hold in the present case, not only that the mere lapse of time is not sufficient to make the contract a contract of membership, but also that in the present case a sufficient time had not elapsed. The company had made no allotment, and so long as that was so it cannot be said that a reasonable time for the directors to qualify had elapsed. One must bear in mind the object for which this provision is inserted; it is for the protection of such of the outside public as come in and take shares. The only person who had ever agreed to take shares in this company was the vendor, and the provision was not meant for his protection, but for the protection of any persons who may come in. Under the circumstances I hold that the names of these gentlemen ought not to be on the list of contributories.

Solicitors: *Hurrell* and *Mayo*; *Lindo* and *Co.*; *Collison* and *Prichard*; *Munns* and *Longden*.

QUEEN'S BENCH DIVISION.

Oct. 30 *and* 31, 1894.

(Before MATHEW and CHARLES, JJ.)

REG. *v.* HIS HONOUR JUDGE PATERSON AND CLARKE. (*a*)

Tithe—Redemption money and expenses—Jurisdiction of County Court.

The County Court has now, since the Tithe Act 1891, *jurisdiction to hear and determine applications for redemption money and expenses incident to the redemption of a tithe-rentcharge.*

RULE calling on the learned Judge of the County Court of Essex, holden at Southend, to show cause why he should not hear and determine the matter of an application under the Tithe Act 1891 for the recovery of 59*l.* 13*s.* 2*d.*, the proportion of the redemption money and the expenses incident to the redemption of a tithe-rentcharge on certain lands in the parish of Prittlewell.

By an order of the Board of Agriculture, made in Feb. 1892, certain rentcharges were directed to be redeemed, and the applicant for the present rule, Mr. Grellier, was duly appointed valuer pursuant to the provisions of the Tithe Acts in the matter of the redemption of the tithe-rentcharge charged on certain lands in the parish of Prittlewell, and he was appointed to assess, collect, and recover the redemption money and expenses.

Amongst the owners of the lands so specified was the respondent, Mr. Clarke, who made no objection to the apportionment of the redemption money or expenses, or to the share thereof to be borne by him; but he refused to pay the amount thereof.

Proceedings were then taken by the applicant in the County Court for the recovery of the sum of 59*l.* 13*s.* 2*d.*, being the amount of the proportion of such redemption money and expenses assessed against Mr. Clarke.

A preliminary objection was taken by the judge that the court had no jurisdiction to hear a claim

(*a*) Reported by W. W. ORR, Esq., Barrister-at-Law.

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for redemption money. After argument the learned judge reserved his judgment, which he afterwards delivered in writing to the effect that under the Tithe Act 1891 he had no jurisdiction to make the order asked for, and he dismissed the application on that ground.

The present rule was then obtained at the instance of the plaintiff in the action.

Rentcharge in arrear was recoverable by distress under sects. 81-85 of the Tithe Act 1836 (6 & 7 Will. 4, c. 71).

S. T. Evans showed cause against the rule.—The application was made under the Tithe Act 1891, and that is an Act for the recovery of tithe-rentcharge, as stated in the preamble. It is limited to that, and it contains no express provision for the recovery of redemption money or expenses incident to redemption. Sect. 2 of the Act gives jurisdiction, over claims for tithe-rentcharge, but the section is confined to tithe-rentcharge, and there is no provision in the Act which gives jurisdiction unless it can be contended that sect. 10, sub-sect. 4, may be construed to give such jurisdiction. But this sub-section deals with any "expenses, rentcharge, or other sums," and it is true that under the sub-section certain expenses and rentcharge, which by former Tithe Acts are made recoverable as tithe-rentcharge, may now be recovered in the County Court under the Act of 1891; but there is no mention made in the section of redemption money, and unless the words "other sums" are to be construed as including redemption money, such redemption money does not come within the section. The words "other sums" must mean something *ejusdem generis* with expenses and rentcharge, and it would be straining the Act to construe them as including or referring to redemption money, and the words ought not to be so construed. If the Legislature had intended that redemption money should be included in this sub-section, it would have said so in express terms. Moreover, neither the rules nor forms framed for carrying out proceedings under the Tithe Act 1891 have any application to redemption money, which shows that the framers of these rules did not consider that redemption money came within the Act. It was contended for the applicant that the effect of sect. 39 of the Tithe Act 1860 was to give the court jurisdiction in such a claim as the present. But, even if that section gave jurisdiction as to redemption money, it only applied, as the section expressly states, to "redemption money, which may have been fixed as provided in the Act," and there was no evidence to show that the redemption money claimed in this action was fixed under or as provided by the Tithe Act 1860.

C. A. H. Black (*Willis*, Q.C. with him) in support of the rule.—By sect. 39 of the Act of 1860 redemption money and expenses are recoverable in like manner as the expenses of an original apportionment; and by sect. 18 of the Tithe Act 1839, the expenses of an original apportionment are recovered in like manner as tithe-rentcharge in arrear, that was formerly under the Tithe Act 1836 by distress. Now, by sect. 10, sub-sect. 4, of the Act of 1891, any enactment in the Tithe Acts directing any expenses, rentcharge, or other sums to be recovered as tithe-rentcharge, is to be construed to refer to the recovery of tithe-rentcharge under this Act. But the enactment in sect. 39 of the Act of 1860 is such an enactment, for it is an enactment directing redemption money and expenses to be recovered as tithe-rentcharge in arrear, and therefore the case comes directly within sect. 10, sub-sect. 4, of the Act of 1891, and by that sub-section the mode of recovery is the same as for tithe-rentcharge under the Act, and that is, by sect. 2, the County Court, which is there given exclusive jurisdiction. The County Court therefore has, by the combined operation of these sections, jurisdiction to entertain this claim for redemption money and expenses incident to redemption. [He was stopped.]

MATHEW, J.—This was an application to the County Court judge for the recovery of redemption money and expenses. The learned County Court judge refused to deal with the case on the ground that he had no jurisdiction. He was referred to sect. 10, sub-sect. 4, of the Act of 1891. That sub-section provides: [His Lordship read the section and proceeded:] The County Court judge considered that this sub-section did not apply to the case; but it appears to us that on that point his Honour was in error. Was this a sum recoverable as tithe-rentcharge within the meaning of the section? To answer that we have to turn to sect. 39 of the 23 & 24 Vict. c. 93. [His Lordship read the material portions of that section.] The section provides for the recovery of expenses and redemption money, and this appears to me to be one of those cases. Now the section goes on to say, amongst other things, that "all the powers and provisions of the said recited Acts concerning the assessment and recovery of the expenses of an original award of rentcharge or apportionment shall be applicable to the assessment and recovery of any such redemption money," and then we go back to see what those Acts were, and when we turn to the Tithe Act 1839 (2 & 3 Vict. c. 62), s. 18, it is clear that the expenses of an apportionment are recoverable as tithe-rentcharge in arrear. The analogy, therefore, between this charge and the ordinary rentcharge is as clear as can be. I do not refer to any other points which may come before the judge, but merely decide that the County Court judge has jurisdiction over redemption money.

CHARLES, J.—I am of the same opinion.

Rule absolute with costs.

Solicitors for the applicant, *Wordsworth, Blake, and Co.*

Solicitors for the respondent, *Rollit and Sons.*

Wednesday, Oct. 31, 1894.

(Before MATHEW and CHARLES, JJ.)

SWEET v. SWEET. (a)

Husband and wife — Separation deed — Deed between husband and wife without a trustee—No dum casta clause—Covenant by wife not to "annoy" husband—Adultery of wife—Right of wife to sue for arrears of annuity.

A separation deed between husband and wife may, since the Married Women's Property Act 1882, be entered into by the husband and wife alone without the intervention of a trustee, and the wife can sue in her own name upon such deed.

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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When such deed contains no dum casta *clause, the admitted adultery of the wife is no defence to an action by the wife against the husband for arrears of the annuity which the husband covenanted in such deed to pay to his wife.*

Adultery by the wife is not an "annoyance" to the husband within the meaning of a covenant in the deed that the wife was not to molest, annoy, or interfere with her husband.

APPEAL by the defendant from the judgment of the learned deputy-judge of the Brompton County Court of Middlesex.

The plaintiff is the wife of the defendant, and the action was brought to recover the sum of 4*l.* 6*s.* 8*d.*, being one month's instalment, due on the 9th June 1894, of an annuity of 52*l.*, payable monthly, granted by the defendant to the plaintiff by a deed of separation dated the 9th Nov. 1883.

The separation deed was entered into between the husband and wife alone without the intervention of a trustee, and contained no *dum casta* clause. It contained the clause that the wife should henceforth live separate from her husband, and should not seek for restitution of conjugal rights, or in any way molest, annoy, or interfere with her husband.

The defence raised by the defendant was the adultery of the wife, which was admitted.

The learned deputy-judge held, on the authority of *Fearon* v. *The Earl of Aylesford* (52 L. T. Rep. 954; 14 Q. B. Div. 792), and of the Married Women's Property Act 1882, that adultery of the wife was no defence.

For the defendant it was submitted to the learned judge that the cases did not apply when the separation deed was entered into without the intervention of a trustee, and on this point he gave leave to appeal.

The defendant appealed.

Oswald, Q.C. (*S. W. Lambert* with him) for the defendant.—The separation deed is bad in law. It is not such a deed as the husband and wife can enter into without the intervention of a trustee. They have only a limited power to contract, and they have no power to contract in such a case as this without the intervention of a trustee. Before the Married Women's Property Act 1882 a husband could not sue a wife, or a wife her husband, except for matrimonial offences, and a contract relating to such matrimonial offences was the only contract that a wife could validly enter into with her husband before the Act of 1882. Then came the Married Women's Property Act of 1882, sect. 1, sub-sect. 2 of which gave the power to contract in certain cases; but I submit that all that the Act does is to give a power to contract with reference to property. The husband and wife can now contract with reference to disputes which are matrimonial disputes, or with reference to property which is the separate property of the wife. The present case does not fall within either branch, as here there is no contract aimed at the wife's separate estate, and, as it is said by Lord Esher, M.R., in the case of *Palliser* v. *Gurney* (19 Q. B. Div. 519), the wife is not given an unlimited capacity to enter into and be bound by any contract. In *McGregor* v. *McGregor* (21 Q. B. Div. 424), although it was held that a contract for separation might be made without the intervention of a trustee, yet the circumstances there were wholly different from those in the present case. In that case an assault had been committed, and there was clearly a matrimonial offence, an offence which gave the wife a right to apply to the court for a judicial separation, and the reason of the decision in that case was, that the assault was a ground for applying to the court. This is very clearly put in the judgment of Smith, J., in the court below (58 L. T. Rep. at p. 229; 20 Q. B. Div. at p. 533), where he says: "In our judgment the law is that, when circumstances exist between husband and wife which would or which might give rise to proceedings by way of suit for matrimonial offences, it is competent, in consideration of the one not taking such proceedings against the other, for the two to contract to live separate and apart, and that the courts will enforce the stipulations of such a contract when made." In the second place, adultery is a good defence, although there is no *dum casta* clause. This does not conflict with the decision of the court in the case of *Fearon* v. *The Earl of Aylesford* (52 L. T. Rep. 954; 14 Q. B. Div. 792); because in that case, although the wife had been guilty of adultery, it was merely decided that adultery by the wife was no defence to an action by the trustee, inasmuch as he was not guilty of any offence, but came into the court with clean hands. Here, if there had been a trustee, no doubt the case would have been governed by the *Earl of Aylesford's* case, and the trustee could have sued. But the person who sues here is the wife, and the same considerations do not apply, so that adultery, which is a matrimonial offence, is a defence to the action. In the third place, adultery is a defence, notwithstanding the decision in the *Earl of Aylesford's* case, as there the covenant by the wife was not to "molest" her husband, and it was held that the wife's adultery was not molestation within the meaning of this covenant. In the present case, however, the words are much stronger, as the wife covenants not to "molest, annoy, or interfere" with her husband, and we submit that the adultery of the wife, accompanied as it was by the birth of a child, was an "annoyance" to the husband, and therefore a defence to this action. Lastly, the covenant by the wife not to molest or annoy her husband is really equivalent to a *dum casta* clause, in which case the adultery would have been a defence to this action.

Montague Lush, for the plaintiff, was not called upon.

MATHEW, J.—This appeal must be dismissed, as it seems to me that the County Court judge was right. The question is, what construction we are to place on the Married Women's Property Act 1882. By sect. 1, sub-sect. 2, of that Act a married woman is capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract. Mr. Oswald's argument is, that this is not a contract in reference to the separate property of the wife; but it is quite plain that the sub-section is quite sufficient to cover this case. Then sub-sect. 3 provides that every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown. The wife, therefore, had capacity to make the contract with her husband and to sue and be sued in respect thereof. It was contended

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also for the husband that it makes all the difference here that there is no trustee; but I do not see why the presence or absence of a trustee makes any difference in the matter. According to the old rule adultery was no answer, and in reference to such defence the Master of the Rolls, in the case of *Fearon* v. *The Earl of Aylesford* (*ubi sup.*), does not refer to the presence or absence of a trustee as of any importance, and I see no reason why it should be so. He says (14 Q. B. Div. at p. 799): "I myself should absolutely refuse to say that, owing to the mere fact of a woman falling into this grave offence under any circumstances of neglect by her husband, public policy requires that the husband shall not be obliged to pay to her the annuity which he has undertaken to pay to her without any such condition being expressed." It appears to me, therefore, that the answer is complete and the argument fails. The point was made that in this deed we have the word "annoyance," and that that distinguishes the present case from the *Earl of Aylesford's* case, where the word used in the deed was "molest;" but there is no real distinction between the words. It appears clearly that this appeal must be dismissed with costs.

Charles, J.—I am of the same opinion. The chief argument which has been addressed to us on behalf of the appellant was, that the absence of a trustee in a deed of separation precludes the wife who has been admittedly guilty of adultery from enforcing against her husband the covenant in that deed for her maintenance. The authorities are quite plain that a husband and wife are competent to enter into a contract of this description. This is settled by the case of *Besant* v. *Wood* (40 L. T. Rep. 445; 12 Ch. Div. 605); and, although it is true that in all the cases before the Married Women's Property Act 1882 we find the intervention of a trustee, as well as the husband and wife, I do not think that in the present state of the law such intervention is essential. That Act has conferred on a wife the right to sue without the intervention of any other person, and the argument, therefore, for the appellant on that point fails. It was also said that this case is to be distinguished from the case of *Fearon* v. *The Earl of Aylesford* (*ubi sup.*), where the covenant by the wife was only not to "molest" her husband; whereas here the covenant is not to "annoy" her husband. In my opinion, however, there has been no such annoyance as to prevent the respondent from recovering against her husband on this claim, and the case must follow the decision in *Fearon* v. *The Earl of Aylesford* (*ubi sup.*), notwithstanding the difference in the words.

Appeal dismissed.

Solicitors for the plaintiff, *Windybank, Samuell,* and *Behrend.*

Solicitor for the defendant, *Churchill.*

Judicial Committee of the Privy Council.

Nov. 8 *and Dec.* 8, 1894.

(Present: The Right Hons. Lords Watson, Hobhouse, Macnaghten, and Shand, and Sir R. Couch.)

Re Semet and Solvay's Patent. (a)

PETITION FOR PROLONGATION OF PATENT.

Patent law—Prolongation of patent—Expiration of foreign patent—Patents, Designs, and Trade Marks Act 1883, *s.* 25, *sub-sect.* 4.

The Judicial Committee have not, prior to the passing of the Patents, Designs, and Trade Marks Act 1883 (46 & 47 *Vict. c.* 57) *laid down any rule to the effect that where a British patent for a foreign invention precedes any foreign patent, the provisions of sect.* 25 *of the Patent Law Amendment Act* 1852 (15 & 16 *Vict. c.* 83) *apply to the case, and therefore a foreign invention first patented in England before the passing of the Act of* 1883, *may be dealt with under sect.* 25. *sub-sect.* 4, *of that Act, on the footing that the Act of* 1852 *has been repealed as to it.*

The lapse or expiration of foreign patents are circumstances to be considered in considering the question of the extension of a British patent, but are not conclusive against such extension.

This was a petition for the prolongation of letters patent, dated the 17th Nov. 1880, granted to Louis Semet and Ernest Solvay, both of Brussels, for "improvements in apparatus for coking and distilling coal."

The petition stated that the invention related to a novel mode of construction and arrangement of ovens for coking and distilling coal (which might be shortly described as "retort ovens"), by the use of which, as contrasted with other coking ovens in ordinary use, the quantity of coke obtainable from each ton of coal was largely increased, the duration of the processes of coking and distillation was most materially diminished, and the valuable bye-products of the gas produced in coking were readily preserved and offered for condensation and utilisation. The invention possessed very great merits. All possible efforts had been used, and very heavy expenditure had been incurred, in order to promote the use of the invention. For some time it was found impossible to obtain any practical introduction of the invention into this country, partly by reason of the expense of forming or setting up a battery of coking ovens, but chiefly by reason of the opinion which for a long period prevailed in this country that coke and the bye-products of coke produced in retort ovens were inferior to the products of beehive ovens. In Belgium, where coal-mining and the manufacture of iron and steel were among the chief industries, ovens constructed according to the invention had been in operation for some years past. The invention gained a silver medal at the Paris Exhibition of 1889, and a diploma of honour at the Antwerp Exhibition of 1894. The petitioners had, by means of attracting the attention of English manufacturers to the advantageous use which had been made of the invention in foreign countries and by their efforts and expenditure, succeeded in establishing the

(a) Reported by C. E. Malden, Esq., Barrister-at-Law.

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reputation of the invention in this country, and they had now so effectively brought the advantages of the invention to the notice of the public, that it would henceforth become remunerative and compensate the petitioners for their labour and expenditure in the past. The petitioners, subsequently to the date at which the provisional specification of this patent was lodged, took out patents for the same invention in France, Belgium, Germany, and other countries, which foreign patents were still subsisting.

Sir *R. Webster*, Q.C. and *Waggett* for the petitioners.

The *Attorney-General* (Sir R. Reid, Q.C.) and *H. Sutton* for the Crown.

Witnesses were called in support of the petition and spoke to the great merits of the invention. It was stated that the opinion which for a long period prevailed in this country that coke and the bye-products produced in retort ovens were inferior to the products of beehive ovens now no longer existed. The patent taken out by the petitioners in France for the invention would expire in 1895, and the patents taken out by them in other foreign countries would expire at other dates subsequent to 1895. The patent which the petitioners took out in Belgium would expire in 1900.

At the conclusion of the arguments their Lordships said that they would recommend the prolongation of the patent for a period of five years, and would give their reasons at a later date.

Dec. 8.—Lord WATSON gave their Lordships' reasons for their report as follows:—The letters patent of which an extension is craved were issued to the petitioners Semet and Solvay, who were the inventors, on the 17th Nov. 1880. At that date the invention was not protected in any foreign country, but patents were subsequently obtained in France, Germany, Austria, Belgium, the United States, Russia, and Spain. With the exception of the last two, these patents are still in force. The French patent will expire in the course of next year, the German in 1896, the Austrian in 1897, and those for Belgium and the United States in 1900. The Russian and Spanish patents have lapsed in consequence of the failure of the patentees to comply with a condition of their exclusive privilege, which required that the invention should be brought into actual operation within a time limited. The patentees have assigned their whole interest in these patents to the other petitioners, the Société Solvay et Compagnie, a concern in which they are both shareholders. The petitioner Solvay is a director of the company, whilst the petitioner Semet is employed by the company, and receives as remuneration a percentage of the profits derived from the use of the invention. The patent is for improvements in apparatus for coking and distilling coal, and its chief merit appears to consist in the substitution of fire-clay tubes for the brickwork flues, forming part of the structure of the kilns or ovens, which were previously in use for carrying off the products of combustion. The advantage of the substitution is twofold. In the first place, it prevents the escape of these products from the flue into the oven, through leakage, to the detriment of the coke; and, in the second place, it permits the repair of the flues without taking down the brickwork of the oven. Although the invention is apparently a very simple one, it is proved to be of considerable commercial utility. It not only effects a saving in the cost of maintaining the coking apparatus, but it yields a much larger percentage of coke, with a considerably increased amount of the products of distillation. Their Lordships have, in these circumstances, had no difficulty in coming to the conclusion that the invention is of sufficient merit to justify them, if the other circumstances of the case be favourable, in recommending an extension of the patent. That neither the patentees nor the company which has been engaged in bringing their invention under the notice of the public in this and in other countries have been adequately remunerated is established beyond doubt. The accounts produced and proved show a large debit balance; and the cross-examination of the petitioners' witnesses by counsel for the Crown and their observations upon the evidence merely went to show that the pecuniary loss of the petitioners may ultimately prove to be less than they anticipate. In some circumstances the fact that such losses have been sustained during the currency of the patent might go far to show that the patented invention was not of public utility, but their Lordships are satisfied that there is no room for such an inference in the present case. The invention appears to them to be one which from its very nature cannot reasonably be expected to come at once, or within a short period, into general use. Its adoption necessitates the destruction of existing and the erection of new apparatus, and will therefore in all probability be gradual as the old-fashioned apparatus wears out. Their Lordships' attention was very properly directed by the Attorney-General to the enactments of sect. 25 of the Patent Law Amendment Act 1852, which apply to cases where a foreign invention has not been first patented in the United Kingdom, and also to a series of decisions of this board, in which it was held that cases in which the foreign invention was first patented in this country, though not within the letter, were within the spirit of these enactments. Their Lordships do not consider it necessary to notice these decisions in detail. In this case the patent is dated before the passing of the Patents, Designs, and Trade Marks Acts 1883. and had it not been the first granted in any country the question might have arisen whether, having regard to the terms of sect. 113 of the later statute, their Lordships were bound to deal with the case as falling under sect. 25 of the Act of 1852. But their Lordships do not think that, prior to the passing of the Act of 1883, this board had laid down any rule to the effect that cases in which the British patent was the first were within the spirit of sect. 25 in such sense that its enactments ought to be strictly applied to them. The decisions already referred to go no further than to establish that, in dealing with such cases, the lapse of patents for the same invention in foreign countries and the policy of the Legislature, as indicated in sect. 25, were circumstances to be taken into account in considering whether a prolongation ought to be granted. Thus, in *Re Betts' Patent* (7 L. T. Rep. 577; 1 Moo. P. C. N. S. 49) three patents had been obtained, in Britain, France, and Belgium, the British being the first of them; and this board advised Her Majesty to grant an extension for five years, although the Belgian patent had expired before

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the date of the application for renewal. Their Lordships are of opinion that, inasmuch as sect. 25 of the Act of 1852 does not apply to it, the present case must be dealt with under the provisions of the Act of 1883, and therefore on the footing that sect. 25 has been repealed by the Legislature. The rule laid down for their guidance by sect. 25 (4) of the later Act is to the effect that "the Judicial Committee shall, in considering their decision, have regard to the nature and merits of the invention in relation to the public, to the profits made by the patentee as such, and to all the circumstances of the case." The practical result of that legislation is, that the committee are no longer deprived of the right to recommend, in their discretion, the extension of a patent which is not the first in cases where one or more foreign patents for the same invention have lapsed or expired. But the lapse or expiry of foreign patents remains, as it always has been, one of the circumstances which must necessarily be considered. It is a circumstance which may prejudicially affect the interests of the inhabitants of the United Kingdom; and it is therefore one which must be taken into account, along with the other facts of the case, where there is no patent for the invention outside the United Kingdom, as well as in cases where foreign patents exist or have existed. In cases where the prolongation of a patent would place the inhabitants of Great Britain and Ireland at a disadvantage in competition with the subjects of a foreign state, that circumstance must militate strongly against its extension. Whether the disadvantage, either certain or probable, ought to outweigh the right of the patentee to obtain a renewal upon other grounds must always be a question of degree, to be decided according to the special circumstances of each case. In the present case the evidence does not suggest that there is much or any appreciable competition in the markets of the world between coke of British and of foreign manufacture, or between articles British and foreign, which depend for their manufacture upon the use of coke as fuel. Then, in Russia and Spain, the two countries in which the patents taken out for the present invention have lapsed, the evidence shows that the invention is not used. In these circumstances their Lordships have come to the conclusion that the patent ought to be extended for a term of five years, and they have humbly advised Her Majesty to that effect.

Solicitors for the petitioners, *Stevenson* and *Couldwell*.

Solicitor for the Crown, *The Solicitor to the Treasury*.

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 9 and 10, 1894.

(Before LINDLEY and SMITH, L.JJ.)

KITTS *v.* MOORE AND CO. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Arbitration—Agreement to refer—Action impeaching document containing agreement—Staying arbitration—Injunction—Judicature Act 1873, *s.* 25, *sub-sect.* 8.

The jurisdiction of the court to grant an injunction restraining arbitration proceedings where the right to refer the dispute to arbitration is founded on a document which is impeached by an action has not been curtailed by sect. 25, *sub-sect.* 8, *of the Judicature Act* 1873.

Decision of Lord Russell, C.J. affirmed.

The North London Railway Company *v.* The Great Northern Railway Company (48 *L. T. Rep.* 695; 11 *Q. B. Div.* 30) *distinguished.*

THE plaintiff and defendants were corn merchants, and in 1893 they entered into a speculation with reference to a cargo of alfalfa, or foreign hay, then on its way from the River Plate.

The agreement was contained in several letters, telegrams, and a "sold note."

On the 13th June 1893 the defendants sent the following telegram to the plaintiff:

> We are offered steamer cargo 1000 to 1500 tons alfalfa; for orders go anywhere. June July shipment. Think 100*s.* would buy. What do you think of this?

The plaintiff telegraphed in reply:

> Take the cargo alfalfa 100*s.* Will go joint account.

Some further letters and telegrams passed between the parties, and on the 19th June the defendants sent a printed form of "sold note" to the plaintiff, dated the 15th June, by which they purported to sell the hay to him "for account of selves" at 5*l.* per ton, "subject to the printed rules of the Liverpool Corn Trade Association Limited." This was accompanied by a memorandum from the defendants dated the 19th June, stating:

> It is understood and hereby agreed that we take one half joint interest with yourself in this cargo.

On the same day the plaintiff wrote a letter acknowledging the receipt of the contract and memorandum dated the 15th and 19th June 1893, with reference to the purchase of the cargo at 5*l.* per ton, and concluded:

> And I confirm the same in all respects.

The bye-laws of the Liverpool Corn Trade Association Limited provide that,

> All disputes out of transactions connected with the trade, except such as arise out of the business of the Clearing House, shall be referred to arbitrators.

On arrival in England the cargo was found to be short, and was rejected by the defendants, who obtained from the vendors by arbitration a sum of 400*l.* as compensation for breach of contract. The plaintiff claimed half of this as his profit, but the defendants then stated they had bought the hay at 4*l.* 15*s.* per ton, and were entitled to

(*a*) Reported by W. C. BISS, Esq., Barrister-at-Law.

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retain a sum of 5s. per ton, the difference between that price and 5l. per ton, for themselves before the money was divided, and gave the plaintiff notice that they should proceed to arbitration to settle the matter.

On the 28th Sept. 1894 the writ in this action was issued, claiming a declaration that a partnership existed between the plaintiff and defendants in respect of the cargo of hay; an account of all moneys received by the defendants belonging to the partnership; payment of what should be found due to the plaintiff on such account; and an injunction restraining the defendants from proceeding or attempting to proceed with any arbitration having reference to any disputes between the plaintiff and defendants in respect of the cargo or the partnership.

On the 17th Oct. the plaintiff applied to Lord Russell, C.J. (sitting as Vacation judge), for an interlocutory injunction restraining the defendants from proceeding with the arbitration proceedings, and the injunction was granted: (97 L. T. 536.)

From this decision the defendants appealed.

T. Willes Chitty for the appellants.—This is not a case in which an injunction should be granted; but, if it is, the court has no jurisdiction to grant one. It is not a case in which before the Judicature Act 1873 the court could have granted an injunction, and the jurisdiction has not been increased by sect. 25, sub-sect. 8, of that Act. An injunction will not be granted even though the arbitration proceedings may be futile and vexatious:

The North London Railway Company v. *The Great Northern Railway Company*, 48 L. T. Rep. 695; 11 Q. B. Div. 30;
London and Blackwall Railway Company v. *Cross*, 54 L. T. Rep. 309; 31 Ch. Div. 354;
Furrar v. *Cooper*, 62 L. T. Rep. 528; 44 Ch. Div. 323;
Jackson v. *Barry Railway Company*, 68 L. T. Rep. 472; (1893) 1 Ch. 238;
Wood v. *Lillies*, 61 L. J. 158, Ch.

The effect of sect. 25, sub-sect. 8, of the Judicature Act 1873 on the jurisdiction of the court to grant injunctions, was considered in *Bonnard* v. *Perryman* (65 L. T. Rep. 506; (1891) 2 Ch. 269) and *Monson* v. *Madame Tussaud Limited* (70 L. T. Rep. 335; (1894) 1 Q. B. 671), and Lord Halsbury is alone in considering that it was intended to enlarge it. The case of *The North London Railway Company* v. *The Great Northern Railway Company* (*ubi sup.*) does not appear to have been referred to. There is no claim here to rectify the agreement, but merely a claim for a declaration that a partnership existed between the plaintiff and the defendants. The plaintiff can get in the arbitration proceedings all the relief he asks by the action.

Marten, Q.C. and *P. S. Stokes* for the plaintiff.—The documents show that the plaintiff and defendants entered into a partnership with reference to this hay, and therefore the plaintiff is entitled to half the actual profit without any extra payment being made to the defendants:

Bentley v. *Craven*, 18 Beav. 75;
Partnership Act 1890 (53 & 54 Vict. c. 39), s. 29 (1).

This case differs from those cited, as here the document which it is alleged gives the defendants the right to have the dispute decided by arbitration, is impeached by the plaintiff, and in that state of circumstances the court has always had jurisdiction to restrain the arbitration proceedings until the question on the document itself is decided:

Mylne v. *Dickinson*, G. Cooper, 195;
The South-Western Railway Company v. *Coward*, 5 Rail. Cas. 703;
Maunsell v. *Midland Great Western (Ireland) Railway Company*, 8 L. T. Rep. 347; 1 H. & M. 130.

In *London and North-Western Railway Company* v. *Smith* (1 Mac. & G. 216) Lord Cottenham restrained a person seeking compensation under sect. 68 of the Lands Clauses Consolidation Act 1845 from proceeding by arbitration to have the damages assessed until he had established his right to compensation at law. In *East and West India Docks and Birmingham Junction Railway Company* v. *Gattke* (3 Mac. & G. 155) Lord Truro refused to restrain the arbitration proceedings in a case under that section, but in his judgment (3 Mac. & G. 168) he distinguished the former case on the ground that in that case the only question was a question of law. Here the dispute is a question of law—namely, whether a partnership was created between the parties. In *East and West India Docks and Birmingham Junction Railway Company* v. *Gattke* the question was damage or no damage, and that decision does not affect this case. The court has jurisdiction to restrain arbitration proceedings in such a case as this:

Witt v. *Corcoran*, L. Rep. 8 Ch. App. 476 (n.);
Sissons v. *Oates*, 10 Times L. Rep. 392;
Malmesbury Railway Company v. *Budd*, 2 Ch. Div. 113;
Piercy v. *Young*, 42 L. T. Rep. 710; 14 Ch. Div. 200.

The only agreement is to refer to arbitration any dispute arising under the "sold note" itself, and the dispute here does not arise under it.

T. Willes Chitty in reply.

LINDLEY, L.J.—The question raised on this appeal is one of some practical importance, and it is one that is not altogether free from difficulty. The case is this: The plaintiff and the defendants entered into a speculation with reference to some hay, and they have disagreed with reference to the mode in which the accounts between them are to be adjusted. The agreement between them is contained in a series of documents commencing on the 13th June 1893, and amongst those documents there is what is called a "sold note," which has given rise to all this difficulty. The defendants adopted, as business men very often do, a printed form entirely inapplicable to the case. It is a printed form applicable to a transaction of sale instead of such an adventure as the plaintiff and defendants have entered into. The printed form refers to the printed rules of the Liverpool Corn Trade Association, and the plaintiff acknowledged the receipt of it and the memorandum accompanying it. Now a dispute has arisen as to whether the hay which is referred to is to be invoiced to the firm, the plaintiff and defendants (as sale is out of the question, there was no sale), at 100s., or at 95s. The plaintiff says it should be the latter. The defendants say, "We must refer that dispute to arbitration." The plaintiff says, "No, I shall not

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refer it to arbitration; I shall bring an action to have our rights determined, and I shall impeach the agreement upon which you rely. That printed document upon which you rely I shall ask the court to say does not contain the true agreement between us." Under these circumstances the plaintiff, Kitts, brings an action for the ordinary partnership account, and he asks for an injunction to restrain the arbitration proceedings, and he does so upon the footing that the agreement which contains the arbitration clause is for some reason which he alleges not binding—whether for fraud or mistake, or surprise, or for some other reason, I do not say, because the statement of claim has not been delivered. His equity is to impeach that agreement. Then it is argued on his behalf that, where the agreement has been impeached the courts of equity have always granted an injunction restraining an action or a reference under the agreement, until the equity suit has been determined. That appears to me to be a correct statement of the practice of the courts of equity before the Judicature Act. That is shown by the cases of *Mylne* v. *Dickinson* (*ubi sup.*), *The South-Western Railway Company* v. *Coward* (*ubi sup.*), and *Maunsell* v. *Midland Great Western* (*Ireland*) *Railway Company* (*ubi sup.*). In all those cases the Court of Chancery did grant an injunction to stay a reference to arbitration upon the ground that the agreement containing the clause was impeached. Now, is there anything to alter that practice, or to render it incumbent upon us to depart from it? Mr. Chitty says there is, and he pressed us with the cases of *The North London Railway Company* v. *The Great Northern Railway Company* (*ubi sup.*), *London and Blackwall Railway Company* v. *Cross* (*ubi sup.*), *Farrar* v. *Cooper* (*ubi sup.*), and *Wood* v. *Lillies* (*ubi sup.*). It appears to me that they do not touch the principle to which I have referred. The most important case is the one I mentioned first, *The North London Railway Company* v. *The Great Northern Railway Company*, in which there was an agreement to refer any difference to arbitration. One party wished to refer, and the other did not, and brought an action to stop the reference. There the agreement was not impeached; there was nothing of the kind; there was no ground in that case for stopping the arbitration. And in their judgments Lord Esher, M.R. (then Brett, L.J.) and Cotton, L.J. say that in that state of circumstances courts of equity had never granted such an injunction, and they said also — and this was an important part of the decision—that sub-sect. 8 of the 25th section of the Judicature Act 1873 has not extended the jurisdiction so as to enable them to do so now. That was the decision. They did not mean to say that in cases where the Court of Chancery used to interfere the power was gone. Whether the Court of Appeal has taken too narrow a view of, or placed too narrow a construction upon, that section is another matter altogether. I do not consider I am at liberty to discuss the question. The Court of Appeal has put a construction upon it, and by that construction I am bound, but that case does not touch the principle. Now the case of *The London and Blackwall Railway Company* v. *Cross* (*ubi sup.*) was a case under the Lands Clauses Act, and the decision really amounts to this: that, notwithstanding the 25th section of the Judicature Act, the court will not alter the practice which has prevailed under the Lands Clauses Act since it was settled by Lord Truro in *East and West India Docks and Birmingham Junction Railway Company* v. *Gattke* (*ubi sup.*). There was a difference of opinion at that time on this subject. There were great inconveniences either way. The inconveniences were pointed out by Lord Truro, and also by Lord Cottenham. Lord Cottenham thought the best thing was to allow a person to bring an action, or file a bill, and have his rights determined before the arbitration. Lord Truro thought that way was inconvenient, and that the best way under the Lands Clauses Act was to let the parties have an arbitration, and get their rights determined. That case was decided fifty years ago, and what was said in the case of *The London and Blackwall Railway Company* v. *Cross* (*ubi sup.*) was that, notwithstanding the 25th section of the Judicature Act 1873, the court would not alter the practice as it had been settled in the case of the *East and West India Docks and Birmingham Junction Railway Company* v. *Gattke*. There is no single case which Mr. Willes Chitty with all his energy and all his industry has been able to discover which in any way curtails the power of this court to stop an arbitration which is founded upon an agreement which is impeached. I think the Lord Chief Justice took a correct view of the case, and that this appeal ought to be dismissed. Of course the injunction will only be, as the Lord Chief Justice has worded it, until the trial.

Smith, L.J.—This is an appeal from the judgment of the Lord Chief Justice, who granted an injunction against the defendants restraining them from proceeding further with an arbitration until the trial of an issue which has been raised between the plaintiff and the defendants. The real question in this case, speaking for myself, is whether we are bound by authority to say that the Lord Chief Justice could not grant that injunction. Now, as I understand the facts of the case which have been brought before me, as a matter of convenience I have not the slightest doubt that the proper thing is to stay this arbitration until the issue in dispute between the plaintiff and defendants has been adjudicated upon. At one time, without fully understanding the facts, I was of a contrary opinion; but, in my judgment, it has been shown that there is here a real controversy between the parties as to whether or not the printed document, which is the only document containing the arbitration clause, is or is not indicative of the real position between the plaintiff and the defendants. With regard to the question—and it is the real question ultimately to be decided between the plaintiff and the defendants—whether this hay is to be placed on the joint account at the cost price of 100*s.* or 95*s.* a ton, if that document is unimpeached it seems to me that the plaintiff's case is gone, because it is there stated that it is to be at 5*l.*, that is 100*s.* a ton. Therefore the plaintiff brings his action for the purpose of impeaching that agreement. The defendants had before the plaintiff brought his action to impeach this agreement commenced proceedings to have the matter decided by arbitration, and the plaintiff having brought his action to impeach the agreement, I do not say upon what ground, applied to the Lord Chief Justice to stay the arbitration, and the Lord Chief Justice came to the conclusion—I use words upon which a great deal has already been

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said—that it was just and convenient that it should be stayed. Whereupon it is said that it cannot be stayed because, in the case of *The North London Railway Company* v. *The Great Northern Railway Company* (*ubi sup.*), this court held that under no conceivable circumstances has the court jurisdiction to stay by injunction proceedings by arbitration. I am of opinion that the averment of Mr. Willes Chitty is too large when he says that is the decision of the court in that case. The point which came up for adjudication there was whether or not sect. 25, sub-sect. 8, of the Judicature Act 1873, which says that an injunction may be granted when the court thinks it just and convenient, has enlarged the jurisdiction which the Court of Chancery had theretofore exercised. That was the point which came up for adjudication, and this court has undoubtedly held that where a litigant had no right to an injunction, and would not have obtained an injunction from the Court of Chancery prior to the Judicature Act 1873, he cannot get one now. That was the *ratio decidendi*, and I am loyally following that case. There was no question there of impeaching the agreement for arbitration, but the sole ground taken was that the arbitration proceedings should be stayed by injunction, because there was nothing in it, and they would be futile and useless. The court held that, inasmuch as before the Judicature Act 1873 that was no ground for staying such proceedings, it was no ground for staying the proceedings in that case. That I take to be the decision in *The North London Railway Company* v. *The Great Northern Railway Company* (*ubi sup.*). Mr. Marten accepts that decision, and in no way cavils at it, nor could he, and we are loyally following it. But Mr. Marten contends that, prior to the passing of the Judicature Act 1873, the decisions of the Court of Chancery were that where a litigant was seeking to impeach a document which contained an arbitration clause, the Court of Chancery had jurisdiction to grant an injunction when it thought it right to do so. The two salient cases which he referred to were *Mylne* v. *Dickinson* (*ubi sup.*), before Lord Eldon, in 1815, and *Maunsell* v. *Midland Great Western* (*Ireland*) *Railway Company* (*ubi sup.*), decided in the year 1863. The latter case was before Wood, V.C., and it was a case in which there was an agreement to refer disputes to arbitration, and an injunction was asked by one of the parties to restrain proceedings by arbitration, that party impeaching the agreement, because he said the directors had been acting *ultra vires*. If the point had been not that the agreement was *ultra vires*, but that the agreement had been entered into by the directors on behalf of the shareholders *intra vires*, and they wanted to get rid of the arbitration on the ground of its being useless and futile, no injunction would have been granted. But they impeached the agreement, because they alleged that the agreement was *ultra vires* the directors. It was held that they were not bound by the agreement, and not bound by the proceedings on arbitration, and therefore the court granted the injunction. The decision in the case of *The South-Western Railway Company* v. *Coward* (*ubi sup.*) is to the like effect. Therefore, loyally following the case of *The North London Railway Company* v. *The Great Northern Railway Company* (*ubi sup.*), and adopting it, I am of opinion that this case is not covered by it, because in that case there was no pretence for saying that anybody was impeaching the agreement. Mr. Marten has satisfied me that the practice of the Court of Chancery was to grant injunctions under these circumstances prior to the Judicature Act 1873. I do not think it could be argued that sect. 25 of the Judicature Act 1873 was intended to curtail the jurisdiction of the court, which seems to have been the point that was specially argued in *Monson* v. *Madame Tussaud Limited* (*ubi sup.*), in which case Lord Halsbury held that it was intended to enlarge it; but he is the only judge who has expressed that opinion up to the present day. As I have already said, if there was jurisdiction to stop these arbitration proceedings, I think it ought to be exercised, and I think the decision of the Lord Chief Justice in this case should be affirmed. The appeal must be dismissed with costs.

Solicitors for the plaintiff, *Woodward* and *Hood*.

Solicitors for the defendants, *Pritchard, Englefield*, and *Co.*, agents for *Barrell, Rodway*, and *Co.*, Liverpool.

Tuesday, Nov. 13, 1894.

(Before Lord HALSBURY, LINDLEY and RIGBY, L.JJ.)

McILQUHAM v. TAYLOR. (a)

APPEAL FROM THE CHANCERY DIVISION.

Covenant—Construction—Covenant to pay 1000*l. or transfer "*1000*l. worth" of fully paid-up shares in company to be formed by covenantor—Company formed with preference and ordinary shares—Breach—Right of covenantee to recover sum of money.*

The defendant, by deed dated the 2*nd Dec.* 1892, *covenanted within twelve months from that date to "pay the sum of* 1000*l., or hand over to or otherwise transfer into the names of" the plaintiffs "*1000*l. worth of fully paid-up shares in a company to be formed" by the defendant within the same period for working certain mines, the capital of such company not to exceed* 12,000*l.*

The defendant formed the company, and it was registered on the 20*th Nov.* 1893 *with a capital of* 12,000*l., divided into* 600 (*A*) *or preference, and* 600 (*B*) *or ordinary shares of* 10*l. each. On the* 23*rd Nov.* 1893 *the defendant executed to the plaintiffs a transfer of* 100 (*B*) *shares purporting to be fully paid, but which had not been paid for in cash. No contract had been registered in respect of these shares before issue as required by sect.* 25 *of the Companies Act* 1867. *The shares of the company had never had any marketable value. Under these circumstances the plaintiffs declined to accept the shares, but claimed payment of* 1000*l. in cash.*

It was decided by Stirling, J. (ante, *p.* 484) *that the shares which the defendant had contracted to transfer were to be shares in a company in which all the shareholders should stand on a footing of equality; that by forming the company with preference and ordinary shares the defendant had put it out of his power to comply with that branch of the covenant which related to the transfer of shares; and that he was, therefore, on*

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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the authority of Studholme *v.* Mandell (1 *Lord Raym.* 279), *bound to perform the other alternative by paying the* 1000*l.* *The defendant appealed.*

Held, that the meaning of the covenant was not shares of the nominal value of 1000*l.*, *but shares which were worth* 1000*l. in the market; and that therefore on this ground, without going into the reasons given by Stirling, J. for his decision, his judgment must be affirmed, and the appeal dismissed with costs.*

Appeal by the defendant from a decision of Stirling, J. (*ante*, p. 484).

Graham Hastings, Q.C., and *Bramwell Davis* for the appellant.—The respondents claim damages for the breach of the covenant contained in the deed. The appellant's contention is that no damage was sustained, and therefore that, in spite of the breach of the covenant, there ought to be no damages awarded. It is an alternative covenant to pay 1000*l.* or to hand over 1000*l.* worth of fully paid-up shares. There is no guarantee that the shares will fetch that sum. It is an option to pay 1000*l.* or to hand over shares. The appellant does not deny that there was a technical breach, but he says that the respondents have sustained no damage, because, although they did not get the shares, the shares were absolutely worthless. Stirling, J. decided the case on the ground that the covenant contemplated that all the shares in the company should rank equally—that there was an implied term in the covenant to that effect—and that therefore the appellant was bound to perform the first part of the covenant, he having put it out of his power to perform the latter. We submit that there was no implied stipulation that the shares should rank equally, for companies are generally formed with two classes of shares—ordinary and preference. The appellant having stipulated one thing—viz., that the capital of the company should not exceed 12,000*l.*—he could (if that had been the intention) have as well stipulated that the shares should rank equally. Why, then, should such a stipulation be inferred? There is no question of fraud here; it is not suggested. It is absolutely immaterial that there were two classes of shares, because the preference and the ordinary shares were both of no value. Stirling, J.'s judgment proceeded on the Partnership Act 1890, and also on the case of *The British and American Trustee and Finance. Corporation Limited* v. *Couper* (70 L. T. Rep. 882; (1894) App. Cas. 399). His Lordship also attached great importance to *Hutton* v. *The Scarborough Cliff Hotel Company Limited* (2 Drew. & Sm. 521). But we submit that the learned judge's view was based on a fallacy, because he was not construing articles of association, but a deed of covenant. The shares were worth 1000*l.* nominal value, although of no value in the market. [Lord Halsbury.—You can hardly deny that your construction strikes the word "worth" out of the covenant altogether. It is not 1000*l.* nominal value. It is 1000*l.* worth of shares.] The respondents are to have fully paid-up shares of the nominal valne of 1000*l.*

Grosvenor Woods, Q.C. and *Griffith Jones*, for the respondents, were not called upon to argue.

Lord Halsbury.—I confess that in this case I have not been able to entertain any doubt from the first time the covenant has been read to me. I should construe it as I should construe any ordinary language. I think if the covenant itself is not ambiguous I have no right to refer either to the recitals or to the statement of the consideration. And it seems to me, without at all going into the reasons of the learned judge in the court below, that it would not be proper to contend that those words have not in their ordinary natural meaning an intelligible proposition that there is to be 1000*l.* worth of shares. It is vain to contend that if you take any other construction of it you do not strike out the word "worth" altogether. Therefore, upon the ordinary principle of construction, if there is nothing cutting down the natural meaning of the word, I must construe it according to what I apprehend to be the natural meaning of the word. You cannot construe an instrument of this sort by striking out a word and asking us to read the document in such a way as to make that word absolutely inoperative. It sins against the ordinary rule of construction. I am of opinion that the court below was right, and that the true construction of the language is that the transfer was to be of 1000*l.* worth of shares. It is admitted that these shares were not worth 1000*l.* The appeal must be dismissed with costs.

Lindley, L.J.—I am of the same opinion. The covenant was by the defendant that he will within twelve calendar months from the date of the document pay the sum of 1000*l.*, or hand over to or otherwise transfer into the names of the plaintiffs 1000*l.* worth of fully paid-up shares in a company to be formed by the defendant, the capital of which was not to exceed 12,000*l.* Now, what does that mean? Mr. Graham Hastings has invited us to construe the covenant as meaning that the defendant will pay 1000*l.* in cash or in shares—that is to say, that he will transfer shares to the nominal value of 1000*l.* I do not think that that is the fair meaning of the language used. I put to Mr. Graham Hastings this aspect of the case: Supposing that these shares had gone up in price and the defendant had offered and tendered a smaller number than 1000*l.* in nominal value, but 1000*l.* worth in the market, what would have been the answer? The shares would be taken to be according to the market value. Of course, it is the same question from another point of view. But it strikes me that it would be unanswerable. No one could have accused the defendant of breaking his covenant; he would have done exactly what he said he would do—viz., pay 1000*l.* worth of shares. Reliance has been placed on the recitals, and the recitals no doubt express the intention of the parties in language somewhat different. But I do not think it is right to construe the plain words of this covenant with reference to the language of the recitals, more especially as the draftsman has departed from the view which he entertained when he drew the recitals. There is no covenant here to form a particular company with this, that, or the other capital, or anything of the sort. It is all put in a different shape; the defendant is to pay the money or 1000*l.* worth of shares in a company to be formed. And although of course the recitals from one point of view helped Mr. Graham Hastings, the recital that he is to pay 1000*l.* worth of shares is against him. I think that the only safe way is to adhere to the

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language of the covenant, which to my mind is perfectly plain.

RIGBY, L.J.—I am of the same opinion. The word "worth" is not only an important word, but it appears to me to be the important word in the covenant. What does "worth" mean? It means worth in the sense of the real value somehow to be ascertained. There can be no difficulty in ascertaining it; it does not mean nominal value. A thing may be of the nominal value of 100,000*l.*, or, as in this case, 1000*l.*, and yet not be worth a farthing. I do not consider that the covenant is in any way ambiguous. If it had been, I do not see that we should have got any light from the recitals, or from the consideration, because I consider that they are very ambiguous, and that they do not exclude the meaning which is given in the covenant. The better way to put it undoubtedly is that, unless we see that there is something ambiguous in the covenant itself, we ought not to care about the consideration.

Appeal dismissed.

Solicitor for the appellant, *Daniel Jones*, agent for *A. J. Hughes*, Aberystwyth.

Solicitor for the respondents, *Robert Jenkins*, agent for *Smith, Owen*, and *Davies*, Aberystwyth.

Saturday, Nov. 17, 1894.

(Before LINDLEY and SMITH, L.JJ.)

NEW *v.* BURNS. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice — Evidence—Commission—Examination of defendant resident abroad—Application by defendant—Order XXXVII., r. 5.

In the exercise of its discretion to grant or refuse a commission to take evidence abroad, the Court has regard to the fact that there is a material difference between a foreign plaintiff and a foreign defendant; and where a defendant was resident in Canada. an application by him to have his evidence taken in that country was, under the circumstances, allowed.

The principle upon which the Court ought to act in granting or refusing a commission to take evidence abroad is correctly enunciated by Chitty, J. in Ross *v.* Woodford (70 *L. T. Rep.* 22; (1894) 1 *Ch.* 38).

Decision of Day, J. reversed.

THIS action was brought by two bondholders of the Caraquet Railway Company, a Canadian company, against the defendant Burns, the chairman of the company, who was also the contractor, for alleged fraudulent misrepresentations contained in a prospectus issued in London, inviting the public to subscribe for certain 6 per cent. mortgage bonds of the company.

The alleged misrepresentations were (1) that forty miles of railway constructed by the company had cost 4833*l.* per mile; (2) that the uncalled capital amounted to 44,440*l.*; (3) that an estimate based on existing traffic showed a probable revenue of 200*l.* per mile.

The defendant resided at Bathurst, in Canada, and had no place of residence in England.

The writ in the action was issued in Feb. 1891, at a time when the defendant happened to be in England. Notice of trial was, however, not given till June 1894, the delay being caused by negotiations which had been pending for a long time between the parties with a view to a settlement.

In order to carry on these negotiations the defendant came to England in March 1894. He however, returned to Canada in the following April without having come to any final settlement, and the negotiations were continued for some time longer by letter. It was stated that the difference between the parties amounted to about 1000*l.*

Shortly after notice of trial had been given the defendant took out a summons for a commission to Bathurst. In support of the application the defendant stated that he was a member of the Legislature in Canada, and that he held an important public position, which made it difficult, if not impossible, for him to attend and give evidence at the trial; and that there were other material witnesses who were resident in Canada.

The master refused the application, and Day, J., sitting at chambers, affirmed the decision of the master in view of the fact that the defendant had been served with a writ in London and had been in London during the present year.

The defendant now appealed.

Bigham, Q.C. and *Tindal Atkinson* for the appellant.—As Mr. Burns is domiciled abroad and is not the plaintiff but the defendant in this action, he ought not to be compelled to come over here to give his evidence:

Ross v. *Woodford*, 70 L. T. Rep. 22; (1894) 1 Ch. 38.

[They were stopped by the Court.]

Murphy, Q.C. and *Fitzgerald* for the respondents. [LINDLEY, L.J.—Why should there not be a commission?] Having regard to the nature of this action, it is a case in which the defendant ought to be examined in open court. Where it is sought to have a material witness examined abroad, and the nature of the case is such that it is important that he should be examined here, the party asking to have him examined abroad must show clearly that he cannot bring him to this country to be examined at the trial:

Lawson v. *The Vacuum Brake Company*, 51 L. T. Rep. 275; 27 Ch. Div. 137.

Cotton, L.J. in that case said: "I think that in a case of this sort, where it is important that the witness should be examined in court, a heavy burden lies on the party who wishes to examine him abroad, to show clearly that he cannot be reasonably expected to come here." Applying that principle to this case, on what ground is it that the defendant should not come to this country to be examined at the trial? It is not suggested that he is seeking to delay the proceedings by asking for a commission. The plaintiffs do not object to the case being adjourned. But what they want is to have the defendant examined here. [LINDLEY, L.J.—It is rather a strong thing to ask a defendant to come from Canada to be examined here.] A commission to examine witnesses abroad will not be granted unless the court is satisfied that the witnesses to be examined can give evidence material to the issue:

Ann. Pr. (1894-5) p. 730, citing *Langen* v. *Tate*, 49 L. T. Rep. 758; 24 Ch. Div. 522.

[LINDLEY, L.J.—Yes; of course the court must be satisfied that the witness is a material witness.]

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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The defendant is charged with fraud, and it is essentially a case where he ought to be examined before the jury who try the action, and he ought to make out a very strong case why he should not be. It has been laid down in many authorities that the burden is on the person asking to be excused from coming to show cause why he should not be examined in the usual way. It makes no difference whether the defendant is a domiciled foreigner or not, since the cause of action arose here and he has been served here. He has come here on several occasions, and there is no reason why he should not come again. In *Ross* v. *Woodford* (*ubi sup.*) the defendants were in the Transvaal. They had been served with a writ in this country. The evidence showed that they had no money with which to pay the expenses of the journey, and the amount the plaintiff offered was quite inadequate for the purpose. That is an entirely different case from the present. Here the defendant is a wealthy man.

No reply was called for.

LINDLEY, L.J.—I do not think that this is a case in which the court ought to refuse a commission. It was merely by a lucky accident that the plaintiffs were enabled to launch their action in this country at all. [His Lordship stated the facts of the case, and continued:] The defendant is resident in Canada, and but for the lucky accident of his temporary visit to England the plaintiffs must have gone to Canada to sue him. Under these circumstances it is not for Mr. Burns to show why he should not come here; but it is for those who are suing him to show why he should. Mr. Burns has not gone back to Canada to escape process, but because the negotiations for a settlement of the action fell through. He comes here, and he goes back, but not to escape the service of the writ. After the action is set down for trial the defendant asks that there may be a commission. I think that the general principle is correctly enunciated by Chitty, J. in *Ross* v. *Woodford* (70 L. T. Rep. 22; (1894) 1 Ch. 38). In granting or refusing a commission to take evidence abroad, there is a material difference between a foreign plaintiff and a foreign defendant. *Primâ facie* a foreigner who is sued in this country is entitled to a commission to the place where he lives. When we bear in mind that long before this action was set down for trial, the defendant had returned to Canada, I do not think that the circumstance that he was over here in March last is enough to overcome the general practice, and to induce the court to refuse a commission for the examination of a foreign defendant. I think, therefore, that the order for a commission must go, and that the appeal must be allowed. The costs will be costs in the cause.

SMITH, L.J.—I concur. It is not suggested that this application is made for the purpose of delaying the trial of the action. But it is said that, if an Englishman sues in the courts of this country a person domiciled abroad, he can force the defendant to come over to this country for the trial of the action. I do not believe that any such right at all exists on the part of a plaintiff suing a domiciled foreigner. It is said that the plaintiffs in the present case have an illegitimate motive for compelling the defendant to come over here, their object being to induce him to pay the 1000*l.* required to bring the parties to a settlement, as it was said that he would rather pay the 1000*l.* than come to this country. It is said, further, that there is another motive which appears from the affidavits—viz., that there are other gentlemen in this country who have lost their money in this company, and who wish to serve writs upon the defendant. In my opinion, those are not legitimate motives for forcing the defendant to come over here. How was it that the learned judge (Day, J.) came to the conclusion that a commission ought not to be granted? It is admitted that the learned judge was about to make an order for a commission, but when he was told that the defendant had been in this country in March last, and that he ought to be brought over again for the trial of the action, his Lordship declined to make the order. But Day, J. was not told that the defendant's presence in this country in March last was not for the purpose of defending the action, but for the purpose of carrying out negotiations for a settlement, which negotiations were still pending when he returned to Canada. If the learned judge had been told that, he would probably have granted the commission. If he had had the true facts in his mind, he would not have refused it. For these reasons I think that the appeal should be allowed.

Appeal allowed.

Solicitors for the appellant, *Morgans* and *Harrison.*

Solicitors for the respondents, *G. S.* and *H. Brandon.*

Wednesday, Nov. 21, 1894.

(Before Lord HALSBURY, LINDLEY and SMITH, L.JJ.)

Re THE RAILWAY TIME TABLES PUBLISHING COMPANY LIMITED; *Ex parte* WELTON (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Company—Issue of shares at a discount—Winding-up—Discharge of creditors—Calls—Rights of contributories inter se—*Companies Act* 1862 (25 & 26 *Vict. c.* 89), *s.* 38—*Companies Act* 1867 (30 & 31 *Vict. c.* 131), *s.* 25.

A limited company, having under its articles of association power to issue shares at a discount, created additional capital in shares, some of which were issued at a discount to A. who was also an original shareholder. The company having been ordered to be wound-up, all the creditors were duly paid before the whole of the share capital had been called up. The question then arose whether, in adjusting the rights of the shareholders inter se *under sect.* 38 *of the Companies Act* 1862, *A., as the holder of discount shares, was still liable under sect.* 25 *of the Companies Act* 1867 *to pay up the whole amount of those shares.*

Held, that the issue of shares at a discount was void altogether, and not merely as against creditors; and that therefore the discount shares were liable to be called up in full, under sect. 25 *of the Companies Act* 1867, *for the purpose of adjusting the rights of the various shareholders in the company* inter se.

Re The Almada and Tirito Company Limited; Allen's case (59 *L. T. Rep.* 159; 38 *Ch. Div.*

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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415); The Ooregum Gold Mining Company of India *v.* Roper (66 *L. T. Rep.* 427; (1892) *App. Cas.* 125); *and Re* The Weymouth and Channel Islands Steam Packet Company Limited (63 *L. T. Rep.* 445, 686; (1891) 1 *Ch.* 66) *considered. Decision of Kekewich, J., affirmed.*

THE above-named company was incorporated on the 5th Jan. 1886 under the Companies Acts 1862 to 1884 as a company limited by shares.

The original capital of the company was 30,000*l.*, divided into 6000 shares of 5*l.* each. With the exception of ten signatory shares paid for in cash, all these shares were issued to William Alexander Sandys, his mortgagee and nominees, as fully paid up under a duly registered agreement and as the consideration for the transfer to the company of the copyright, goodwill, plant, and stock-in-trade of his business.

By a special resolution of the company, passed at a general meeting held on the 25th May 1886, and duly confirmed at a similar meeting held on the 11th June 1886, the capital of the company was increased by the creation of 2000 additional shares of 5*l.* each. Of these, 600 shares were issued and paid for in cash. Of the remainder, 500 were issued as bonus and 900 as discount shares.

The articles of association of the company contained the following material provisions:

4. The shares shall be under the control of the directors, who may allot or otherwise dispose of the same to such persons on such terms and conditions and at such times as the directors think fit, and either at a discount, premium, or otherwise.

41. The company may from time to time increase the capital by the creation of new shares of such amount as may be deemed expedient.

42. The new shares shall be issued upon such terms and conditions and with such rights and privileges annexed thereto as the directors shall determine, and in particular such shares may be issued with a preferential or qualified right to dividends and in the distribution of the assets of the company, and with a special or without any right of voting.

43. The company may before the issue of any new shares determine that the same or any of them shall be offered in the first instance to all the then members in proportion to the amount of the capital held by them, or make any other provisions as to the issue and allotment of the new shares, but in default of any such determination, or so far as the same shall not extend, the new shares may be dealt with as if they formed part of the shares in the original capital.

140. If the company shall be wound-up and the surplus assets shall be insufficient to repay the whole of the paid-up capital, such surplus assets shall be distributed so that as nearly as may be the losses shall be borne by the members in proportion to the capital paid up or which ought to have been paid up on the shares held by them respectively at the commencement of the winding-up. But this clause is to be without prejudice to the rights of the holders of shares issued upon special conditions.

By a special resolution of the company, passed at a general meeting held on the 29th Nov. 1886, and duly confirmed at a similar meeting held on the 16th Dec. 1886, the capital of the company was increased by the creation of 5000 additional shares of 5*l.* each.

By a circular dated the 16th Dec. 1886, and sent to each shareholder of the company, an amount of this new capital proportionate to his holding was offered to him at the price of 1*l.* for each 5*l.* share.

The result of that circular not being satisfactory, a second circular, dated the 22nd Dec. 1886, was issued, wherein the price of each share was reduced from 1*l.* to 10*s.*

The whole of this increased capital, representing 5000 discount shares, and also the 900 discount shares above referred to, were issued on this footing, and in some cases agreements were duly filed.

Thomas Abercrombie Welton was the holder of 1270 ordinary shares of the company, 215 bonus shares, 4460 discount shares, and 1680 preference shares. He became entitled to the discount shares under these circumstances: In 1886 one Henry Hoare proposed that he should enter into a guarantee to find 2500*l.* for the "purposes of the company," 500*l.* to be paid at once and the balance at 200*l.* per month, and that the necessary resolutions for increasing the ordinary capital of the company by 5000 shares of 5*l.* each should be passed, such shares, or so many of them as might be needed to represent with the balance of unissued capital 2500*l.* at a discount of 90 per cent., to be issued at this discount.

This offer was approved by the directors at a board meeting held on the 8th Nov. 1886, Henry Hoare agreeing that any of the shareholders of the company might participate to any extent in the advantages thereby given to him. An agreement as to the creation of additional capital to be underwritten by Henry Hoare was duly filed. The discount shares were allotted to Henry Hoare, and 4460 of them were transferred by him to T. A. Welton for a nominal consideration. As to 640 of the shares, agreements were duly filed.

The company was subsequently ordered to be wound-up, and by the chief clerk's certificate, dated the 23rd March 1893, T. A. Welton was settled on the list of contributories as the holder of 4460 discount shares, upon each of which the sum of 4*l.* 10*s.* remained unpaid.

As regards the bonus shares, it was decided by Kekewich, J., on the 12th May 1893, that the holders were liable to pay up the full amount thereof in cash: (68 L. T. Rep. 649.)

On the 31st Jan. 1894 a summons was taken out by the liquidator of the company, asking that two calls, one of 10*s.* per share and the other of 2*l.* 5*s.* per share, might be made upon the holders of bonus, discount, and preference shares mentioned in the schedule to the summons. The object of the calls was to provide funds for the purpose of satisfying the several debentures and liabilities of the company, and of paying the costs, charges, and expenses of and incidental to the winding-up of the affairs of the company, for which the liquidator then estimated the amount to be realised by those calls would be sufficient.

A second summons was shortly afterwards taken out by the liquidator, asking that a third call of 2*l.* 5*s.* per share should be made on the bonus, discount, and preference shares, being the balance remaining uncalled on the shares after the making of the first and second calls above mentioned. The object of the third call was, as far as the moneys thereby produced should not in the result be required for providing for any of the debts, liabilities, costs, and expenses (for which it was anticipated they would not be required), to enable the liquidator by means thereof to adjust the rights of the contributories *inter se.*

T. A. Welton disputed the right of the liquidator to make a call on the bonus, discount, and

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preference shares held by him for the purpose of adjusting the rights of the contributories; and contended that as between him and the other shareholders the same should, by reason of the terms on which the same were issued, be treated as paid up to the extent not required for the payment of debts, liabilities, or such costs and expenses as aforesaid.

The summons was adjourned into court, and on the 7th Aug. 1894 it came on to be heard before Kekewich, J., when the following judgment was delivered:—

Kekewich, J.—There is no doubt that this case is one of some considerable importance, and I apprehend the strength of Mr. Eve's position and the strength also of his argument. Certainly the difficulty of the case depends upon what was said by the present Lord Chancellor (Lord Herschell) in *The Ooregum Gold Mining Company of India Limited* v. *Roper* (66 L. T. Rep. 427; (1892) App. Cas. 125) in the House of Lords. It is not pretended that what fell from Lord Herschell in that case was in any way necessary to the decision of the point then arising for decision in the House. To that extent what his Lordship said may fairly come within the class of *obiter dicta*. But of course anything said by Lord Herschell as a judge, irrespective of his present position, deserves the very greatest respect from me. And more than that, anything said by any member of the ultimate Court of Appeal must be regarded with scrupulous care. I need hardly add that I entertain a considerable amount of diffidence in not being able to follow the reasoning of Lord Herschell in that case. But I think it is right, having regard to his position, and the place whence the words were uttered, to express my own reasons as clearly as I can. Mr. Welton, represented by Mr. Eve, accepted shares in this company issued at a discount. I will take this as a sample, because, although there are other classes of shares, bonus shares and others, respecting which the argument has arisen, what is true of the discount shares will at least be true of the other shares in equal degree. He has been held to be a contributory as regards the bonus shares for the whole amount unpaid in cash, according to the 25th section of the Companies Act 1867, and in that decision he has acquiesced: (see *Re The Railway Time Tables Publishing Company Limited*, 68 L. T. Rep. 649.) But he says that all he is required to do is to pay the claims of creditors and the cost of winding-up. He contends that, when the court arrives at the stage which has now been reached, of adjusting the rights of contributories among themselves, then he is not liable, because there was what he has called, and I will venture to call also, a contract between him and the other contributories that these discount shares should be issued, not as carrying the liability to pay the full amount in cash, but as carrying a lesser liability; and that the liquidator cannot, now it has come to a question of the contributories *inter se*, insist on his paying the full amount in cash. I use the word "contract" as it has been used in argument for such an arrangement because I know of no other word which will fit the case, and I avoid the use of the word *quasi*-contract. But really, to my mind, the question is whether there is in any strict sense of the word a contract at all. There is no occasion to go through the sections of the Act of Parliament—the Companies Act 1862—though it was perhaps necessary for counsel to call my attention to them, because it is conceded that there is the liability of ordinary shareholders not only to contribute to debts and costs, but also to the adjustment of rights *inter se*. All that is said is, that these provisions are not applicable to this particular case because of the contract to which I have just referred. Now, under what circumstances is the contract entered into? The shareholders in general meeting—and I will assume for this purpose all the shareholders, without stopping to consider how many were present and how many voted by proxy or otherwise—agree that these shares shall be issued at a discount. Of course that was not agreed to in so many words, but I wish to put the case as strongly as I can. The 25th section of the Act of 1867 says: "Every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing." That was not done. It has now been finally settled in the case of *Re The Almada and Tirito Company Limited; Allen's case* (59 L. T. Rep. 159; 38 Ch. Div. 415) that any resolution of that kind is *ultra vires*; that it is not within the powers of the company, even by unanimous resolution, to issue shares at a discount; and in that sense—in the sense in which it is *ultra vires*—it may be said that the shareholders could not in general meeting, even if they were all present, so ratify a contract of that kind as to make it binding on the company. That is, I apprehend, the meaning of *ultra vires* of the company. That might still leave it open to the shareholders to take the burden of the resolution on themselves individually to debar them from saying that it is not binding on them individually. But surely the issuing of shares at a discount is something more than *ultra vires* of the company in that sense. It is in some of the cases on the point called "illegal." In another judgment which I had before me not long ago, but which I have not been able to put my hand on at the present moment, it is called "not legal." There may be some difficulty in determining what is the precise epithet by which to style the issue of shares at a discount which is forbidden (so the Court of Appeal held) by statute. But, at any rate, you come to this: It being forbidden by statute, it is illegal, at any rate in the sense that the law says it shall not be. Is it possible to have a contract which the law says shall not be entered into? Mr. Eve says "Yes; you can have a contract between the shareholders though it is not a contract to which the company is a party." But, to my mind, there is great difficulty in principle in saying that a contract which the statute has forbidden and says shall not be can take place in one way more than another. That, I think, is concluded by authority. I have before me a case oddly enough arising in this company which then seems to have been attached to Stirling, J.—*Re The Railway Time Tables Publishing Company Limited*; *Ex parte Sandys* (61 L. T. Rep. 94; 42 Ch. Div. 98). That was before the winding-up of the company. The learned judge quotes there the judgment of Cotton, L.J. in *Re The Almada and Tirito Company Limited* (*ubi sup.*). He says: "Cotton, L.J. held that the

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contract in that case, which was substantially the same as the one I have to consider in the present case, was beyond the powers of the company to enter into. Fry, L.J. and Lopes, L.J. expressed agreement in general terms with the reasons of Cotton, L.J. Certainly they expressed no dissent whatever from that position. Then, if the contract be *ultra vires* of the company, it is not merely voidable, but it is absolutely void, and, as Lord Cairns said in a well-known case, it is incapable of being ratified by the whole of the shareholders of the company, even if they were assembled in one room and voted to that effect." Having regard to the language of that learned judge there, I do not think he was directing his attention to a contract merely *ultra vires* of the company, and which might be a contract good as between the shareholders. But what he says is just open to that distinction. However, what was said in *Re The Weymouth and Channel Islands Steam Packet Company Limited* (63 L. T. Rep. 445, 686; (1891) 1 Ch. 66) does not seem to me to be open to any such remark. North, J. says: "Mr. Cozens-Hardy's principal argument was this, that although no doubt what was done was illegal"—that was an issue of shares at a discount—"as between creditors and the contributories of the company, yet it was perfectly open to all the contributories to make such an agreement *inter se*, and that there is sufficient evidence that this was really done. If all the shareholders had been present in the same room and had all agreed to it there was nothing illegal in the bargain, nothing to incapacitate them from contracting to that effect; and Mr. Hardy says it must be taken as between the shareholders (the creditors being got rid of) that the assent of all was actually given. Mr. Hardy referred to one or two cases as tending in that direction; but I do not think they go further than that. I feel great difficulty in seeing how it would be possible to say that all the shareholders were bound." Then he goes on to make some other remarks about it. That case came subsequently before the Court of Appeal, and the Court of Appeal agreed with North, J. There are some observations in the other judgments, but Bowen, L.J. concludes his judgment in this way: "If there was a contract as between the individuals as suggested—and suggested without reason"—he puts the hypothesis—"it can only be a contract between the individuals that each should make an illegal contract with the company—a contract with the company which is *ultra vires* of the company. Such an agreement if made could not be enforced against present, and certainly would not bind future, shareholders." That seems to me to determine the point which has been argued here, and with great respect I express my entire concurrence in the views which I understand the learned judge to have entertained. To my mind, it being once decided that the issue of shares at a discount is illegal, in the sense of being forbidden by statute, the result is that the issue can confer no rights at all; and the parties meeting and agreeing that it should be done confers no rights on themselves *inter se*. I approach what Lord Herschell says in *The Ooregum Gold Mining Company of India Limited* v. *Roper* (*ubi sup.*) from that point of view. Now, the first remark I make upon what fell from Lord Herschell is, that it was not necessary for the case before the House. Lord Watson says that he has had an opportunity of considering the suggestions made by his noble and learned friend Lord Herschell, and he agrees with him. But his agreement is based on sect. 5 of the Companies Act 1879, to which Lord Herschell does not refer. Then, before turning to Lord Herschell's own language, I observe that Lord Macnaghten, who also addressed the House at considerable length, and Lord Morris, who expressed a shorter opinion, do not allude to this point at all. Ultimately Lord Halsbury, being then Lord Chancellor, says: "My Lords, before putting the question, I only desire to add that I have designedly avoided alluding to the point which has been mentioned by my noble and learned friend Lord Herschell, inasmuch as it was neither insisted upon nor argued at the bar." Lord Herschell makes those remarks, which will be found at page 143 of (1892) App. Cas. Those remarks, so far as they are directly in point here, are prefaced by these words: "Except when the Legislature has expressly or by implication forbidden any act to be done by a company, their rights," and so forth, and his conclusion is governed by that preliminary observation from first to last. It would not be agreeable to me, and I do not think it would be right, that I should read through what Lord Herschell says and criticise his language. Probably he had not before him at the moment the question of the issue of shares at a discount as it is regarded now by the practice of the court. I cannot think that he meant to say decisively and judicially that that was a case in which the Legislature had not expressly or by implication forbidden that act to be done. And treating what falls from him, as I have already said, with the greatest possible respect, I would remark that it is not binding on me, so that I am at liberty to exercise my own judgment to the best of my ability, and I must treat it as not governing this case. I must follow what I consider to be authorities which are binding on me and which agree with my own view, and hold that Mr. Welton is liable to contribute, not only to the debts and costs, but also to the adjustment of the rights of the contributories *inter se*. The order will be in the terms of the summons. I am afraid that I cannot treat this as a test case. I think I must express my opinion, refer the summons back to chambers, and order Mr. Welton to pay the costs of the adjournment.

From that decision J. A. Welton now appealed.

Eve for the appellant.—The question raised by this appeal is, whether it is competent for the liquidator to require the shareholders to pay up their discount shares merely for the purpose of adjusting the rights of the contributories amongst themselves, pursuant to sect. 38 of the Companies Act 1862. Under that section, in the event of a company being wound-up, every present and past member is liable to contribute to the assets of the company to an amount sufficient for payment of the debts and liabilities of the company, and the costs, charges, and expenses of the winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, with certain qualifications specified in the section. The leading case on the subject of shares issued at a discount is

Re Ooregum Gold Mining Company of India Limited v. *Roper*, 66 L. T. Rep. 42[illegible] Cas. 125.

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It was there held by the House of Lords that a limited company under the Companies Acts has no power to issue shares at a discount, although the contract under which the shares were issued has been registered under sect. 25 of the Companies Act 1867, so as to exonerate those taking the shares from the liability, in case of a winding-up, to pay the amount not already paid on the shares. But the point arising here was left open in that case. The decision of the Court of Appeal in *Re The Almada and Tirito Company Limited; Allen's case* (59 L. T. Rep. 159; 38 Ch. Div. 415), was approved by the House of Lords in the *Ooregum Company's* case. [LINDLEY, L.J.—Did we not settle this point in *Re The Weymouth and Channel Islands Steam Packet Company Limited*, 63 L. T. Rep. 445, 686; (1891) 1 Ch. 66?] I submit that there is a clear distinction between that case and the present. The court did not hold that, as between the contributories, such a contract as there is here cannot be binding. In the *Weymouth Company's* case there was, as in this case, a contract between the company and the shareholders, but no clause in the articles of association which contained a contract between the shareholders with respect to the distribution of surplus assets. Here there is art. 140 to that effect. The words "at the commencement of the winding-up" in that article are referable to the phrase dealing with "capital paid up on the shares;" and the concluding words say that the "clause is to be without prejudice to the rights of the holders of shares issued upon special conditions." [LINDLEY, L.J.—Yes; but it must mean valid special conditions.] The 4th article empowers the directors to allot shares at a discount. The question here is as to the adjustment of the rights of the contributories *inter se*. The liability of the contributories is limited to the amount which the shareholders have agreed between them shall be payable:

> *The Lion Mutual Marine Insurance Association Limited* v. *Tucker*, 49 L. T. Rep. 764; 12 Q. B. Div. 176.

The principle there established is also illustrated by

> *Re Maria Anna and Steinback Coal and Coke Company; Maxwell's case*, 32 L. T. Rep. 747; L. Rep. 20 Eq. 585:
>
> *Re Maria Anna and Steinback Coal and Coke Company; McKewan's case*, 37 L. T. Rep. 201; 6 Ch. Div. 447.

Maxwell's case arose under the Companies Act of 1856, but the liability to contribute is the same as under the Companies Act of 1862, sect. 38. If, according to those authorities, there is nothing illegal in contributories *inter se* agreeing that the liability of some of them shall be larger than others, it is not illegal for them to agree that the liability shall be less. In all the cases except *Re The Weymouth, &c., Company* (*ubi sup.*) the rights of outside creditors, as well as of shareholders, had to be regarded. It is competent for shareholders *inter se* to agree as to their respective liability, but not so as to bind outside creditors. There is another aspect of the case: sect. 5 of the Companies Act 1879 has recognised the power of a company to constitute part of its capital as only available in the event of and for the purposes of the company being wound-up. The effect of this company's contract in issuing shares at a discount was to constitute the shares issued at a discount as capital only available for the purposes of a winding-up. The contract operated so far as to prevent the calling up of that capital except for the purposes of a winding-up. Therefore the liability to contribute is only a liability to contribute for purposes of a winding-up. This capital was capital which under the 140th article was issued on those special terms. I rely on Lord Herschell's observations in

> *Re The Ooregum Gold Mining Company of India Limited* v. *Roper*, 66 L. T. Rep. 427, 431; (1892) App. Cas. 125, 143.

[LINDLEY, L.J.—I doubt if Lord Herschell would have made those observations with reference to this contract.] I do not suggest that the contract would be binding if there were any outside creditors; but the contract is binding upon the shareholders *inter se*. [LINDLEY, L.J.—Where is there any contract *inter se* apart from their contract with the company? Bowen, L.J. dealt with that in the *Weymouth Company's* case.] In the *Weymouth Company's* case the parties relied only on the contract with the company. There was nothing in the articles of association. He referred also to

> *Re Hodge's Distillery Company; Ex parte Maude*, 23 L. T. Rep. 749; L. Rep. 6 Ch. App. 51, 55.

Renshaw, Q.C. and *Whinney*, for the respondent, the liquidator, were not called upon to argue.

Lord HALSBURY.—I wish to keep myself perfectly free to deal with this question if it arises elsewhere, when it will be argued under circumstances where the authorities which have been cited will not be binding, except that of *The Ooregum Gold Mining Company of India Limited* v. *Roper* (66 L. T. Rep. 427; (1892) App. Cas. 125). But sitting here, I am bound by those authorities, and I am unable to distinguish the point raised in this case from that which was raised in *Re The Almada and Tirito Company Limited; Allen's case* (59 L. T. Rep. 159; 38 Ch. Div. 415) and in *Re The Weymouth and Channel Islands Steam Packet Company Limited* (63 L. T. Rep. 445, 686; (1891) 1 Ch. 66). I designedly avoid entering into the argument in this case, because, as I say, I desire to preserve my judgment perfectly free when the case comes, if it ever does come, before the ultimate Court of Appeal for decision. At present it is enough for me to say that I have looked at the three cases of *The Ooregum Gold Mining Company of India Limited* v. *Roper* (*ubi sup.*) in the House of Lords, which is binding on everybody; *Re The Almada and Tirito Company Limited; Allen's case* (*ubi sup.*), which was approved in the House of Lords; and *Re The Weymouth and Channel Islands Steam Packet Company Limited* (*ubi sup.*). The last-named case, with all respect to Mr. Eve, does, I think, deal with the very question now before us, and therefore, sitting in this court, I am bound by that decision. By saying that, I do not in the least mean to say that I disagree with it. So far as I am at present advised I should agree with it. But, whether I agree with it or not, sitting here I am bound by it. The result of that is, that we must affirm the judgment of the learned judge in the court below, and the appeal must be dismissed with costs.

LINDLEY, L.J.—I am of the same opinion. I do not think that by any process a share can be

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issued at a discount so as to render the holder of it not liable to pay calls under any circumstances. I do not think it can be done consistently with the Acts of Parliament. I think that that principle has been sanctioned, and will be found to be made the ground for decision in a great number of cases. Those which have been referred to by Lord Halsbury are the most recent and the best known. But if you take them all, adding *Trevor* v. *Whitworth* (57 L. T. Rep. 457; 12 App. Cas. 409), in which the principle of the whole question was very carefully discussed in the House of Lords, my view is that it cannot be done, and if it is to be done the House of Lords must say so.

SMITH, L.J.—I really have nothing to say, except that I feel myself bound by authority here.

Appeal dismissed.

Solicitors for the appellant, *Slaughter* and *May*.

Solicitor for the respondent, *C. T. Whinney*.

Nov. 21 *and* 22, 1894.

(Before Lord HALSBURY, LINDLEY and SMITH, L.JJ.)

TYRRELL *v.* PAINTON. (*a*)

APPEAL FROM THE PROBATE DIVISION.

Practice — Equitable execution — Reversionary interest in proceeds of sale of real estate—Application for receiver—Jurisdiction to appoint.

The court has jurisdiction to appoint a receiver by way of equitable execution over an equitable reversionary interest in personalty under a will.

Fuggle *v.* Bland (11 *Q. B. Div.* 711) *approved and followed.*

Decision of Lord Russell, C.J. reversed.

BY an order of the President of the Probate Division (Sir Francis Jeune), made in this action on the 27th April 1894, it was ordered that the defendants, Joseph Richard Painton and John Painton, should, within seven days from the service of the order upon them, pay to the plaintiff, Edward Brooks Tyrrell, or to his solicitors, the sum of 213*l.* 14*s.* 10*d.*, being the amount of his taxed costs of the action.

The order was duly served on both the defendants, on the 2nd May 1894, but the money was not paid.

The defendant John Painton was entitled to a reversionary interest in the residuary real and personal estate devised and bequeathed by the will of Joseph Painton, who died on the 14th Aug. 1869.

By his will, dated the 22nd Dec. 1868, the testator devised and bequeathed all his real estate and chattels real and all his personal estate to two trustees upon trust, with all convenient speed after his decease, to get in and convert into money all such part of his personal estate (except chattels real) as should not consist of money, and to invest the same and his other residuary moneys in manner therein mentioned, and during the life of the testator's wife to pay to her, or permit her to receive, the income thereof, and also the rents and profits of his real estate; and from and immediately after her decease the testator directed that the trustees for the time being of his will should forthwith sell his real estate and chattels real. And he declared that his trustees should stand possessed of the moneys to arise from the realisation of his real estate and chattels real and of all other his moneys and residuary personal estate, upon trust, in case there should be issue of his marriage with his said wife, for the children of the marriage as therein mentioned, but in case there should be no issue of the marriage in trust for the defendant absolutely.

The testator's wife survived him, but there were no children of the marriage.

The testator's real estate consisted of certain copyhold premises.

The plaintiff took out a summons asking that he might be appointed "receiver of the reversionary interest to which the defendant John Painton is entitled under the will of Joseph Painton deceased" of and in certain copyhold premises, the description of which was given, "which said several premises form part of the residuary real estate of the said Joseph Painton, deceased, for the purpose of realising thereout the sum of 213*l.* 14*s.* 10*d.*" ordered to be paid by the defendant to the plaintiff.

At the time when the application for the appointment of a receiver was made the testator's widow was still living, and she was in receipt of the rents and profits of the copyhold premises.

The plaintiff, in his affidavit in support of the application, stated that "he was informed and believed that the defendants had very little property (if any) which could be attached under a writ of *fieri facias*.

On the 23rd Sept. 1894 Lord Russell, C.J., sitting at chambers as vacation judge, refused the application because he thought that under the will the defendant had an interest in land which was held in trust for him; and that consequently that interest could be taken under a writ of *elegit*.

From that decision the plaintiff now appealed.

Wheeler, Q.C. (*W. H. Nash* with him) for the appellant.—The interest of the respondent under the will is an equitable reversionary interest in a sum of money, and not an interest in land held on trust, within the meaning of sect. 11 of 1 & 2 Vict. c. 110. Consequently it is not liable to be attached by means of a writ of *elegit*, or otherwise than by the appointment of a receiver by way of equitable execution. The appellant is therefore entitled to an order appointing him receiver of the respondent's equitable reversionary interest in the proceeds of the sale of the copyholds. There being, as the appellant swears, very little property belonging to the respondent which can be attached under a writ of *fi. fa.*, he seeks to obtain equitable execution. A judgment creditor can procure the appointment of himself as receiver of a reversionary interest in personalty under a will by way of equitable execution:

Fuggle v. *Bland*, 11 Q. B. Div. 711.

That case was referred to and acted upon by Chitty, J. in

Westhead v. *Riley*, 49 L. T. Rep. 776; 25 Ch. Div. 413.

The case against the appellant is:

Harris v. *Beauchamp*, 70 L. T. Rep. 636; (1894) 1 Q. B. 801.

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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In that case the question was as to whether or not special circumstances were necessary in order to justify the making of an order for the appointment of a receiver at the instance of a judgment creditor. The court held that the circumstances of the case must be such as would have enabled the Court of Chancery to make such an order before the Judicature Acts, and that the court had no jurisdiction to appoint a receiver merely because under the circumstances of the case it would be a more convenient method of obtaining satisfaction of a judgment than the usual mode of execution. [LINDLEY, L.J. referred to *The Anglo-Italian Bank* v. *Davies*, 39 L. T. Rep. 244; 9 Ch. Div. 275.]

A. H. Carrington for the respondent.—The cases on this subject are summed up in Chitty's Archbold's Practice (14th edit., vol. 2, pp. 877, 8.). I rely on the language of Davey, L.J. in

Harris v. *Beauchamp*. 70 L. T. Rep. 636, 638; (1894) 1 Q. B. 801, 808.

Sect. 11 of 1 & 2 Vict. c. 110 empowers the sheriff or other officer to whom any writ of *elegit*, or any precept in pursuance thereof, shall be directed, at the suit of any person, upon any judgment which shall have been recovered in any action, "to make and deliver execution unto the party in that behalf suing of all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards." [LINDLEY, L.J.—In *Neate* v. *The Duke of Marlborough* (3 My. & Cr. 407) Lord Cottenham said that where there is a legal impediment to the remedy by *elegit* at law, and a judgment creditor is not able to obtain relief at law because his debtor has only an equitable interest, he is entitled to come to this court and have the same benefit in equity which he would have had at law if the debtor's estate had been legal. Equity gives the judgment creditor precisely the same relief as he would have got at law.] As regards *Fuggle* v. *Bland* (*ubi sup.*) there was no argument. The application being *ex parte* no one opposed for the debtors, and it is contrary to the decision in *Harris* v. *Beauchamp* (*ubi sup.*). As regards *Westhead* v. *Riley* (*ubi sup.*), although *Fuggle* v. *Bland* (*ubi sup.*) was there cited, it was so only for the purpose of showing that the principle of equitable execution is not confined to land.

Wheeler, Q.C., in reply, referred to the following authority as further showing that a writ of *elegit* was not a remedy open to the appellant:

Doe d. Hull v. *Greenhill*, 4 B. & Ald. 684.

Cur. adv. vult.

Nov. 22, 1894.—The following judgments were delivered:—

Lord HALSBURY.—We have considered this case, and it appears to us tolerably certain that Lord Russell, C.J. refused the application for the appointment of a receiver because he was under the impression that according to the practice an *elegit* could be issued to take the defendant's interest under the will. We think that is not so, because the interest which the defendant takes under the will is an equitable reversionary interest in personalty, and is not, as things now stand, an interest in land. Inasmuch as the authorities establish that relief of the kind asked for is the proper remedy when an *elegit* cannot be issued, we think that the order of Lord Russell, C.J. must be reversed, and an order made for the appointment of a receiver.

LINDLEY, L.J.—I am of the same opinion. The difficulty has arisen from the form of the will. [His Lordship read the material portions and continued:] After carefully considering the provisions of the will I cannot make out that any interest in land is held in trust for the defendant within the meaning of sect. 11 of 1 & 2 Vict. c. 110. His interest is an equitable reversionary interest in a sum of money, and such an interest cannot be got at by means of an *elegit*, or in any other way than by the appointment of a receiver. I have looked at the authorities, and I cannot find that the Court of Chancery has ever appointed a receiver of an equitable reversionary interest. It is said that there is this difficulty, that during the life of the tenant for life there would be nothing for the receiver to receive. But I do not think that that is a fatal objection; and I think that, if it had been shown that a tenant for life was *in extremis*, the Court of Chancery would have appointed a receiver of the equitable reversionary interest. I think that there is jurisdiction to do so. The matter stands thus: There is a case at common law of *Fuggle* v. *Bland* (*ubi sup.*) in which such an order has been made, and I can see no reason why we should not follow that and make an order appointing the plaintiff receiver of the defendant's equitable reversionary interest in the proceeds of the sale of the copyholds. The summons is wrong in form, because it asks for the appointment of a receiver of the defendant's reversionary interest in the copyholds themselves.

SMITH, L.J.—I am of the same opinion. I have nothing to add.

Appeal allowed.

Solicitors for the appellant, *Wood, Bigg*, and *Nash*, agents for *A. G. Haines*, Faringdon.

Solicitors for the respondent, *Tarry, Sherlock*, and *King*.

Nov. 12 *and* 14, 1894.

(Before the LORD CHANCELLOR (Herschell), LINDLEY and SMITH, L.JJ.)

THE BARRY RAILWAY COMPANY *v.* THE TAFF VALE RAILWAY COMPANY. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Railway company—Enactment as to rate at which one company shall forward traffic of another—Complaint as to overcharge—Jurisdiction of court to entertain—Railway Commissioners—Barry Dock and Railways Act 1888 (51 *&* 52 *Vict. c. clxxxii.*), *s.* 23—*Railway and Canal Traffic Act* 1888 (51 *&* 52 *Vict. c.* 25), *ss.* 9, 10,

By the special Act of the B. Railway Company it was enacted that the T. Railway Company should forward and afford all reasonable facilities for goods and mineral traffic destined for or coming from the undertaking of the B. Railway Company from or to certain specified places at rates per mile not greater than the lowest rate which should for the time being be charged by the T. Railway

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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Company for like traffic to or from certain other specified places. It was further enacted that, if at any time, on application made by the B. Railway Company to the Railway Commissioners sitting as arbitrators, the said Commissioners should decide that the T. Railway Company had failed to give any of the facilities therein provided, the B. Railway Company should have running powers over the lines of the T. Railway Company.

Held, that there was nothing to oust the jurisdiction of the court to entertain the complaint of the persons aggrieved by an overcharge; and that neither the special Act nor the Railway and Canal Traffic Act 1888 *conferred upon the Railway Commissioners exclusive jurisdiction.*

Decision of Chitty, J. reversed.

THE plaintiff company were incorporated by the Barry Dock and Railways Act 1884, and they conveyed goods and mineral traffic to and from their docks situate at Barry, in Glamorganshire, from and to the points of junction at Havod and Treforest, where their railways joined those of the defendant company.

The defendant company also owned and worked certain railways in Glamorganshire, and they conveyed goods and mineral traffic to and from the various collieries situated on or near their system from and to the several docks at Cardiff and Penarth, and also all goods and mineral traffic destined to and coming from the undertaking of the plaintiff company from and to the said collieries between those collieries and the junctions at Havod and Treforest.

This traffic, the plaintiff company alleged, amounted to upwards of three and a half millions of tons per annum, the most important traffic being that of coal for shipment at the docks at Barry and at the docks at Cardiff and Penarth.

The plaintiff company had no direct communication by means of any railway of their own with the collieries, all the goods and mineral traffic conveyed by the plaintiff company going to or coming from the collieries situated at or near the defendant company's system being exchanged with the defendant company at the junctions at Havod and Treforest, these junctions being situate on the defendant company's railway between the said collieries and the docks at Cardiff and Penarth. The distance from any particular colliery to the shipping places at the docks at Barry, by way of Havod and Treforest, was greater than the distance to any of the shipping places at the docks at Penarth and Cardiff.

Sect. 23 of the Barry Dock and Railways Act 1888 provided as follows:

1. The Taff Vale Company shall punctually and regularly forward and afford all reasonable facilities for goods and mineral traffic destined for or coming from the undertaking of the company (that is, the Barry) from or to Treforest, or any place northward thereof, at rates per mile not greater than the lowest rate which shall for the time being be charged by the Taff Vale Company for like traffic to or from the docks at Cardiff, Penarth, or Barry, and shall deliver all such traffic into and take the same from the company's sidings, as regards all traffic coming from or destined for Havod, or any place westward thereof, at Havod, and, as regards other traffic, at Treforest, without any terminal or other charge in respect thereof, but with such bonus (if any) in respect of traffic exchanged at Havod as, in default of agreement between the Taff Vale Company and the company, shall be from time to time determined on the application of either of them by the Railway Commissioners sitting as arbitrators, having regard to all the circumstances of the case and to the following proviso: Provided that, where any such traffic shall be carried on the Taff Vale Railway for a less distance than four miles, the Taff Vale Company shall be entitled to charge in respect of such traffic as if it were carried on their railway for a distance of four miles, and the company shall in all respects be placed on at least as favourable a footing as any other company with regard to traffic exchanged with the Taff Vale Company.

2. The Taff Vale Company shall not (except with the consent of the company under their common seal) use the railway authorised by the Cardiff, Penarth, and Cadoxton-juxta-Barry Junction Railway Act 1885 for mineral traffic other than local traffic.

3. If at any time, on application made by the company to the Railway Commissioners sitting as arbitrators, the said commissioners shall decide that the Taff Vale Company have failed to give any of the facilities herein provided for, and shall not, within reasonable time after notice, have remedied such failure, or if the Taff Vale Company use the Cardiff, Penarth, and Barry Railway contrary to the provisions of this Act, or in case the Cardiff, Penarth, and Barry Junction Railway Company shall use, or permit to be used, their railway for the conveyance of mineral traffic other than for local traffic, then the company (that is, the Barry Company) may run over and use with their engines, carriages, and waggons, and officers and servants, whether in charge of any engines or trains, or for other purposes, and for the purposes of their traffic of every description, the railways and stations following—that is to say, so much of the railways belonging to or leased or worked by the Taff Vale Company as is situate to the northward or westward of the termination of railway No. 7 authorised by the Act of 1884; together with all stations, &c., on the said portions of railway; provided always that, if and whenever the company shall exercise the running powers by this section conferred, the Taff Vale Company shall, during the period of such exercise, be relieved and discharged from any obligation under this section to deliver traffic to the company at Havod or Treforest, and from any restrictions as to the use of the Cardiff, Penarth, and Barry Railway.

By their statement of claim the plaintiff company alleged that, notwithstanding the above section, the defendant company had charged, and were continuing to charge, rates per mile for the conveyance of goods and mineral traffic destined for and coming from the undertaking of the plaintiff company between the points of junction at Havod and Treforest and the collieries, greater than the lowest rate per mile which they had from time to time charged, and were still charging, for like traffic conveyed by them to and from the said collieries from and to the said docks at Cardiff and Penarth, and the plaintiff company alleged that in this way they had suffered, and were suffering, great damage.

The plaintiff company claimed an injunction to restrain the defendant company from charging for the conveyance of goods and mineral traffic destined for or coming from the undertaking of the plaintiff company from or to Treforest, or any place northward thereof, rates per mile greater than the lowest rate which the defendant company were and should from time to time be charging for like traffic to or from the docks at Cardiff or Penarth, such lowest rate to be ascertained by dividing the gross rate charged by the defendant company for like traffic conveyed by them to or from any of the docks at Cardiff or Penarth

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divided by the distance such traffic was actually conveyed.

The plaintiff company claimed damages in addition to the injunction.

The defendant company, by their statement of defence, denied that they had in fact violated the provisions of sect. 23 as to rates. They also insisted that, if there had been any breach of the section, which they denied, the only remedy available to the plaintiff company was provided by the section, viz., by the exercise of their running powers.

The defendant company further submitted that, both by reason of sect. 23, and also by the Railway and Canal Traffic Act 1888, the Railway and Canal Commissioners alone had jurisdiction to deal with or give any remedy for any alleged breach of sect. 23; and that the court had no jurisdiction to entertain the action, or to give any of the relief which the plaintiff company claimed.

On the 17th July 1894 the action came on for trial before Chitty, J., who, without expressing any independent opinion of his own, but following a recent decision of Day, J. in *The Taff Vale Railway Company* v. *Davis and Sons Limited* (1894) 1 Q. B. 43), gave judgment for the defendant company.

The plaintiff company now appealed.

Sir *Richard Webster*, Q.C. and *Moulton*, Q.C. (with them *Joseph Shaw*) for the appellants.—The respondents are acting contrary to sect. 23 of the Barry Dock and Railways Act of 1888, and are charging the appellants more than that section authorises them to charge. The appellants are entitled to have their traffic carried at the lowest rates that the respondents charge for similar traffic to or from Cardiff, Penarth, or Barry. It is true that the section provides a remedy for a breach of its provisions; but the appellants still have their common law remedy of bringing an action:

Couch v. *Steel*, 3 E. & B. 402, 413;
Budd v. *The London and North-Western Railway Company*, 36 L. T. Rep. 802.

[The Lord Chancellor referred to *Atkinson* v. *The Newcastle and Gateshead Waterworks Company* (36 L. T. Rep. 761; L. Rep. 6 Ex. 404, 2 Ex. Div. 441) as throwing doubt upon that view of the law.] The appellants are suing because too high a charge is made against them. The provisions of sect. 23 of the Barry Dock Act of 1888 were made in the interest of the appellants, and they are entitled to all the remedies for the breach of it unless sub-sect. 3 has taken away those remedies:

The Taff Vale Railway Company v. *Davis and Sons, Limited* (1894) 1 Q. B. 43.

By that sub-section provision is made for failure of the respondents to give the appellants any of the facilities mentioned in sect. 23. A rate is not a facility in the sense in which the word is used there:

The Great Western Railway Company v. *The Railway Commissioners and Brown*, 45 L. T. Rep. 65; 7 Q. B. Div. 182.

Under sect. 23 there would have been no power for the Railway Commissioners to have awarded the appellants damages for past treaties. An action is maintainable for the expense incurred by the plaintiffs owing to the neglect of the defendants of a statutory duty:

The Guardians of Holborn Union v. *The Vestry of St. Leonard, Shoreditch*, 35 L. T. Rep. 400; 2 Q. B. Div. 145.

Under sect. 23 the appellants have a private statutory contract with the respondents. The Railway Commissioners, sitting as arbitrators, are not the tribunal that ought to decide the present question, and so oust the jurisdiction of the court. The jurisdiction conferred on the Railway Commissioners by sect. 10 of the Railway and Canal Traffic Act 1888 (51 & 52 Vict. c. 25) would not empower them to deal with the matter:

Reg. v. *The Railway Commissioners*, 60 L. T. Rep. 606; 22 Q. B. Div. 642.

Balfour Browne, Q.C. and *W. J. Noble* for the respondents.—The appellants' sole remedy is that which is afforded them by sub-sect. 3 of sect. 23, and that is fatal to the appellants' contention that there can be any remedy by action:

The Newcastle and Gateshead Waterworks Company (*ubi sup.*).

The appellants originally asked for running powers, but the Legislature gave the powers to them merely as an alternative for certain facilities. The Railway Commissioners, sitting as arbitrators, have only to find that the respondents have failed to give the facilities, and then the appellants can exercise their running powers. That is the remedy provided by the Act, and it ousts the jurisdiction of the court:

The Caledonian Railway Company v. *The Greenock and Wemyss Bay Railway Company*, L. Rep. 2 Sco. App. 347.

Under sub-sect. 3 of sect. 23 the Railway Commissioners are only to act as arbitrators. It is intended that they should exercise the jurisdiction conferred upon them by the Railway and Canal Traffic Act 1888. Where parties have elected to have their disputes settled by arbitration, they have relinquished their right to come to the court. An agreement to refer to arbitration ousts the jurisdiction of the court:

Watford and Rickmansworth Railway Company v. *The London and North-Western Railway Company*, 21 L. T. Rep. 81; L. Rep. 8 Eq. 231.

If the appellants have any past damages to complain of it is their own fault. They could have got a remedy sooner, if they were suffering any damage. Moreover, sect. 23 of the Barry Dock Act 1888 is a facility section, and the jurisdiction of the court is thereby ousted. Under sects. 9 and 10 of the Railway and Canal Traffic Act 1888 the Railway Commissioners have the like jurisdiction to deal with a complaint in such a matter as they had to deal with a complaint of the contravention of sect. 2 of the Railway and Canal Traffic Act 1854 as amended by subsequent Acts. The jurisdiction of the Court of Common Pleas under that Act was transferred to the Railway Commissioners by sect. 6 of the Railway and Canal Traffic Act 1873. Consequently, under sect. 6 of the Act of 1854 they have an exclusive jurisdiction. The term "like jurisdiction" is mentioned again in sect. 30 of the Act of 1888. Sect. 12 of the same statute authorises the Railway Commissioners to award damages. The appellants could therefore have obtained from the Railway Commissioners an

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efficient remedy. Clearly the Railway Commissioners have jurisdiction under sect. 9 of the Act of 1888, whether it is exclusive or not. But it is impossible to give jurisdiction full meaning unless it means exclusive jurisdiction. An action will not lie in respect of any breach of the provisions of sect. 2 of the Railway and Canal Traffic Act 1854:

The Denaby Main Colliery Company Limited v. *The Manchester, Sheffield, and Lincolnshire Railway Company*, 54 L. T. Rep. 1; 11 App. Cas. 97.

[Sir *Richard Webster*, Q.C. referred to *Brown* v. *The Great Western Railway Company*, 47 L. T. Rep. 216; 9 Q. B. Div. 744.] That was a case of overcharge, not undue preference, or failure to give accommodation.

Sir *Richard Webster*, Q.C., in reply, referred to

Pickering Phipps v. *The London and North-Western Railway Company*, 66 L. T. Rep. 721; (1892) 2 Q. B. 229.

The Lord Chancellor (Herschell).—The questions at issue between the parties in this case depend upon the construction of the 23rd section of the Barry Dock and Railways Act 1888, which regulates the rights of the parties in this matter. The Barry Dock Company have what Parliament gave them in that clause; the Taff Vale Company are subject to the burdens imposed upon them by that clause; neither party has, or is subject to, anything beyond that. Now, the first question is, whether the Taff Vale Railway Company have been complying with the provisions of this section, or have been making a charge in respect of the carriage from various collieries to the Hafod or Treforest Junction in violation of that section. [His Lordship read and commented on the provisions of the section, and continued:] How is the lowest rate for the time being charged to be ascertained? The Legislature seems to me to have provided that you may ascertain either the rate being charged to the docks at Cardiff, or the rate being charged to the docks at Penarth, or the rate being charged to the docks at Barry. Whichever of those is the lowest mileage rate is the lowest mileage rate to the docks at Cardiff, Penarth, or Barry within the meaning of this section; and of course that would be ascertained by taking the charge from any given colliery to Penarth, finding the mileage and the rate charged, and then ascertaining, by a comparison of the mileage and the rate charged, what was the mileage rate. Now, it is not disputed that ascertained in that fashion the Taff Vale Company have been charging, in respect of traffic which was going to the Barry Docks and which passed over their line, a higher mileage rate than the mileage rate so ascertained. But it is said that the Taff Vale Company charge the same total rate, whether the traffic is taken to the Cardiff Docks or to the Penarth Docks. [His Lordship considered the construction of the section and discussed the merits of the case, and continued:] For these reasons I think the contention of the appellants on the construction of this first sub-section is well founded, and that they are entitled to a declaration to the effect that their rights are such as I have indicated. Now that determines the rights of the parties so far as the question of charge is concerned. But then it is said that, even supposing that the construction contended for by the appellants is well founded, they are not entitled to come to this court for relief; that the obligations were imposed by the Legislature in the first sub-section of sect. 23; that the third sub-section of that clause contains a remedy if those obligations are not fulfilled; that, containing such a remedy, it contains the only remedy; and that the jurisdiction of the courts is ousted, even if the appellants establish that their rights have been violated. It cannot be disputed that where rights are acquired under statutory provision, the Legislature may so frame the enactment as to give a remedy and to confine that remedy. It always becomes a matter of construction in each case whether that is what the Legislature has done. Of course, if it were clear that the remedy given would not be a remedy applicable to all cases, it would be impossible to suppose that the Legislature had given a right, and left that right to be violated with impunity. Therefore, unless the third sub-section covers such a case as we are now dealing with, it is quite clear that the jurisdiction of the court remains. The third sub-section provides as follows: [His Lordship read that sub-section, and continued:] The first question which arises is this: Do the words "have failed to give any of the facilities herein provided for" cover a case such as that now under consideration, where there is no complaint made about the carriage, or anything in connection with carriage, except this, that a higher rate has been charged than under the statute the respondent company were justified in charging? I own that upon that point I feel very considerable difficulty. The language of the first sub-section is, that they shall afford all reasonable facilities at a given rate—a rate as certain as if it had been fixed in money—and without any terminal or other charge. But can it be said that when in the later sub-section the language used is merely "have failed to give any of the facilities herein provided for," those words cover a charge at a rate higher than that prescribed, or the making of a terminal or other charge? If that had been intended, certainly one would have expected—and reasonably good drafting would have required—that the language of the third sub-section should have been different from what it is. Unquestionably where you find the rates and the terminal and other charges specifically mentioned in the first sub-section, and in the third sub-section you only find the words "fail to provide any of the facilities," it does suggest that the scope of the third sub-section is less wide than contended for by the respondents. That is all the more so when you see that the right is only to arise where the Taff Vale Company, having done that, shall not within reasonable time after notice have remedied the failure. But I do not think it is necessary to rest my decision upon that point, although I confess that I cannot but entertain considerable doubts whether the case is within the scope of the third sub-section. Nor should I think it extraordinary that it was omitted from the third sub-section, because a question of charge of that sort is a matter which may be very easily and readily settled. It is the simplest possible question of fact, and there are modes of remedying it which are so simple that one would hardly be surprised if the Legislature had not provided a special tribunal of arbitration for the determination of such questions. But even supposing it to be within the third sub-section, the question arises

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whether it was intended that the only resort of the party aggrieved should be to that tribunal, or whether he is left to the ordinary remedies which the law provides, and would have provided if there had been no power to resort to that tribunal. In determining that, of course, one must be guided very much by the framing of the section—by the language used. It is not a reference of such questions to arbitration. If it had been, the case of *The Caledonian Railway Company* v. *The Greenock and Wemyss Bay Railway Company* (*ubi sup.*), and the other cases cited by Mr. Balfour Browne, might have been applicable. It does not provide that any such dispute shall be referred to arbitration, but merely that if at any time the Barry Dock Company apply to the Railway Commissioners in such a case, then the Railway Commissioners shall determine it, and certain consequences shall follow. It makes it in terms, as clearly as a thing could be made, merely optional on the part of the aggrieved party, the Barry Dock Company, to adopt that particular remedy. And I cannot myself come to the conclusion that there is anything in the provisions of the third sub-section to oust the ordinary jurisdiction of the courts to entertain the complaint of a party aggrieved by a distinct breach and violation of the provisions of the earlier part of the first sub-section of sect. 23. For these reasons, I think that the court has jurisdiction, and, as I have already said, this is a case for its exercise. There is another matter that was dealt with in the course of the argument, and that is the suggestion as to the effect of the Railway and Canal Traffic Act 1888. It was said that the Railway and Canal Traffic Act 1888 conferred exclusive jurisdiction upon the Railway Commissioners. The Railway and Canal Traffic Act 1888 was not actually passed until after, and did not come into operation until some months after, the Bill of the Barry Dock and Railways Company became an Act. And I do not think it would be according to sound principles to look at the Railway and Canal Traffic Act 1888 for the purpose of construing the 3rd sub-section of sect. 23 of the Barry Dock and Railways Act 1888. It was said—and it is an argument which I admit has force—that under the 3rd sub-section there was no power to award damages, and that the plaintiffs must wait a reasonable time before they could get any remedy, and that during that reasonable time the contract with them would have been violated, and they would have been sustaining injury. That was used for the purpose of showing that the 3rd sub-section could not have been intended to oust the jurisdiction of the courts. The answer sought to be given to that was, that the Railway Commissioners had jurisdiction now to give damages under the Act of 1888. The Barry Dock Act of 1888 must be construed as it would have been construed on the day it was passed without reference to a public Act coming later into operation. But then it was said that the Act itself, because of the provision as to facilities, gave the Railway Commissioners exclusive jurisdiction. There are two points upon that—first, that the 10th section of the Act seems to treat a dispute as to a rate, or a toll, or a charge, as something different from a dispute as to facilities, which is dealt with in the 9th section; and next that, as regards the 9th section, it does not provide that the commissioners shall have exclusive jurisdiction. They are to have the like jurisdiction to hear and determine a complaint of a contravention as the commissioners have to hear and determine a complaint of a contravention of sect. 2 of the Railway and Canal Traffic Act 1888. It only gives them the same jurisdiction as to the contravention of sect. 2. The only provision giving exclusive jurisdiction is found in the Railway and Canal Traffic Act 1854, sect. 6, and that only provides that the jurisdiction shall be exclusive "in any proceeding for a violation or contravention of the above enactments." Now, it seems to me impossible to enlarge sect. 6 of the Act of 1854 and make it apply, not to the enactments to which it in terms applies, but to later enactments. Probably most of the things (or many of them at all events) mentioned in the 9th section are matters in which the Railway Commissioners would have exclusive jurisdiction because they are matters in which no other court had jurisdiction, or would have jurisdiction, at common law. That may be so, just as it has been held that in the case of the Railway and Canal Traffic Act 1888 there was no action at common law, and that the only remedy was before the commissioners. But it seems to me impossible to say that if, at the time it passed, the third sub-section of sect. 23 did not make the jurisdiction of the Railway Commissioners exclusive in the matter with which we are dealing, that effect was produced by the public Act which was passed in the same year. The appeal will be allowed with costs, both here and in the court below.

Lindley, L.J.—I have come to the same conclusion. Chitty, J.'s judgment simply follows the judgment of Day, J. in *The Taff Vale Railway Company* v. *Davis* (*ubi sup.*). Day, J., in his judgment, expressed the opinion that the remedy had been misconceived, and if it existed at all, that it should have been sought for by an application by the Barry Company to the commissioners. I take that to be an indication that in the opinion of that learned judge a dispute of this kind cannot be settled by an action at law, but must be settled by proceedings before the Railway Commissioners. Now, I must say I cannot read this Act of Parliament—the Barry Dock and Railways Act 1888—as excluding the jurisdiction of any court of law. Whether the expression in clause 3 of sect. 23 "the facilities herein provided for" would include the granting of "the facilities at the rate before mentioned," or whether it is confined to facilities apart from the rate, is by no means an easy question to answer. But I will assume that "the facilities herein provided for" would include "the facilities at the rate." Still what one must look for and find in order to support Mr. Balfour Browne's argument, is something which would exclude the jurisdiction of the court. Now, I cannot find anything approaching that. There is no agreement to refer to arbitration; there is no obligation to go to the commissioners at all; it is a mere option given to one of the parties to this statutory agreement to go before the commissioners if they like. If they do not like they are not obliged to go. And before you can say that an Act of Parliament prevents a person who is aggrieved from having recourse to the ordinary remedies open to the subjects of the country in general, you must find some negative words, or some clear and distinct enactment to that effect. Construe it as you will, you cannot

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find that here. And that appears to me to be the answer to that part of the argument—that this remedy is misconceived altogether. Now I come to the question as to the merits, which is the real controversy between the parties. That turns upon the true construction of the first clause of sect. 23. Without going through it again, I confess I cannot read "or" there as "and." Unless we do read the expression "to or from the docks at Cardiff, Penarth, or Barry" as equivalent to "to or from the docks at Cardiff, Penarth, and Barry," it appears to me that we cannot accede to the argument which has been addressed to us by the defendants. The object of this, obviously, is, that the Barry Company should get the benefit of the lowest rate. The lowest rate of what? The lowest rate which shall for the time being be charged by the Taff Vale Company for like traffic to or from the docks at Cardiff, Penarth, or Barry. [His Lordship discussed the merits of the case, and continued:] As regards the actual form of the order I have sketched out very roughly that which is only intended as an idea. I see no reason at all at present for granting the injunction. An injunction can be got subsequently if it is wanted. A declaration of the rights of the parties will be ample, and it will be something to this effect:—Declare that the defendants are only entitled to charge for the conveyance of goods and mineral traffic destined for or coming from the undertaking of the plaintiffs from or to Treforest or any place northward thereof at rates per mile not exceeding the lowest rate per mile which the defendants are, and shall from time to time be, charging for like traffic to or from the docks at Penarth, such lowest rate to be ascertained by taking into account the actual distance carried, and not the conventional distance adopted in the case of the Cardiff Docks. Then you will have to put in some words to fix the point at Penarth. Perhaps "the middle of the docks" will be the best way of putting it. That must be arranged. Then there must be an inquiry of what is due from the defendants to the plaintiffs in accordance with the above declaration, and the defendants must be ordered to pay what shall be found due. Then there will be liberty to apply. That will answer the purpose. Then the defendants must pay the costs. That is only a sketch, and will have to be dealt with and put into shape.

SMITH, L.J.—I have but little to add after the manner in which this case has been dealt with by the Lord Chancellor and my brother Lindley. As to the first point—namely, whether an application to a court of law can be now maintained—it seems to me that in this case it very clearly can. It is not disputed that prior to the passing of the Barry Act 1888, if a person or company complained—as the Barry Company do complain here—that excess charges had been made by the defendants, an action at law would have lain for that excess. And the question is whether or not under sect. 23, sub-sect. 3 of that Act, you find an indication that that action at law which the Barry Company might have entertained is excluded, and that they are driven by that Act of Parliament to an application to the Railway Commissioners—whether sitting as arbitrators or not. It appears to me, without reading sub-sect. 3 again, that all that that sub-section does is to provide this: The Barry Company having the right of action, as undoubtedly they had, when the Act was passed—if they liked they might make the application to the Railway Commissioners, and then they might get the benefit resulting from that jurisdiction. To say that that is ousting the jurisdiction of the court is, in my judgment, to say that which is not accurate, and therefore that point fails. Now, as to the other point, I have only two or three words to say. Mr. Balfour Browne in his very able argument seems to me to be driven to this: If he is right in saying that the mileage rate is to be estimated upon the rate to Cardiff as pooled, he is forced to cut out Penarth and Barry from that clause. And if he is right that section should have run in this wise: "At rates per mile not greater than the lowest rate which shall for the time being be charged by the Taff Vale Railway Company for like traffic to or from the docks at Cardiff." That would have covered his case. But the section does not say that, because it goes on and adds, "to or from the docks at Cardiff, Penarth, or Barry." It seems to me, therefore, he is wrong upon that point, and upon that point the appeal succeeds.

Appeal allowed.

Solicitors for the appellants, *Downing, Holman,* and *Co.*, agents for *Downing* and *Handcock*, Cardiff.

Solicitors for the respondents, *Ince, Colt,* and *Ince*, agents for *Ingledew* and *Sons*, Cardiff.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

July 27, *Nov.* 8, 12, *and* 15, 1894.

(Before WILLIAMS, J., sitting as an additional Judge of the Chancery Division.)

Re NEW ZEALAND LOAN AND MERCANTILE AGENCY COMPANY LIMITED. (*a*)

Company—Winding-up—Official receiver—Board of Trade—Scheme of arrangement—Reservation to official receiver of rights against directors of old company—Opposition to proceedings by new company—Sanction of court—Companies (Winding-up) Act 1890, *s.* 10.

Whether or not proceedings under sect. 10 *of the Companies (Winding-up) Act* 1890 *for misfeasance ought to be instituted by the official receiver against the directors or officers of a company, is a matter for the determination of the court, and not of the Board of Trade.*

Where a scheme sanctioned by the court under the Joint Stock Companies Arrangement Act 1870 *contains a reservation to the official receiver of his right to proceed against the directors of the old company under sect.* 10 *of the Companies (Winding-up) Act* 1890 *for misfeasance, the Court will refuse to sanction such proceedings even where a* primâ facie *case of misfeasance has been shown, if it is satisfied that the directors of the new company have come to a* bonâ fide *conclusion that such proceedings will be detrimental to the interests of their company.*

THE New Zealand Loan and Mercantile Agency Company Limited was ordered to be wound-up compulsorily on the 21st July 1893.

On an *ex parte* application by the official

(*a*) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

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receiver an order was made under sect. 8 of the Companies (Winding-up) Act 1890 for the public examination of certain of the directors of the company therein mentioned.

On the 16th March 1894 the directors applied by motion to Williams, J. to discharge his order, and on his refusal to do so they appealed to the Court of Appeal.

On the 20th March 1894 the Court of Appeal by consent discharged the order, and directed that a public examination of such directors should take place before the court or such person as might be appointed by the court, with liberty for the official receiver, and any creditor or contributory of the company, to take part in the examination, putting such questions only as should be allowed by the court: (see 71 L. T. Rep. 130). The public examination of the directors was, by the direction of Williams, J., subsequently held before him in court, and occupied a considerable period, at the conclusion of which his Lordship made a statement, in which he reviewed the evidence which had been taken before him, and stated that in his opinion a *primâ facie* case of misfeasance had been established against certain of the directors.

On the 13th April 1894, pending this examination, an order was made sanctioning a scheme under the Joint Stock Companies Arrangement Act 1870, for the reconstruction of the company, upon a statement that the scheme and the carrying out of it should not interfere with the prosecution by the official receiver of such claims as it might be right to make against the officers of the company.

In order to carry out this scheme an agreement, dated the 16th May 1894, was entered into between the old company and its liquidator and the new company, which had been incorporated with the same name on the 10th May 1894, whereby the right of the official receiver to proceed against the officers of the old company was reserved, and provision made for the payment of the costs of the winding-up of the old company by the new company. In pursuance of the scheme and the agreement the assets of the company were handed over to the new company.

On the 18th June 1894 an order was obtained by the official receiver and liquidator giving him liberty to take such proceedings under sect. 10 of the Companies (Winding-up) Act 1890 against all or any of the directors or other officers of the company as he might be advised, and giving him and the new company liberty to apply.

Under this order the official receiver now proposed to take out a summons asking that certain directors of the old company might be declared accountable for moneys of that company and guilty of misfeasance and breach of trust, inasmuch as they distributed in the year 1893 a dividend at the rate of 10 per cent. per annum for the year ending the 31st Dec. 1892, whereas there were no funds properly available for payment of such dividend. The summons also asked that it might be declared that the auditors had been guilty of misfeasance, inasmuch as they certified that the balance-sheet upon which such dividend was declared and distributed showed a balance to the credit of the profit and loss account of 69,365*l.*, when in fact no such balance existed, and the summons claimed compensation from the auditors in respect thereof. Mr. Paul, the manager of the company, was also included in the summons.

This was a summons taken out by the official receiver in the winding-up of the old company against the new company, which (as amended by consent of the new company) asked for a declaration that, under the provisions of the scheme and the agreement made with the new company in pursuance of it, the new company were liable to pay the costs, charges, and expenses to be incurred by the applicant in the proceedings on and incident to the proposed misfeasance summons, and that the applicant might be at liberty to continue such proposed proceedings.

The new company objected to the liquidator taking out or proceeding with such summons, on the ground that any benefit which might thereby be derived would be more than counterbalanced by the loss of credit which would thereby accrue to the new company. Mr. Martin, the chairman of the board of directors of the new company, stated in the eleventh paragraph of his affidavit that "the directors of the new company are distinct from the directors of the old company, and there is not a single member common to both boards. In forming our opinion I and my colleagues are absolutely uninfluenced by any personal considerations whatever, and are considering solely the interests of the new company, which are intrusted to our care." This statement was not contradicted by the official receiver.

Latham, Q.C. and *Howard Wright*, for the official receiver and liquidator, submitted that a *primâ facie* case of misfeasance had been shown, and that the official receiver ought to be allowed to continue the proceedings.

Swinfen Eady, Q.C. and *Eve* for the new company.—The new company do not claim to have an absolute right to veto these proceedings; but they say that, having regard to the circumstances of this case, they ought not to be continued. It is not the duty of the liquidator to prosecute legal claims when the costs of so doing may exceed the amount recovered. The new company object to the continuance of these proceedings on the ground that they will involve great expense and occupy a considerable time, and that great damage will be thereby occasioned to the new company. The present condition of affairs has been considered by the directors of the new company, and they have unanimously come to the conclusion that the proposed proceedings will be detrimental to the interests of the new company. Under these circumstances we submit that the court ought to act upon that opinion, and direct a stay of these proceedings.

Ingle Joyce, for prior lien debenture stock trustees.

Latham, Q.C. in reply.—There are dissentient shareholders of the old company, and there is no express provision in the scheme that the whole of the assets are to pass to the new company.

Cur. adv. vult.

Nov. 15.—WILLIAMS, J. delivered the following written judgment:—Before giving judgment on this summons I wish to say that, in my judgment, the questions raised thereby are questions proper for judicial rather than departmental decision. There is no doubt that the official receiver cannot take any forensic step in the performance of his duties which shall impose upon the Board of Trade, through him, an obligation to pay costs

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without the sanction of the board. It is equally clear that as an officer of the court he cannot be allowed to take forensic steps at his own risk for costs. It may not be easy to draw a hard and fast line defining the matters as to which the board would properly determine what legal proceedings ought or ought not to be taken by the official receiver, and what are the cases in which the decision of these matters ought to be left to the court, and the court has no jurisdiction to draw such a line for the board. But whenever there is an omission by the official receiver to take a forensic step arising in the due course of liquidation proceedings the court has the right and the duty to ask the official receiver, who is its officer, to explain in open court why the step has not been taken. Generally the answer will be sufficient that he has abstained from taking the step in question by the direction of the board (his official superiors), and the court will have no right to control the discretion exercised by the board. I say "generally" because my observation has no application to the presentation by the official receiver of his report under the provisions of sect. 8 of the Act of 1890. The presentation of the report under this section is a duty the official receiver owes to the court, and a duty in the performance of which he is bound by the very terms of the statute to state his opinion—that is, his own personal opinion. I make these observations in regard to this particular summons because the Board of Trade at one time, during the pendency of it, issued to the official receiver a minute which the Board of Trade were good enough to direct the official receiver to show me, in which they said that the Board of Trade, for reasons fully stated therein, concluded, first, that the board could not advise the official receiver that he should, in the existing state of circumstances, proceed further with his summons against the new company for an indemnity; and, secondly, that the Board of Trade could not authorise the official receiver to take proceedings under sect. 10, except on the condition that the vote was fully safeguarded by an indemnity voluntarily given by those who would receive pecuniary benefit from such proceedings if successful. I hope it will be understood that I am not criticising the reasons contained in the Board of Trade minute. I have no right, even if I had the wish, to do so. The view which I wish to express is simply that the matter was one for judicial and not for departmental decision. The Board of Trade, however, out of deference, I believe, to my opinion that the questions raised by the summons ought to be decided judicially, authorised the official receiver to proceed with the summons in the form in which it now comes before me. [His Lordship then referred to the present summons, and also to the proposed misfeasance summons, and continued:] The substantial question which I have to decide in this case is, whether the proceedings under sect. 10 of the Act of 1890, which by an order on a summons taken out by the official receiver I gave the official receiver leave to institute against certain directors and officers of the old New Zealand Loan and Mercantile Agency Company, ought to be continued in the face of the opposition of the new New Zealand Loan and Mercantile Agency Company, or whether they ought to be stayed. The summons of the official receiver, in its amended form, as amended by the consent of all parties, raises also in form the question whether the new company are liable to defray the costs of the proceedings, even though it may be established that the proceedings are proceedings which ought to be continued. But Mr. Eady, on behalf of the company, did not dispute the liability of the new company to pay the costs in such case. Indeed, having regard to the terms of the order and agreement, the obligation of the new company to pay the costs seems abundantly clear. His contention merely was, that the new company ought not to be put to the cost of these proceedings, because these proceedings ought to be stayed and ought not to be allowed to continue. Mr. Eady did not go so far as to contend that the new company had an unqualified right to veto these proceedings, his contention, as I understood it, being that the new company had a right to say that the proceedings should not continue at their expense, because the new company were the persons for whose benefit the sums, if any, recovered by these proceedings would be recovered, and in the opinion of the advisers of the new company such proceedings were likely to be so costly and were so uncertain as to their result that the directors of the new company were bound as prudent administrators to oppose such expenditure, especially having regard to the damage which protracted proceedings against the directors and officers of the old company, from whom the new company purchased the business, were likely to bring upon the commercial credit of the new company. Against this contention it is urged that the claims against the directors and officers of the old company have never been transferred to the new company; that the reason why the official receiver did not transfer these claims and why the new company did not demand a transfer of them was that the sanction for the scheme under the Act of 1870 was asked for and granted on a statement that the scheme and carrying out of the scheme should in no way interfere with the prosecution by the official receiver of such claims as might be deemed right after the conclusion of the then pending examination of the directors and officers of the old company. In determining this question I propose to ask myself—first, whether these proceedings under sect. 10 for misfeasance are proceedings which the court ought to sanction in the case of an ordinary liquidation under an order for compulsory liquidation; secondly, whether, assuming the proceedings to be of that character, such proceedings ought to be stayed or discontinued because the new company by its directors have arrived at an honest conclusion—and it is not suggested by the official receiver that the conclusion is other than honest—that the possible gain to the company by a successful prosecution of these claims is not worth the risk of the costs and the injury to the commercial reputation of the company; and, thirdly, whether, assuming that these views of the new company ought to prevail generally as the views of those who would benefit by the result of the proceedings, such views ought to prevail in the present case, having regard to the statement on which the sanction for the scheme was obtained, the form of the order sanctioning the scheme, and the limitation of the agreement giving effect thereto. With regard to the first question, I cannot doubt but that in an ordinary liquidation no court would hesitate to sanction the proposed misfeasance proceedings.

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There is the opinion, taken by the official receiver, of counsel, who say that the parties against whom this summons is directed, or some of them, are liable to contribute to the assets of the company in respect of dividends improperly paid. [His Lordship read the opinion, and also the case submitted to counsel on behalf of the new company, and their opinion thereon, and said that the latter opinion fell far short of expressing a clear opinion that there was no such liability, and continued:] The question in sanctioning proceedings under sect. 10, it is to be remembered, is not whether misfeasance has been proved, but whether a *primâ facie* case of misfeasance has been shown. I should add that, in my judgment, there is also a *primâ facie* case against the auditors, who objected to the entries in the balance-sheet and yet acquiesced, and against Mr. Paul, the manager, to whom the objections were made. I should also say that the directors deny that these objections were brought to their notice. The second and third questions I propose to treat together—that is to say, the questions whether generally, and whether in this particular case, the proceedings by summons under sect. 10 of the Act of 1890, taken to enforce a *primâ facie* case of misfeasance and breach of trust, ought to be continued in the face of the opposition of the new New Zealand Company, to whom any asset or sum recovered by such proceedings would have to be paid. I will begin by pointing out that sect. 10, although it deals with misapplication of funds and breach of trust, is not punitive in its object. This has been well established. The object of the section is not punishment of delinquents, but recovery of assets. I have assumed by my questions that the new company are, notwithstanding the reservation of these claims to the official receiver, to be treated as the purchasers of these claims and the beneficial owners of anything which may be recovered thereunder. I do not think that the fact that there are outstanding a small number of shareholders of the old company who are non-assenting prevents this being so, nor do I think that, even if I ought to treat the asset reserved to the official receiver as held in trust for the non-assenting creditors, that ought to operate to induce me to order these proceedings to recover that asset to go on at the expense of the new company. I have assumed the new company to be the beneficial owners of this asset, because, although it is true that the asset is not included in the transfer to the new company, yet the official receiver would hold the asset if recovered in trust primarily for the creditors of the old company, and the creditors of the old company, by the very terms of the scheme, hold their claims in trust for the new company. This being so, no one would dispute but that *primâ facie* the new company would have the right to determine whether this asset shall be realised. Generally, as beneficial owners, the new company would have the right to have proceedings for the recovery of the asset, taken by the official receiver as trustee for them, stayed, if the company, as the *cestui que trust*, determines that the asset is not worth realisation, and this determination can be carried out without injury to others. It by no means, however, necessarily follows from this that in this particular case the new company ought to have the control of the realisation of this asset, or have a right to have the proceedings stayed because the new company does not care to have the asset recovered. So to hold would be to say that, in spite of the reservation to the official receiver of these claims, the new company has an absolute veto, an absolute right to say, "This asset is ours. We do not care to have it realised. The reasons of our objection or veto are no concern of the court." This would be to give no effect to the reservation. Mr. Swinfen Eady did not care to place his case as high as that. He expressly disclaimed arrogating to the new company an absolute right to control the realisation of this asset, no doubt because he felt that some effect must be given to the reservation of this asset to the official receiver, having regard to the circumstances that led to that reservation. What, then, is the meaning of this reservation? On the one hand, it seems clear that it deprives the new company of the absolute control, but, on the other hand, it could not be construed as giving the official receiver absolute control of this asset without the new company having any voice in the matter. No doubt the effect of the reservation which embodies the conditions imposed by me when I sanctioned the scheme of arrangement is to leave this part of the liquidation under the control of the official receiver, to the exclusion of the control of the new company. That is what I intended. This is what, in my judgment, the reservation effects—but ought I, by reason of the reservation, to deprive the new company of all voice? Does the reservation preclude me from giving effect to the views of the board of the new company, if I think that those views are honest views, honestly arrived at in the performance of fiduciary duties? I think not. The object of the reservation was public morality — commercial morality. The fact of the necessary personal continuity between the old and the new company made it the duty of the court to take care that the scheme of arrangement was not used as a shield to screen those against whom the examinations held before me showed that a *primâ facie* case of misfeasance had been made. And it is now my duty not to permit the abandonment of this asset if the abandonment is shown to any extent or in the smallest degree to screen any one from the consequences of his misfeasance; but the object of the reservation being what I have stated it to be, I do not think I ought to give the reservation an effect which would injure the commercial interests of the new company, if once I am satisfied that the desire of the company to have the proceedings stayed is honest and in no degree tainted with the corruption which the reservation was intended to prevent. In such case I think I ought to give effect to the commercial objection of the *cestui que trust* that the possible gain by a successful prosecution of these claims is not worth the risk of the costs and the injury to the commercial reputation of the company. Now, ought I in this case to impute honesty to the board of the new company?—ought I to assume that their resolution is free from taint? I think I ought to do so. The evidence before me states positively that such is the case. Mr. Martin, whose testimony is entitled to be treated with every respect, says, in the 11th paragraph of his affidavit: [His Lordship read the paragraph above set forth and continued:] I have to add to this the fact that the official receiver, in the case presented by him to me, does not suggest anything to the contrary. Having regard to the considerations which I have

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mentioned, I think I ought not to authorise the continuance of these proceedings. In arriving at this conclusion I do not give any weight to any opinion of the directors, if such there be, of the new company as to whether there is a *primâ facie* case against the old directors—that is for me to determine—but I am pressed with their commercial opinion that the proceedings would damage the company. That is a matter on which I am bound to give more weight to their opinion than to my own. I may be, and am, of opinion that in the long run it would be better for the interests of the new company that the most disagreeable facts in the past history of the management of the old company should be disclosed than that the truth should not be arrived at. Truth and light never do much harm, even in commercial matters, but I have no right to act on my own opinion against that of the board of directors to whom the company has intrusted its interests. One more remark. I cannot help feeling that the result of this judgment is unfortunate. The examination disclosed a *primâ facie* case of breach of trust. But for the reconstruction scheme that case would have been heard and determined on a misfeasance summons, and the respondents would have been found liable or declared free from liability—would have been exculpated or condemned. It seems to me a matter for regret, in everybody's interest—from every point of view—that the *primâ facie* case disclosed by the examination should never be disposed of one way or the other. It is to be regretted, but I do not know that it could have been avoided. I do not think it would have been right to refuse sanction to the reconstruction scheme for fear of this result. I do not know that the scheme could have been safeguarded more effectively than it was by the reservation. I hope that the conclusion at which I have reluctantly arrived to-day may do no man any injustice. With regard to the costs of this summons, Mr. Swinfen Eady says that the company are willing to pay them. That is right. The summons was a necessary step in the course of the liquidation, and the new company undertook to pay these costs.

Solicitors: *Freshfields* and *Williams*; *Paines, Blyth*, and *Huxtable*; *Hollams, Son*, and *Coward*.

QUEEN'S BENCH DIVISION.

Thursday, Nov. 1, 1894.

(Before Mathew and Charles, JJ.)

Pilbrow (app.) v. The Vestry of the Parish of St. Leonard, Shoreditch (resps.). (a)

Metropolis management — Drainage — Buildings divided into two blocks separated by causeway—Main drain under causeway—Premises within same curtilage—Whether drain under causeway is a "drain" or "sewer"—Metropolis Local Management Act 1855 (18 *&* 19 *Vict. c.* 120), *s.* 250.

Certain dwellings, which consisted of sets of apartments, were divided into two blocks, separated by a causeway twenty feet wide. The drainage, which was put in by the owner, was by means of branch drains running north and south from each set of apartments into a main drain running east and west under the causeway into a sewer within one hundred feet of the blocks. This main drain was a single nine-inch pipe, and the branch drains were inserted into it. No order of the vestry had been obtained for draining either of the blocks by a combined operation.

Held, that the premises were within the same curtilage, and that the main drain under the causeway was a "drain" for the drainage of "premises within the same curtilage," and was not a "sewer" within the meaning of sect. 250 *of the Metropolis Local Management Act* 1855, *and that therefore the owner of the blocks was liable for the necessary repairs to the same.*

Case stated by Mr. Rose, metropolitan police magistrate.

The appellant appeared before the magistrate to answer a summons issued by the clerk to the vestry of the parish of St. Leonard, Shoreditch, the respondents, to recover from him expenses to the amount of 209*l.* 7*s.* 6*d.*, incurred by the vestry as sanitary authority of the parish in necessary works in cleansing, alteration, and amendment of drains at Norfolk-buildings, within the parish.

The appellant was in receipt of the rents and profits of certain dwellings called Norfolk-buildings, which consisted of forty-six sets of apartments divided into two blocks, which were separated by a causeway twenty feet wide.

They were erected and the drains put in by the owner in 1882 without any plans having been submitted to the local authority, or any inspection or sanction of the drains by them.

The drainage was by means of twelve branch drains running north and south from each set of apartments into a main drain running east and west under the causeway into a sewer within 100 feet of the blocks. The main drain was a single nine-inch pipe. The branch drains were inserted into the main drain through holes cut in that pipe. No order of the vestry was produced, or had been made for draining either of the blocks by a combined operation.

The inspector of nuisances appointed by the vestry gave written notice addressed to the "owner of the dwelling-house and premises, being the block of apartments numbered 1 to 24, Norfolk-buildings," and a similar notice in respect of the block of apartments numbered 24 to 46, to "forthwith amend and reconstruct the main drains, and provide therein a properly ventilated inspection chamber fitted with interception traps; to amend and reconstruct the branch drains of all soil pipes; to disconnect the waste pipes of kitchen sinks from drains and connect the said waste pipes into inlets in stoneware gully traps fitted in surface of pathway," and that, if the owner neglected or refused to comply with this notice, the vestry would cause the above works to be done, and do such other works as the case might require, and recover the expenses or proceed for and recover the penalties incurred from the owner in the manner provided by the Metropolis Local Management Acts.

These requisitions were not complied with, and the works were ultimately done by the vestry at the cost of 209*l.* 7*s.* 6*d.* The appellant having refused to pay this sum, the summons was then issued.

The appellant contended that he was not liable to pay the expenses incurred by the vestry in the drainage because the alleged main drain was used

(a) Reported by W. W. Orr, Esq., Barrister-at-Law.

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"for the drainage of more than one building," and not "for draining any block of houses by a combined operation under the order of any vestry or district board," and was therefore not a "drain," but a "sewer," within the meaning of the interpretation clause 250 of the Metropolis Local Management Act 1855.

The magistrate decided that, having regard to the provisions of that Act and the Amendment Act (25 & 26 Vict. c. 102) as to the construction and maintenance of drains and sewers, the alleged main drain in question, draining blocks of houses by a combined operation, was, under the circumstances and notwithstanding the absence of any order of the vestry for the purpose, a "drain" and not a "sewer" within the meaning of the Acts, and he held that the appellant was liable to pay, and made an order against him for the payment of the sum of 209*l.* 7*s.* 6*d.*, the expenses which he found to have been duly and reasonably incurred by the vestry, together with the sum of 20*l.* for costs.

The question for the opinion of the court was, whether the decision of the learned magistrate was correct in point of law.

By sect. 250 of the Metropolis Local Management Act 1855 (18 & 19 Vict. c. 120):

> The word "drain" shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed, and shall also include any drain for draining any group or block of houses by a combined operation under the order of any vestry or district board; and the word "sewer" shall mean and include sewers and drains of every description, except drains to which the word "drain," interpreted as aforesaid, applies.

By sect. 73 of the Act the vestry or district board may in certain cases compel owners of houses to construct drains into the common sewer, and if the owner neglect or refuse to carry out and complete such works, it shall be lawful for the vestry or board to cause the same to be constructed and made, and to recover the expense of the same from the owners.

By sect. 74 the vestry or board may order that a group or block of contiguous houses may be drained and improved by a combined operation in cases where such group or block of houses can be drained more economically or advantageously in combination than separately, and a sewer of sufficient size already exists or is about to be constructed within one hundred feet of any part of such group or block of houses.

Woodfin for the appellant.—The learned magistrate was wrong in holding that this was a "drain." The main drain in question in this case under the causeway was not a "drain" within the meaning of the Act, but a "sewer." It does not fall within any of the definitions of the word "drain" in sect. 250. It is not a drain used for the drainage of one building only, or for the drainage of premises within the same curtilage, and it is not a drain for "draining a group or block of houses by a combined operation under the order of a vestry or district board." It is simply a drain used for the drainage of more than one building, and is therefore a "sewer" within the meaning of the section. In *Bateman* v. *The Poplar District Board of Works* (2 Times L. Rep. 637) the owner of certain cottages, which formed a continuous row, had built a nine-inch pipe drain from the cottages, the drain being at the rear of the cottages under the backyards belonging to them; this drain received the sewage from the cottages only, and carried it into a main sewer under the roadway, and North, J. held that this nine-inch pipe was a "sewer" within the meaning of sect. 250. He also referred to

Stroud v. *The Wandsworth District Board of Works* 70 L. T. Rep. 190; (1894) 2 Q. B. 1.

Finlay, Q.C. (*L. Thomas* with him) for the respondents.—The finding of the magistrate was justified if this be looked upon as a question of fact; if it be a question of law, there is really nothing in it. What is there to show that these blocks of houses are not within the same curtilage? Unless these premises are within the same curtilage we are bound to assume that the owner made a drain for the draining of this block by a combined operation without the consent of the vestry, and thus he would be enabled to throw the liability of repairing the same on the vestry. He would thereby be taking advantage of his own wrong. These blocks are different premises within the same curtilage; but if we assume for the sake of the argument that they are not within the same curtilage, then, if the owner makes a combined system of sewers without consent—as he has done here—he does a wrongful act and an unlawful act, and he would be getting an advantage by his own wrong. There are thus two points, and the decision was right in either view.

Woodfin in reply.—[MATHEW, J.—Our impression is that these premises are within the same curtilage.] The causeway is open to the public, as it opens to a thoroughfare, and the houses are entirely separate, and not connected with each other in any way. One of the blocks opens into a street; the other block opens into the causeway, and to be within the same curtilage there must be a means of access direct to the causeway from each block of houses, which does not exist in the present case.

MATHEW, J.—I think that in this case our judgment must be for the respondents. The learned magistrate was right. The question is, whether what the order applies to is a drain or a sewer within the meaning of the Metropolis Management Act 1855, sect. 250. The word drain according to that section is to mean and include any drain used for the drainage of one building only or premises within the same curtilage. Now, according to the statement in the case, there are two blocks having between them what is described as a causeway, which I should conclude was a paved yard used for the purposes of both structures, and occupied as to part of it by the common dust-bin. Is that a yard within the curtilage of both buildings? It seems to me that it is, and if we look to the definitions, first in Stroud's valuable book (Stroud's Judicial Dictionary, pp. 174-5), of curtilage, he describes it as "A little garden, yard, field, or piece of void ground lying near and belonging to the messuage; a little croft, or court, or place of easement, to put in cattle for a time, or to lay in wood, coal, or timber; or such other things necessary for the household. This is used to get rid of things unneces-

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sary for the household, namely, the dust." Then Stroud refers to the two cases that are commonly referred to in reference to this matter in recent times, namely, *Marson* v. *The London, Chatham, and Dover Railway Company* (18 L. T. Rep. 317; L. Rep. 6 Eq. 101) and *The Commissioners of Inland Revenue* v. *Goodfellow* (45 J. P. 588). Now, if it be necessary to refer to further authority, Jacob's Dictionary (by Tomlins, 4th edit.) gives a fuller description of the word "curtilage": "A court-yard, back-side, or piece of ground lying near and belonging to a dwelling-house." Then he refers to the statutes (4 Ed. 1, c. 1; 35 Hen. 8, c. 4); and also to the Act which is so frequently referred to in quarter sessions (the 7 & 8 Geo. 4, c. 29, s. 13). by which latter Act it is declared that "no building, although within the same curtilage as the dwelling-house, and occupied therewith, shall be deemed part of the dwelling-house, for the purposes of burglary, &c., unless there is a communication immediate, or by a covered-in way with the house." I have no doubt, therefore, that this was a curtilage, and that being so it comes within the very definition supplied by the Act of Parliament. The expenses, therefore, ought to have been paid by the owner of those two blocks of houses having this court-yard between them for their common convenience. The judgment of the magistrate was therefore right.

CHARLES, J.—These premises appear to me to be within the same curtilage. That being so, I think upon that short ground the magistrate was right. It is suggested that there is something in the definition of the word "street" which prohibits one from holding that this open space of ground between the two blocks of buildings is within the curtilage. I do not agree in that argument at all. The only significance of the definition of the word "street" is that it gives an artificial meaning to that word for various purposes in the Act of Parliament, and I do not think it helps us at all in construing the part of the interpretation clause which deals with drains. I think the respondents must have our judgment.

Appeal dismissed. Leave to appeal refused.

Solicitor for the appellant, *S. E. Lambert.*

Solicitor for the respondents, *H. Mansfield Robinson.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PROBATE BUSINESS.

Monday, Nov. 5, 1894.

(Before the PRESIDENT (Sir F. Jeune.)

In the Goods of ANGELICA ARMS (deceased). (a)

Will—Construction—Beneficiary—Administration with will annexed granted to surviving beneficiary.

By her will, the testatrix gave all her property to her friend Jane C. B. "for her own use, and also for the education, maintenance, and placing out in business of her son Harry E. B."; but in case the said Jane C. B. should die during the minority of the said Harry E. B., the testatrix directed "the money arising from all the property to be laid out or invested" by her executor "for his use and benefit until he shall attain the age of twenty-one, when whatever remains shall be handed over to him." Jane C. B. died before the testatrix, but after the said Harry C. B. had attained the age of twenty-one. The executor renounced, and, there being no known next of kin of the testatrix, and the Queen's Proctor declining to interfere;

The Court granted administration with the will annexed to Harry E. B., the surviving beneficiary.

THIS was a motion for administration with will annexed.

Angelica Arms, formerly of Chelsea and late of 79, Foxberry-road, Brockley, died on the 11th Dec. 1891, without any known relative, leaving a will dated the 3rd Nov. 1869, by which she named as her sole executor Matthew Andrew Little, who renounced probate on the 27th July 1892.

Advertisements for next of kin were inserted in June and July 1894, but produced no response; and the Solicitor to the Treasury, having been communicated with, wrote to say that he would not oppose the present application for administration with the will annexed to the surviving beneficiary named in the will.

The will, which was duly executed and attested, was in these terms:

This is the last will and testament of me, Angelica Arms, of No. 3, York-street, Chelsea, spinster. I direct all my just debts, funeral and testamentary expenses, to be fully paid and satisfied; I give all my household goods, furniture, plate, linen, and china, and all the rest, residue, and remainder of my personal estate and effects, whatever and wheresoever, untb my friend, Jane Curry Beeston, of No. 3, York-street, aforesaid, for her own use, and also for the education, maintenance, and placing out in business of her son, Harry Edward Beeston, and I appoint her guardian of her said son during his minority. But in case the said Jane Curry Beeston should die during such minority, then I direct the money arising from all the said property to be laid out or invested by my executor, hereinafter named, for his use and benefit until he shall attain the age of twenty-one, when whatever remains shall be handed over to him. And I appoint Matthew Andrew Little, of No. 7, Exeter-street, Sloane-street, Chelsea, sole executor of this my will.

Jane Curry Beeston died in the lifetime of the testatrix and after Harry Edward Beeston had attained his majority.

Bargrave Deane now moved the court to grant letters of administration with the will annexed to Harry Edward Beeston. He referred to

Wilkins v. *Jodrell*, 41 L. T. Rep. 649; 13 Ch. Div. 564; and

Armstrong v. *Armstrong*, 20 L. T. Rep. 776; L. Rep. 7 Eq. 518.

The COURT made the grant to the applicant as prayed.

Solicitors: *Shaw* and *Co.*

April 6, 7, *and* 9, 1894.

(Before BARNES, J.)

DAYMAN v. DAYMAN. (a)

Probate—Suit for revocation—Plea of undue execution—Evidence of both attesting witnesses —Omnia præsumuntur rite esse acta—*Costs.*

In a suit for revocation of probate on the ground of

(a) Reported by H. DURLEY GRAZEBROOK, Esq., Barrister-at-Law.

(a) Reported by H. DURLEY GRAZEBROOK, Esq., Barrister-at-Law.

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undue execution, both the attesting witnesses swore that the will was not signed by them in the testator's presence, but their evidence did not coincide upon other matters.

Held, that the presumption of law, Omnia præsumuntur rite esse acta, *must prevail.*

The testator died in 1885, *leaving a will appointing three of his sons (the plaintiff and defendants) executors. The will was drawn, from an earlier duly executed will, by a retired doctor who had made wills for other poor persons in the locality, there being no solicitor within twelve or fourteen miles, and it was admittedly signed by the testator, with his mark, in the presence of the doctor, who had prepared it, the two attesting witnesses, and a nurse. Of these four persons, the attesting witnesses alone survived. The plaintiff, soon after the funeral, expressed dissatisfaction with the will, and wrote several letters charging his mother and brothers with fraud and undue influence and stating that the estate would be wasted in law if the defendants insisted on upholding the will, probate of which was, however, granted in common form in* 1886. *Although the plaintiff took legal advice at that time, no active step was taken to set aside the will until* 1893. *The evidence of the two attesting witnesses was in disagreement on many points; but, upon the main point in contest, they both agreed, namely, that they put their signatures to the will in another room to that in which the testator was, and out of sight of the testator. Their signatures and the mark of the testator appeared on the face of the will, and the attestation clause, which was on the back of the document, was admittedly written in another room and after the mark and signatures had been affixed to the document. One of the attesting witnesses, a doctor, had made affidavits in* 1886, *in which he stated that the will was duly executed.*

The Court refused to allow the evidence of the two attesting witnesses to rebut the presumption of law, and gave judgment for the defendants in favour of the will, with costs.

THIS was a suit for revocation of probate of the last will of Richard Dayman, deceased, who died on the 31st Oct 1885, the will bearing date the 19th Oct. 1885. The estate consisted of a freehold farm of less than 20 acres of the net value of about 180*l.*; a cottage worth about 25*l.*; and personalty of the realised value of 151*l.* By his last will, the testator appointed the plaintiff and two defendants executors, and, subject to a life interest in favour of his widow, bequeathed legacies, of 231*l.* in all, among his several children, and gave the residue of his property to the plaintiff and two defendants.

The testator had executed previous wills in 1869 and 1881, which had been drawn by two accountants, and were duly executed and attested. Under the will of 1881 the widow also took a life interest in the testator's property, and, subject thereto, the testator devised the cottage to one of the defendants, bequeathed legacies, of 171*l.* in all, amongst his children, and gave the residue to the plaintiff his eldest son.

The will of 1885 was drawn by a retired doctor, named Carter, at the request of the testator, who had previously spoken to him about it, and the wording of it followed, with necessary alterations, the wording of the will of 1881, which the testator directed to be given to Dr. Carter for that purpose on the 8th Oct. 1885. After its execution on the 16th Oct. the testator expressed satisfaction at what he had done. He was an old man, weak from bodily infirmities, but conscious to the last.

From very shortly after the funeral of the testator, the plaintiff repeatedly expressed dissatisfaction with the will, and he wrote various letters to his mother and the defendants charging them with forgery, fraud, and undue influence, but the only suggestion he then made in regard to the will itself was as to certain alterations appearing on the face of it, all of which had been initialled by Dr. Carter. For the purpose of probate, Dr. Miller, one of the attesting witnesses, made two affidavits in common form, the one on account of the absence of any attestation clause on the face of the will, and the other, to the effect that the alterations above mentioned were made by Dr. Carter before execution. In both of these affidavits Dr. Miller swore that the will was signed by the testator in the presence of himself and the other attesting witness. The plaintiff took legal advice before probate was granted, and there was evidence that Dr. Carter was asked to answer, and did answer, written questions about the will. It was also shown that the plaintiff was present at a bank upon the occasion when the proceeds of the farming stock and other personalty were deposited there in the joint names of himself and the defendants, and he entered no caveat against the will, probate of which was eventually granted in common form to the defendants on the 27th March 1886, power being reserved to the plaintiff to join in the probate. There was evidence that the widow had been unable to obtain the interest on the money in the bank, owing to the refusal of the plaintiff to join in signing the necessary authority to pay it, and it was also stated that he had at times interfered with the collection of the rents on the freeholds; but it was not till 1892 that he took any active step. In that year he issued writs in the Queen's Bench Division against two of the tenants, alleging that his father died intestate and claiming to eject them as heir-at-law. The defendants then consulted their solicitors. Defences were put in simply pleading possession, and the plaintiff's solicitors being informed by the solicitors for the defendants that intestacy was out of the question, in view of the earlier wills of 1881 and 1869, the actions were allowed to drop, and the defendants did not press for costs. Almost immediately afterwards the plaintiffs started the present proceedings, setting up for the first time the case of undue execution now relied upon. Harris, one of the attesting witnesses, was examined on commission, as a witness on behalf of the plaintiff, who was his son-in-law. The other attesting witness, Dr. Miller, was called by the defendants at the hearing, and leave was given to cross-examine him.

Durley Grazebrook for the defendants.—Although there is no statutory limit of time in which the defendants could be called on to prove in solemn form, yet, as the plaintiff has allowed so long a time to elapse before calling on the defendants to do so, he is not entitled to any indulgence, and the court should approach the consideration of this case from a point of view favourable to

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the defendants: (Williams on Executors, 6th edit. 322; 9th edit. 276, note.) It is conceded that, where the attesting witnesses give uncontradicted evidence which demonstrates undue execution, and where there exist no circumstances upon which the court can found an inference that their recollection is faulty, the presumption of law cannot prevail and the will must be set aside: (Williams on Executors, 6th edit. 99; 9th edit. 93.) Such a case was

Wyatt v. *Berry*, 68 L. T. Rep. 416.

The present case differs from that in almost every important respect. Although undue execution is practically the only issue put forward by the plaintiff, the court must look at the *evidentia rei* and take account of all the circumstances surrounding the making of this will, the conduct of the parties, and the institution of the proceedings:

Wright v. *Sanderson*, 9 P. Div., at p. 160.

It is not necessary for the court to have positive affirmative testimony by the attesting witnesses, or either of them, that the will was actually signed in their presence; and, even where they concur in swearing to the contrary, the court may, notwithstanding, uphold the will:

Blake v. *Knight*, 3 Curt., at p. 361.

That is an *à fortiori* case, both on account of time and the number of attesting witnesses who swore to undue execution.

W. Howland Roberts for the plaintiff.—The points upon which the attesting witnesses do not agree are minor points. There has been no attack upon their good faith or disinterestedness, apart from the mere fact that Harris is the father-in-law of the plaintiff. There is nothing improbable in their story, and the reason given by Dr. Miller for their leaving the testator's bedroom before signing their names is reasonable and such as would naturally have made an impression on his mind as a medical man. In these circumstances the court ought not to uphold the will, in the teeth of the evidence of both the attesting witnesses upon the only material point in the case. None of the reported authorities have gone so far as to warrant the court in doing so, under the circumstances.

Durley Grazebrook in reply.—*Blake* v. *Knight* (*ubi sup.*) is an *à fortiori* case, both on account of the shorter time which had elapsed in that case between the death of the testator and the institution of proceedings to set the will aside, and also from the fact that, in that case, three attesting witnesses deposed to its undue execution. If this will is set aside, no executor will be safe in taking probate in common form.

Cur. adv. vult.

April 9.—BARNES, J.—In this case the plaintiff, as an executor of a will, dated the 19th April 1881, of Richard Dayman, of Philham, who died on the 31st Oct. 1885, propounds that will and prays revocation of probate, granted on the 27th March 1886, of a will of the deceased dated the 16th Oct. 1885, which was granted to the defendants, two of the executors named in the later will; power being reserved to the plaintiff to come in and prove it, if he thought fit. The defendants, in substance, while alleging that the will of 1881 was not properly executed, set up the will of 1885, which they say revoked the will of 1881; and they assert that the will of 1885 was properly executed, and counter-claim to have the probate of the will of 1885 delivered out to them. They also refer to a will of 1869, but I think it is agreed, in substance, that either the will of 1885 or the will of 1881 must stand; and that the real question is whether the will of 1885 was duly executed. The will of 1885 was written out by a doctor of the name of Carter, a doctor in the neighbourhood, a person of considerable position, and who, according to the statement of one of the witnesses, had familiarity or knowledge of the way in which wills should be executed, because he had acted, owing to there being no solicitor in the neighbourhood, for other people. The will bears upon it four corrections, also in his handwriting, and which are initialled by him and appear to have been on it at the time it was executed by the testator. At the foot of the will, there is the date filled in and the mark of Richard Dayman, the word "witnesses," and then the signatures of the two attesting witnesses, Dr. Miller and Thomas Harris. In the extreme corner are the words "turn over"; and, on the back, an attestation clause, which states: "The will on the other side was signed by the testator, and by him acknowledged to be his last will and testament, in the presence of us, who, at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses." The persons present at the time the will was executed appear to have been Dr. Miller, Thos. Harris, who is the father-in-law of the plaintiff, a nurse, Mary Prouse, and Dr. Carter. Dr. Carter, I understand, is dead, and the nurse is also dead. The two witnesses to the will are both alive and have been examined, the one before me, and the other on commission owing to the fact that he is an old man and unable to attend. The point raised on behalf of the plaintiff is, that the will was not attested by the witnesses in the presence of the testator, according to the terms of the Wills Act; that part of it which bears upon the point being the words in sect. 9: "Such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." The point made is, that they did not attest and subscribe in the presence of the testator, but that, the will having been executed in the bedroom in which the testator was, the attestation and subscription of the witnesses was made down in the parlour of the same house, but not in the presence of the testator. That raises a question, which has very often been before the courts, as to whether or not, where a will itself is regular on its face, or, as in this case, is fairly regular, the memory of the witnesses who have spoken to the attestation is to be trusted so as to show that the will was not properly executed in accordance with the requirements of the statute. Several things in this case are perfectly clear. There is no doubt whatever that the will was signed, by mark, by the testator, and there is no doubt that this was done in the presence of the two witnesses. There is also no doubt that the witnesses signed it. There is no doubt that the testator was perfectly sound in mind at the time he executed it; and, although the attestation clause is on the back and is not placed where, if

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this document were perfectly regular, it would be, yet the clause itself is regular, and the attestations are put in the place where, on the face of this document, you would expect to find them. So that everything is all right as regards compliance with the Act, except the point suggested, that the will was not subscribed by the two witnesses in the actual presence of the testator. There is, moreover, no doubt that this was the will of the testator, that it was the document which he wished to be his will; and, however one may look at it, as a matter of common sense it is his will. Still, if it has not complied with the requirements of the Act, it will not be valid. Now, it seems to have been written out by Dr. Carter on the 8th Oct. 1885, and it was executed on the 16th Oct. There has been practically no contest about this will for nearly nine years, though it is clear, from letters which passed, that the will was questioned at a very early period by the plaintiff. Some two years ago, one of the attesting witnesses, Thomas Harris, seems to have mentioned to the plaintiff that the will was subscribed by himself and by Dr. Miller down in the parlour, and not in the presence of the testator. There is a letter of the 1st Jan. 1892, written by the plaintiff to Dr. Miller, as follows:—"Park Cottage, Chulmleigh, Jan. 1st, 1892.—Dear Sir,—Will you go to Colonel Stucley and take your oath that you saw Dr. Carter correct the mistakes of the will of Richard Dayman, bearing date the 16th Oct. 1885, down in the parlour, and also signed your name to it while he being upstairs in bed. By your doing so, I should feel obliged, as it would save me a great deal of trouble. Mr. Harris took his oath last week at the Abbey. Will you please send it on to me at your earliest convenience.—Yours truly (signed) W. DAYMAN.—To Dr. Miller, Hartland." The first time that suggestion was made was about two years ago. It came from Harris originally, and was then communicated to Dr. Miller, who, being asked to give his account of the matter, did so in an affidavit sworn on the 9th Feb. 1892. Dr. Miller was examined here at considerable length, and, from what I saw of him, I do not think that he desired to state anything that he did not think was true. But I must say that I was impressed with the fact that his memory about these matters was not a very good one. He proved that the will had been written out on the 8th Oct. 1885 and initialled by Dr. Carter, but he differed entirely from Harris as to what occurred before the signature—both, it seems to me, as to what took place upstairs before the will was executed, and also as to what took place in the bedroom. On one very important matter he and Harris differ very much. Dr. Miller says that the testator was of sound mind, while Harris's deposition reads rather as if the plaintiff was setting up a case of incompetence. On the 23rd March 1886 Dr. Miller made two affidavits in common form, for the purpose of verifying the will. In these he stated, in the usual form, that, after the testator had made his mark, he and Harris thereupon attested and subscribed the will in the presence of the testator. In the witness-box Dr. Miller stated that these two affidavits were made by him without having read them. In cross-examination by the plaintiff's counsel, he was asked about the affidavit of the 9th Feb. 1892 to which I have referred, and which he made as the result of an interview with the plaintiff's solicitor, Mr. Dunn. With regard to this affidavit, Dr. Miller gave a very remarkable account. In the first place, he said that he did make this affidavit after he had seen the plaintiff's solicitor: but that he did not know what he was swearing at all; that he could not account for a portion of what appeared in the affidavit; that he did not tell that to the solicitor; and that it did not occur in the bedroom. The solicitor, Mr. Dunn, was called on behalf of the plaintiff and gave quite a different account. He said that he took that affidavit from Dr. Miller, and took it in a way which indicated that he wished the doctor to tell his own story, and made no suggestions in the form of leading questions or anything of the kind, and he also added that until he saw Dr. Miller he had very little knowledge of the case. Having taken down the statement from the doctor, and having had the affidavit properly prepared and read over to the doctor—and read over again, if I remember rightly, when the commissioner was present—Mr. Dunn says, in substance, that the affidavit contains the language and statement of Dr. Miller himself, and that nothing which is found in it came in any way from Mr. Dunn or from any information which he had received elsewhere. I watched Mr. Dunn with care, and thought him a thoroughly trustworthy witness; and I think he acted with propriety in trying to obtain an affidavit, as a solicitor ought to do. But the result was, that I felt I could not rely at all on Dr. Miller's memory; and the more I trust the solicitor, the less can I trust the memory of the doctor. There is another matter which influences me very much in this case. It was said that this will was not witnessed in the bedroom, because Dr. Carter made the remark that, now they had got the will signed, the rest had better be completed downstairs, as the bedroom was small and stuffy; and that they then went down. But, even on Dr. Miller's own statement in the witness-box, the word "witnesses" was written in the bedroom, and was written, where it now appears, by Dr. Carter. I cannot help thinking that, unless one were very clear about the witnesses recollecting what they said and did, the probabilities are all in favour of Dr. Carter, who seems to have known what he was doing, having had the signatures put to the will in the bedroom, before going downstairs. I do not think that Dr. Miller said there was a table in the bedroom; but it is clear there must have been opportunity for writing in that room, because Dr. Carter had taken down instructions for the will in that room. There was a writing-desk in the room, and it seems to me that, the probabilities being all in favour of proper attestation, Dr. Miller's evidence is perfectly capable of this explanation, that, although the attestation clause on the back of the will was written down in the parlour, the signatures of the witnesses were written upstairs in the bedroom. Whatever Dr. Miller has said, I cannot be sure that his recollection is right, and Harris's evidence differs almost entirely in most matters to which the doctor speaks, though they agree upon the point that the will was attested downstairs; while we have this remarkable state of things, that Harris, when examined upon commission, and being shown the original will, leads off with the extraordinary statement that the signature, "Thomas Harris," at the foot of the

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will, is not in his handwriting. I have no doubt whatever, and it is common ground, that Thomas Harris did, in fact, sign his name on this will, and that this is his signature. My attention has been called to several cases, but I do not think I need refer to them at any length, because they are perfectly well known, and I summed them up myself in the case of *Wyatt* v. *Berry* (68 L. T. Rep. 416). In that case, I was met with the difficulty that the two witnesses spoke with great accuracy and care, and, unfortunately for the will, stated facts which showed that the will was not properly executed. I have looked up my notes of *Winston* v. *Winston* (unreported), the case to which I referred in the course of the arguments. In that case, there was a lady in bed upstairs, and her sister's will was in question. One of the attesting witnesses said that it was signed upstairs where the lady was in bed, and, that there was no one in the room except herself and these two ladies, and, that she was positive that the other attesting witness was not in the room, though there were indications in her evidence that she could not remember the time. She said, "I am perfectly certain I signed the paper in the bedroom, and did not sign anything in the kitchen." Then another witness was called, who said that nothing was signed in the bedroom. The other attesting witness said that she signed at a table in the kitchen, and I do not think this attesting witness ever proved that the first attesting witness had signed the document at all. I held that, in face of that conflict, the will was to be treated as a good will, having regard to the general circumstances of that case, and on the principle of the authorities to which I was referred. I think, in the present case also, that the will must be upheld. It would be most unfortunate, where the matter appears regular, though perhaps not in strict form, and where those witnesses are dead who could speak positively, and where eight or nine years have elapsed before any question is raised, that one should trust to the recollection of two witnesses who are clearly inaccurate in a great part of their evidence, and whose memory I do not think I can fairly trust. For these reasons I pronounce for the will of the 16th Oct. 1885, with costs.

W. Howland Roberts asked for a stay of execution, and, that any costs incurred in regard to the will of 1869, set up by the defendants in the alternative, should be set off or disallowed on taxation.

H. Durley Grazebrook opposed.

BARNES, J.—I think the plaintiff ought to pay all such costs as he is possibly liable for.

Solicitors for the plaintiff, *H. A. Farman*, agent for *Dunn* and *Linford Brown*, Exeter.

Solicitors for the defendants, *J. Davis Peard*, agent for *Hole* and *Peard*, Bideford.

Note.—The plaintiff appealed, and on the 12th July the Court of Appeal (Herschell, L.C., and Lindley and Davey, L.JJ.), after hearing the argument of counsel for the appellant, and the judgment of Barnes, J. read by counsel for the respondents, dismissed the appeal with costs.

DIVORCE BUSINESS.

July 13 *and* 14, 1894.

(Before LOPES, L.J.)

HOUGH *v.* HOUGH. (*a*)

Divorce practice—Costs—Suit for judicial separation—"Usual order" for wife's costs refused.

In a suit by a wife for judicial separation on the ground of cruelty, where no summons for discovery of documents had been applied for by the wife's solicitor, it transpired, and was conclusively proved at the hearing, that numbers of affectionate letters had passed between the parties during a period of more than a year after the husband had gone to China to resume his official duties, and, after the acts specified in the petition as cruelty and deposed to by the petitioner, were alleged to have been committed. At the close of the petitioner's case the petition was dismissed, and The Court refused to make the "usual order" for the wife's costs.

THIS was a suit by the wife for a judicial separation upon the ground of cruelty.

The parties were married at Blackheath on the 2nd Jan. 1890. The respondent, who was some years the petitioner's senior, held an appointment in the Customs in China, and in Sept. 1890 returned thither to resume his official duties.

The petitioner, who remained in England, gave birth to a son on the 8th March 1891.

Down to about Nov. 1891 the petitioner and respondent corresponded on affectionate terms, and the respondent supplied his wife with ample means for the use of herself and the child.

On the 26th Nov. 1891 she wrote to her husband, who had more than once urged her to join him and had also made the alternative suggestion that he should give up his appointment in China and that they should live together in England on his private income of about 400*l.* a year, telling him that, after full consideration, she had come to the determination never to live with him again.

Shortly after writing that letter she filed this petition, the first allegation of cruelty being as follows:

That immediately after the said marriage the respondent commenced, and from thence to about the 5th Sept. 1890, when he left England, continued to give way to violent and uncontrolled outbursts of temper, and to treat your petitioner with great unkindness and cruelty; that he habitually neglected and insulted your petitioner, both when alone and in the presence of third persons; that he assaulted and beat and struck her, and habitually adopted an offensive and insulting course of conduct towards her, and without cause subjected her to divers degrading restrictions and to an offensive and degrading course of treatment; and that, while abstaining from the use of oaths and other gross and filthy expressions, he nevertheless habitually abused your petitioner in offensive, brutal, cruel, and insulting language, and in divers other ways was habitually guilty of cruelty towards her, by reason whereof your petitioner went in bodily fear of him, the said respondent, and her health became and was seriously affected.

There were ten other paragraphs, containing allegations of cruelty, and covering various dates and periods between January and Sept. 1890.

The respondent, in his answer, denied all the allegations of cruelty.

LOPES, L.J., in dismissing the petition, said: The court could not grant a decree of judicial

(*a*) Reported by H. DURLEY GRAZEBROOK, Esq., Barrister-at-Law.

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separation in such a case as this. The petitioner has represented the respondent to be a "brute of a husband," and yet she wrote to him during a period extending over fourteen months the affectionate letters read in evidence before me. She stated here, that she told him, before he returned to China, that she never would live with him again. That was not consistent with the final letter, which she wrote to him on the 26th Nov. 1891, in which she announced that she had come to that determination after full consideration. Why did she write that letter? It may be that she had a dread that the child would be brought up in the Protestant religion; or, that not being strong, she did not, as she told her husband in one of her letters, wish to have a second child; or, that she did not like the prospect of having to live with her husband on his private income of 400*l.* a year, and apprehended that, if he gave up his appointment and came home, she would have to do so. The petitioner has given evidence of acts of personal violence; but there is nothing in the case which amounts to corroboration of any of her evidence on that point, nor is there any evidence whatever, beyond the petitioner's own statements, which could be construed as cruelty, legal or otherwise. I therefore dismiss the petition.

Inderwick, Q.C. and *Powles*, for the petitioner, asked for the usual wife's costs. The respondent has not obeyed the order to lodge in court or secure the amount estimated by the registrar for the wife's costs of the hearing, and he ought not to be placed in a better position than he would be in if he had obeyed the order. The petitioner's solicitor had no knowledge of the affectionate letters which were put to her in cross-examination, and the petitioner had, in fact, previously stated to her solicitor that there were no letters. In *Flower* v. *Flower* (29 L. T. Rep. 253; L. Rep. 3 Prob. & Div. 132) Lord Hannen used these words: "If the question were a question solely between husband and wife, it would be reasonable that the husband, who had successfully rebutted the charge brought against him, should not be obliged to pay her costs; but, unfortunately, in the majority of cases, the wife has no means of her own. She has to find an attorney to take up her case for her, and if she could not obtain from her husband the means of employing one, she would be powerless, and, however good a case she might have for taking proceedings, she would be unable to enforce her rights." [LOPES, L.J.—Lord Hannen also pointed out that there might be exceptional cases, and that the court was not absolutely bound to give the wife her costs.] But Lord Hannen also said that the court would only be justified in refusing them in cases where the attorney had done something wrong, or had instituted proceedings without reasonable ground—that is, where he had the means, before instituting the suit, of seeing that it was one which ought not to be instituted.

Deane (*Priestley* with him), for the respondent, opposed the application. The solicitor will not suffer if the application is refused, as it was proved that money had been borrowed to pay his costs. The court has dismissed the petition, and has characterised the suit as one without any foundation. The husband has been put to great expense by having the suit brought against him during his absence in China, and he ought not to be called on to pay any part of his wife's costs.

LOPES, L.J.—There was no corroboration of the wife's story; so that, even without her letters, the court must have dismissed her petition. I wish to express no opinion on the action of the solicitor in this case; but I do not think that solicitors should be encouraged to bring matrimonial suits on such slight materials. I have already said that the absence of corroboration of the wife's evidence as to alleged acts of violence would have been fatal to her success; but, in regard to her story, I feel bound to express the opinion, that if her husband had treated her in the manner which she, in her evidence, deposed to, it would have been impossible for her to have written the letters she did.

Inderwick, Q.C. intimated that, after what had fallen from his Lordship, the solicitor desired him to say that he no longer asked for costs, though at the same time strongly denying that he had any inkling of the letters.

Solicitors: for the petitioner, *Kenneth Powles*; for the respondent, *Grundy, Izod*, and *Grundy*.

Monday, Oct. 29, 1894.

(Before the PRESIDENT (Sir F. H. Jeune.)

STORER v. STORER. (*a*)

Divorce — Variation of marriage settlements — Contingent interests—Absence of possible beneciary and of one trustee—Order — Trustees' costs.

Where there were five beneficiaries who might become entitled in a remote contingency to share in the settled fund, four of them consented to an order upon the trustees to repay the corpus of the fund to the petitioner, but the fifth was somewhere in the interior of Africa, and could not be communicated with:

The Court made the order, extinguishing the interests of all five; and, as it further appeared that one of the trustees of the settlements had left this country, and his whereabouts could not be ascertained, the costs of the two trustees who had appeared upon these proceedings were allowed out of the settled fund, in his absence, as if he had joined with them.

THIS was a motion on the registrar's report upon a petition for variation of settlements.

The petitioner, Amy Storer, obtained, on the 15th Jan. 1894, a decree absolute dissolving her marriage with the respondent William Storer.

The petitioner subsequently petitioned the court to vary a settlement of the 1st Aug. 1887, made in contemplation of the marriage, of which there was no issue.

By the settlement, the petitioner assigned to trustees her interest in certain property, upon trust for her own separate use for life, and on her death to the respondent for life, if he should survive her; and, on the death of the survivor, "for such present and future children of the petitioner" as she should by will appoint; and, in default of appointment, to the children in equal shares absolutely.

By the same indenture the respondent assigned to the trustees certain furniture and effects, and

(*a*) Reported by H. DURLEY GRAZEBROOK, Esq., Barrister-at-Law.

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covenanted to bring into settlement, within two years after marriage, a sum of 3000*l.*

By an indenture, bearing date the 6th Jan. 1892, the respondent, in consideration of being released from his covenant to bring in 3000*l.* under the ante-nuptial settlement which he had failed to fulfil, assigned to the petitioner all his interest in the settled property.

The petitioner petitioned the court to vary the settlement by depriving the respondent of all interest in the settled property; but the registrar pointed out that no order was required for this purpose, in view of the indenture of the 6th Jan. 1892.

The petitioner's solicitor then stated to the registrar that the real object of the petitioner was to regain absolute possession of the settled property, and, upon this, the registrar reported as follows:

This would seem to prejudicially affect the interests of the children of the petitioner by her former marriage, and it is submitted, therefore, that the court should decline to interfere with the settlement. In any case, before such order could be made it would seem proper that the prayer in the petition for variation should be amended, and notice of the application given to the issue of the former marriage, who are now of age, and one of whom, Amy Beatrice Davidson, wife of F. A. L. Davidson, has executed a settlement and thereby covenanted to bring in after-acquired property to the value of 100*l.* and upwards. The present trustees of this settlement should also have notice.

The respondent did not appear upon the application to vary; but two of the trustees appeared, an order dispensing with service upon the third trustee having been obtained on the 26th Feb. 1894.

The motion first came before the court on the 23rd April, to vary the settlement as if the respondent were dead, and that, if necessary for that purpose, the report of the registrar should be referred back to him.

That motion was adjourned *sine die* to enable the petitioner to communicate with her children on the subject of the said motion. Four of the children consented; but the fifth, who was formerly a sailor in the merchant service, had gone on a trading expedition to the Zambesi, and neither his address nor whereabouts had been known to his mother or solicitor for more than a year; but his solicitor stated that he was confident that he would most readily acquiesce in the proposed order.

Inderwick, Q.C. and *Lipscomb*, for the petitioner, moved to vary the registrar's report by directing the trustees to pay over to the petitioner the whole of the settled property.

Searle for two of the trustees.—The court should hesitate to affect prejudicially the possible interest of the children of Mrs. Storer's first marriage. The trustees cannot take their costs out of the fund as of course, owing to the absence of their co-trustee. The stock stands in the name of all three.

The PRESIDENT.—I think that the interest of these children is so very small that, as four out of the five consent, I ought to extinguish the interest of all five. I therefore make an order that the interest of the absent son of the petitioner's first marriage be extinguished, and that the trust fund be held for the petitioner's benefit absolutely. The trustees are to be put in the same position in regard to their costs as if their co-trustee were here.

Solicitors: for the petitioner, *Cox* and *Lafone*; for the trustees, *Yarde* and *Loder*.

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 15, 16, *and Dec.* 7, 1894.

(Before Lord HALSBURY, LINDLEY and SMITH, L.JJ.)

Re MIDLAND COAL, COKE, AND IRON COMPANY LIMITED; CRAIG'S CASE. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Company—Winding-up—Scheme of arrangement—Transfer of assets and liabilities to new company—Proof of debt—Contingent liability—Joint Stock Companies Arrangement Act 1870 (33 *&* 34 *Vict. c.* 104), *s.* 2.

C., the lessee of certain mines, assigned his lease to a company, the company covenanting to indemnify him against all claims in respect of rent or breach of any of the covenants contained in the lease. The company went into liquidation, and subsequently, with the knowledge of and without any opposition by C., the Court sanctioned a scheme under the Joint Stock Companies Arrangement Act 1870, *under which a new company was formed to take over the assets and liabilities of the old company. After the assets of the old company had been distributed under the provisions of this scheme, C. claimed to prove in the winding-up of the old company in respect of his contingent liability under the lease, and to have the amount secured.*

Held, that C. was a creditor within the meaning of sect. 2 *of the Act of* 1870, *and therefore was bound by the scheme; but, if he was not bound by it, his present application was too late.*

Decision of Wright, J. (71 *L. T. Rep.* 329) *affirmed.*

THIS was an appeal by Mr. W. Y. Craig from a decision of Wright, J. refusing to admit a claim for upwards of 45,000*l.* in the winding-up of the above company.

Mr. Craig was, in 1890, the lessee of a colliery, and by a deed dated the 19th June 1890 he assigned his lease to the above-named company, and the company covenanted with him to pay the rent and royalties reserved by the lease, and to perform the lessee's covenants contained in it, and to indemnify Mr. Craig therefrom. This covenant covered the whole period of the lease, and there was no provision relieving the company from it in the event of the company assigning the lease to any other person. The company took possession and worked the colliery. In May 1893 a resolution was passed to wind-up the company voluntarily. On the 21st July 1893 an order was made to continue the winding-up, subject to the supervision of the court.

On the 13th Sept. 1893 a scheme of arrangement was adopted at meetings of creditors, debenture-holders, and contributories of the com-

(*a*) Reported by W. C. Biss, Esq., Barrister-at-Law.

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pany for forming a new company which was to take over the assets and liabilities of the old company, and to pay or satisfy, within three months of the approval of the scheme by the court, the debentures and unsecured debts of the old company and the costs of winding-up. It was further provided by the scheme that the new company should allot, upon the nomination of the liquidators of the old company, to each shareholder of the old company one share in the new company credited with 4*l.* paid for each share held by him in the old company. It was further provided that, upon payment or satisfaction of the debentures, debts, and expenses, the old company should be wound-up and dissolved.

On the 12th Oct. 1893 this scheme was approved by the court. A new company was formed as proposed, and it was registered on the 30th Nov. 1893. An agreement for taking over the assets and business of the old company was shortly afterwards entered into between the liquidators of the old company and the new company, and those assets were, in fact, taken over pursuant to this agreement, but at what precise time did not appear.

Mr. Craig knew of the proposed scheme, but he did not oppose its approval by the court, nor did he ever take steps to obtain an injunction to prevent its being carried out. But after the scheme had been approved, and after the new company had been formed, and after the new company had entered into an agreement with the liquidators of the old company to take over its assets and liabilities, and to do the various other things which the new company was to do under the scheme—viz., on the 9th Dec. 1893—Mr. Craig applied by summons that a claim by him for 45,787*l.* might be admitted against the old company. A part of this claim consisted of a debt or liability for 336*l.*, which was not disputed. The rest of the claim was based on the covenant by the old company to pay and indemnify him against the future rent and royalties to become due under the lease. The allowance of this claim was resisted by the liquidators of the old company. The new company were not served with the summons.

On the 5th July 1894 Wright, J. made an order allowing the proof of the 336*l.*, but disallowing the rest of the claim (71 L. T. Rep. 329), and from this order Mr. Craig appealed.

Buckley, Q.C. and *Kenyon Parker* for the appellant.—If the appellant is a creditor within sect. 2 of the Joint Stock Companies Arrangement Act 1870 the old company is only relieved from liability if they carry out the scheme agreed to by the creditors and sanctioned by the court. By clause 8 of the scheme, the new company was within three months of the court's approval of the scheme to satisfy "the unsecured creditors of the existing company." They have not satisfied or paid the appellant; therefore he is not bound by the scheme. The appellant is entitled to claim for the future rent and possible breaches of covenants:

Re London and Colonial Company; Horsey's Claim, L. Rep. 5 Eq. 561;
Re Haylor Granite Company, 13 L. T. Rep. 515; L. Rep. 1 Ch. App. 77.

[Lindley, L.J. referred to *Hardy* v. *Fothergill*, 59 L. T. Rep. 273; 13 App. Cas. 351.] In that case there was an insolvent estate, which is not the case here. Mr. Craig is entitled to be indemnified against the whole of his liability, not to receive a dividend only. It is questionable whether a person with a continuing claim is bound at all by the scheme. While the company is in possession of the property the appellant probably incurs no liability, but they may assign the lease to a pauper:

Close v. *Wilberforce*, 1 Beav. 112;
Moore v. *Greg*, 2 Ph. 717.

The appellant is therefore entitled to have sufficient of the assets of the old company set apart to protect him absolutely against his contingent liability under the lease:

Re The Telegraph Construction and Maintenance Company, 22 L. T. Rep. 649; L. Rep. 10 Eq. 384;
Oppenheimer v. *British and Foreign Exchange and Investment Bank*, 37 L. T. Rep. 629; 6 Ch. Div. 744;
Gooch v. *London Banking Association*, 32 Ch. Div. 41;
Lord Elphinstone v. *The Monkland Iron and Coal Company*, 11 App. Cas. 332.

The old company must be treated as a solvent company inasmuch as it is selling itself for shares in the new company which are to be distributed among the shareholders of the old, and each share is to be credited with 4*l.* paid up. The old company is on its own showing a solvent one, and must not hand over these assets to the new company without indemnifying the appellant:

Re City and County Investment Company, 42 L. T. Rep. 303; 13 Ch. Div. 475.

A person who has only a contingent claim on which no present payment is due, and which is incapable of present proof, is not a creditor within sect. 2 of the Act of 1870.

Kirby for the liquidators.—The appellant was a party to and is bound by the scheme of arrangement. The assets of the old company have been distributed under the scheme and are now beyond recall. The appellant has only a right against the new company, and which is liable to indemnify him from time to time against any sum he may be called on to pay. That is not a debt or liability of the old company:

Moule v. *Garrett*, 22 L. T. Rep. 343; 26 L. T. Rep. 367; L. Rep. 5 Ex. 132; L. Rep. 7 Ex. 101.

The arrangement being that all the assets of the old company are to be handed over to the new, the old company must be relieved from any liability. In the cases cited it was the lessor who was applying to be indemnified. The applicant here is the lessee, and he is indemnified by the covenant of the new company, and will probably never be called on to pay anything. This is a contingent liability, and the claim is within sect. 158 of the Companies Act 1862, and, according to *Hardy* v. *Fothergill* (*ubi sup.*), the appellant ought to have had it valued and proved for its value in the liquidation. He has no right to have a sum set aside to meet it, as nothing which is available for the creditors is being distributed. The shares in the new company are not available for distribution among the creditors. They are not assets of the old company which could be sold:

Companies Act 1862, s. 161;
Cardiff Coal and Coke Company, 9 L. T. Rep. 186.

Buckley, Q.C. in reply. *Cur. adv. vult.*

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Dec. 7.—LINDLEY, L.J. delivered the judgment of the Court, and, after stating the facts as above set out, continued:—In order to dispose of the various questions raised by the appeal, it will be convenient to consider (1) Mr. Craig's rights against the old company apart from the scheme of arrangement; (2) the effect of that scheme upon his rights; and (3) the consequences which follow from the fact that the liquidators of the old company have handed over to the new company all the assets of the old company, and have distributed amongst the shareholders of the old company the shares received from the new company as provided by the scheme. First, as regards Mr. Craig's rights against the old company, apart from the scheme. With respect to that, sect. 158 of the Companies Act 1862 provides: "In the event of any company being wound-up under this Act, all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company, a just estimate being made, so far as is possible, of the value of all such debts or claims as may be subject to any contingency or sound only in damages, or for some other reason do not bear a certain value." Notwithstanding the very comprehensive language of this section, Lord Justice Giffard, when Vice-Chancellor, decided, in *Re London and Colonial Company; Horsey's Claim* (*ubi sup.*), that, as it was impossible to put a just estimate on the claim of a landlord to future rent and possible breaches of covenant, he was not entitled to prove against a limited company which is being wound-up and to receive a dividend on his proof, and this view prevailed until a comparatively recent date. But after the decision of the House of Lords in the case of *Hardy* v. *Fothergill* (*ubi sup.*), which must be considered in connection with sect. 10 of the Judicature Act 1875, it is difficult, if not impossible, to say that Mr. Craig could not have had his claim valued and have proved for its value against the old company. Mr. Craig, however, does not really want to do this. What he wants is to enter a claim with a view to have assets of the old company set apart for his indemnity before they are divided amongst the shareholders; or, if he is not in time for that, he asks that the old company may not be formally dissolved so long as he is exposed to liability under his covenants. He bases his claim in this respect on certain decisions in which a lessor of a limited company being wound-up or applying for leave to reduce its capital has been held entitled to enter a claim for the amount of rent and royalties which may become due to him in future and to an injunction to restrain the company from distributing its assets and dissolving without making proper provision for his payment. The cases in which orders to this effect have been made are: *Re The Telegraph Construction and Maintenance Company* (*ubi sup.*), *Oppenheimer* v. *British and Foreign Exchange and Investment Bank* (*ubi sup.*), *Gooch* v. *London Banking Association* (*ubi sup.*), and *Lord Elphinstone* v. *The Monkland Iron and Coal Company* (*ubi sup.*). The last of these cases was in the House of Lords, and the House made an order in favour of the lessor of a limited company, which was being wound-up voluntarily, and declared that the lessee company was bound to fulfil its future obligations, under its lease, and that the liquidators were bound to make due provision for fulfilling such obligations and to set aside assets of the company in their hands for that purpose. It is true that this was a Scotch case, and a case between lessor and lessee; but I see no reason to suppose that there is any difference between English and Scotch law in this respect. The effect, however, of the decision in *Hardy* v. *Fothergill* (*ubi sup.*) on the right of a lessor to have the assets of a limited company which is being wound-up impounded has not yet been judicially determined. The English decisions in favour of his right to enter a claim and have assets impounded to meet it have all proceeded upon the view that the lessor could not prove for any ascertainable sum and be paid a dividend upon it, and on some future occasion those decisions will have to be reconsidered. In the present case it is not necessary to solve this new problem, and I say no more about it. I will assume that, apart from the scheme, Mr. Craig would have been entitled to enter a claim for indemnity, and to have assets in the hands of the liquidators set apart to answer this claim before the final dissolution of the company. This was not what Mr. Craig asked by his summons, but I pass that over, as the summons might have been amended. I will now consider the effect of the scheme of arrangement. Mr. Craig clearly was entitled to be heard in opposition to that scheme. The cases to which I have referred presuppose the existence of assets not yet distributed amongst the shareholders. Until they are distributed he is entitled to be heard in opposition to any scheme for their distribution. Whether the court is bound to give effect to his opposition is a different question, and depends on the meaning of the word "creditor" in the Joint Stock Companies Arrangement Act 1870. Considering that that Act was passed in order to enlarge the powers conferred by sect. 159 of the Companies Act 1862, I agree with Wright, J. in thinking that the word "creditor" is used in the Act of 1870 in the widest sense, and that it includes all persons having any pecuniary claims against the company. Any other construction would render the Act practically useless. If I am right in this interpretation of the Act of 1870, Mr. Craig is bound by the scheme approved by the court, and in my opinion he is so bound. This is of itself enough for the decision of this appeal. But I will again assume in his favour that he is not so bound, and that the scheme itself did not deprive him of the rights which I have assumed that he otherwise would have had. This brings me to the last point —viz., the effect of the approval of the scheme and of what has been done under it. In my judgment Mr. Craig has asserted his claim to have assets set aside for his indemnity far too late. As already stated, he had full notice of the proposed scheme. He did not oppose it; he did not appeal from the order approving it; he took no steps to prevent its being carried out, nor to prevent the shares of the new company from being distributed amongst the shareholders of the old company whilst they were in the hands of the liquidators. The scheme was sanctioned on the 12th Oct. 1893. Mr. Craig made no application to the court until the 9th Dec. 1893, by which time the new company had been formed. Mr. Craig applied for no injunction, and long before the 5th July 1894, when his summons came on to be heard, all the assets of the old company had been handed over

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to the new company, and the shares of the new company had been distributed amongst the shareholders of the old company. There were then no assets of the old company to impound, and it was impossible to stay their distribution. I am far from saying that Mr. Craig could have done anything effectually after he had allowed the scheme to be approved by the court without opposing it. Had he opposed it, the court might have refused to sanction the scheme, for the court is not bound to approve a scheme which it thinks unjust to any one. Be this, however, as it may, it is impossible now to stay any distribution of assets, for there are none to distribute. Although it is not too late to stay the dissolution of the old company, nothing will be gained by so doing now that the assets have all been distributed under the sanction of the court. The appeal, therefore, must be dismissed with costs.

Solicitors for the appellant, *Bircham* and *Co.*

Solicitors for the liquidators, *Ashurst, Morris, Crisp*, and *Co.*

Friday, Dec. 7, 1894.

(Before Lord Halsbury, Lindley and Smith, L.JJ.)

Preston Banking Company *v.* Allsup and Sons Limited. (*a*)

APPEAL FROM THE COUNTY PALATINE COURT OF LANCASTER.

Practice—Order passed and entered—Jurisdiction to rehear—Misrepresentation—Mistake of fact.

When an order has been perfected there is no jurisdiction to rehear the matter, and make a new order or alter the former one, although the order is wrong by reason of some misrepresentation or mistake of fact.

Staniar *v.* Evans (56 *L. T. Rep.* 87; 34 *Ch. Div.* 470) *considered.*

An order was made in a debenture-holders' action that the property comprised in the debentures should be sold out of court, and one of the debenture-holders afterwards applied that the sale and other proceedings under that order should be carried out under the direction of the court. The application was granted subject to L. paying 250*l.* *into court as security for the costs, in default of which the application was ordered to be dismissed with costs. L. did not pay in the money. On the sale of the property a sum was available for distribution among the debenture-holders, and L. then applied that, notwithstanding that order, the costs directed to be paid by him should be costs in the action, and that all further proceedings under the order should be stayed on the ground that when the order was made there had been misrepresentation as to the value of the assets.*

Held (affirming the order of Robinson, V.C.) that there was no jurisdiction to alter the former order and to make the order asked.

This was an appeal from a decision of the Vice-Chancellor of the County Palatine of Lancaster.

The action was a debenture-holders' action, and by an order dated the 17th Feb. 1894 D. W. Allsup and F. L. Lindsay were appointed receivers and managers of the real and personal property of the defendant company, which was charged with three series of debentures. Lindsay was the holder of a debenture of the third series for 1000*l.*, and was also a shareholder.

By an order, dated the 4th June, a sale was directed, with the consent of the plaintiff company, out of court by public auction or private treaty, of the property of the defendant company comprised in the debentures.

The property was afterwards offered for sale by auction, but no biddings were obtained. Lindsay subsequently applied for an order directing that all further proceedings under the order of the 4th June might be carried out under the direction of the court.

The summons was heard on the 11th July, when the Vice-Chancellor made an order directing that, if Lindsay, within one week from that date, paid into court to the credit of the action the sum of 250*l.* as security for the costs of that application, it should be referred to the registrar to appoint some fit and proper person to conduct the sale of the property out of court, but in case Lindsay did not pay in the 250*l.* within the time mentioned, then the application should be dismissed with costs.

Lindsay did not pay the 250*l.* into court. On the 7th Aug. he took out a summons asking that, notwithstanding the order of the 11th July, the costs thereby directed to be paid by him should be costs in the action, and that all further proceedings under that order might be stayed.

At the date of this summons the order of the 11th July had been passed and entered, but the assets of the defendant company had been sold, and some of the proceeds were available for distribution among the holders of the debentures of the third series, and the ground of the application was that, when the order of the 11th July was obtained, there had been a misrepresentation to the court as to the value of the assets.

The Vice-Chancellor held that he had no jurisdiction to make the order asked by the summons of the 7th Aug., and from this decision Lindsay appealed.

Hopkinson, Q.C. and *Mansfield* for the appellant.—The order of 11th July 1894 was obtained without material facts being placed before the Vice-Chancellor, and there was a misrepresentation as to the value of the property to be sold. The judge had therefore jurisdiction to rehear the case:

Staniar v. *Evans*, 56 L. T. Rep. 87; 34 Ch. Div. 470.

The Vice-Chancellor thought, at the time he made the order, that the appellant had no substantial interest in the property, but it now appears that he has. This is in the nature of a supplemental order. The fund realised by the sale is being administered under the direction of the court, and the matter ought to be set right:

Re Roper; Taylor v. *Bland*, 63 L. T. Rep. 434; 45 Ch. Div. 126.

In *Nicholson* v. *Norton* (7 Beav. 67) a fresh order was made, although after decree, and in *Blakey* v. *Hall* (56 L. T. Rep. 400) the order was corrected by adding a direction for the payment of certain costs. [Smith, L.J. referred to the judgment of Fry, L.J. in *Re Suffield and Watts; Ex parte Brown* (58 L. T. Rep. 911, 913; 20 Q. B. Div. 693, 697) and to *Re The St. Nazaire Land Company Limited*, 41 L. T. Rep. 110; 12 Ch. Div. 88.] In *Re Suffield and Watts* there was no fund to be

(*a*) Reported by W. C. Biss, Esq., Barrister-at-Law.

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administered as there is here. When the judge is directing how the fund is to be distributed, the appellant wants to have these costs allowed out of it. [Lord HALSBURY referred to *Flower* v. *Lloyd*, 37 L. T. Rep. 419; 6 Ch. Div. 297.]

Humber for the plaintiffs.

Astbury for the defendants and Allsup.

Lord HALSBURY.—I am of opinion that this appeal must be dismissed. If by mistake an order has been drawn up which does not express the intention of the court, the court must have jurisdiction to correct the mistake. But this was an application to the Vice-Chancellor to rehear an application and alter an order which he intended to make, but which it is said he ought not to have made. Even when an order has been obtained by fraud, it has been held that the court has no jurisdiction to rehear it. If such a jurisdiction existed, it would be most mischievous. The fact that in the present case the application to rehear was made to the particular judge who made the order is immaterial. For, if one judge can rehear and alter the order, another can. Any application which may be made to the Vice-Chancellor for an order in the nature of a supplemental order is, of course, still within his jurisdiction, but he has no jurisdiction to rehear or alter this order.

LINDLEY, L.J.—I am of the same opinion. This is a matter of some importance with reference to the practice and procedure of the court. This is not an application to alter an order on the ground of some slip or oversight, nor is it a case in which the order has not been drawn up. Here the order has been passed and entered, and, it expresses the real decision of the judge, and that being so, the judge has no jurisdiction to alter it. If this summons had proceeded on the theory that the order of the 11th July was right, or that circumstances had since occurred which had rendered a supplemental order necessary, the court might have entertained the application; but this summons proceeds on the theory that the order made on the 11th July was wrong. In my opinion it is of the utmost importance that there should be a finality to litigation when once the order has been completed. The appeal must be dismissed with costs, but without prejudice to any application which the appellant may make to the Vice-Chancellor, that the costs which he has been ordered to pay may be taken out of the proceeds of the sale of the company's assets.

SMITH, L.J.—I am of opinion that the Vice-Chancellor was right in arriving at the conclusion that he had no jurisdiction in this matter. This is not an application to rehear a matter before the order has been drawn up; nor is it an application to vary an order which has been drawn up not in accordance with the order pronounced by the judge; nor is it an application that the judge should make an order supplemental to the order drawn up. This is an application that he should rehear the matter and make a different order. In my opinion the judge had no jurisdiction to do that. It was said that North, J. had decided the contrary in *Staniar* v. *Evans* (*ubi sup.*). But at the date of that decision *Re Suffield and Watts* (*ubi sup.*) had not been decided by the Court of Appeal, and the case of *Re The St. Nazaire Land Company Limited* (*ubi sup.*), upon which Fry. L.J. relied in the former case, was not brought to the notice of the learned judge. *Staniar* v. *Evans* is not now before the court. If it were, in my judgment, it would require reconsideration. Fry, L.J. put the law on the right foundation when he held that a judge ceased to have jurisdiction over a judgment or order when once it was perfected. In my opinion the Vice-Chancellor had no jurisdiction to do what he was asked to do in this case, and the appeal must be dismissed.

Solicitors for the appellants, *T. H.* and *T. Dodds*, Preston.

Solicitors for the plaintiffs, *Finch* and *Johnson*, Preston.

Solicitors for the liquidators, *William Bramwell*, Preston.

Solicitor for Allsup, *Whitehead*, Preston.

Thursday, Dec. 13, 1894.

(Before Lord ESHER, M.R., LOPES and RIGBY, L.JJ.)

THE KATY. (*a*)

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

Charter-party—Demurrage—"Running days"—How computed—When lay days to commence.

A charter-party provided that lay-days were to count from forty-eight hours after the arrival of the vessel at a safe anchorage. The vessel arrived at the port of discharge on a Saturday, and was ready to discharge at 8.30 a.m. The defendants, the consignees, allowed the discharge to commence at 1 p.m., and it went on continuously till 10 a.m. on the following Saturday when the defendants refused to proceed unless the plaintiffs would pay them a certain sum if the discharge was completed on that day. The plaintiffs contended that the lay days expired on the Saturday, and claimed two days' demurrage.

Held (affirming the President), that "running days" meant calendar days, and not any period of twenty-four hours;

Also (reversing the President), that, as the discharge, by consent of the defendants, had commenced on the Saturday, that day counted as a lay day, and therefore the defendants were liable for two days' demurrage.

APPEAL from a decision of the President (Sir F. H. Jeune) reported *ante*, p. 60.

The following are the material clauses of the charter-party:

2. Orders for the United Kingdom, Continent, or other stipulated port, unless given on signing bills of lading, are to be given at Gibraltar within twelve running hours of arrival, or lay days—Sundays only excepted—to count.

3. The charterer has the right to order the steamer from Gibraltar to Queenstown, Falmouth, or Plymouth (at master's option) for final orders to be given within twelve running hours (twenty-four hours at Queenstown) of arrival, or lay days—Sundays only excepted—to count, for the United Kingdom, Continent, or for other stipulated Continental ports not west of Havre, paying 1s. per unit extra freight over and above the rates hereinafter stated.

7. Fourteen running days, Sundays, Good Friday,

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Easter Monday, Whit Monday, and Christmas-day excepted, are to be allowed the said freighters (if the steamer be not sooner despatched) for loading and unloading, and ten days on demurrage over and above the said lay days at 4*d*. per ton of the steamer's gross register tonnage per running day. Lay days at port of loading are not to count before the 23rd Feb. next (new style) unless both steamer and cargo be ready earlier. The freighters have the option of cancelling this charter if the steamer does not arrive at port of loading, and be ready to load on or before midnight of 10th March next (new style) unless the steamer has been detained waiting for orders as to loading port longer than six hours—in which case the date last mentioned shall be extended so far as to cover the time the vessel was detained for orders over and above the six hours, and if by reason of such detention the vessel is prevented reaching her loading port, the charterers shall pay demurrage for each day detained over the said hours, whether the vessel is ultimately loaded or not.

9. c. It is further agreed, that at Sulina the steamer is to load as much cargo inside the bar or harbour as she can safely proceed to the roads with, and the remainder is to be shipped in the roads at freighter's risk and expense, but in the latter case all days on which lighters are unable from bad weather to go outside are not to count as lay days.

12. Should the steamer be ordered to discharge at a place to which there is not sufficient water for her to get the first tide after arrival without lightening, and lie always afloat, lay days are to count from forty-eight hours after her arrival at a safe anchorage, for similar vessels bound for such place, and any lighterage incurred to enable her to reach the place of discharge is to be at the expense and risk of the receiver of the cargo, any custom of the port or place to the contrary notwithstanding, but time occupied in proceeding from the anchorage to the port of discharge is not to count.

T. E. Scrutton, for the plaintiffs, in support of the appeal.

T. G. Carver, contrà.

Lord ESHER, M,R.—This charter-party, like most of them, is not very easy to construe when it comes into the critical hands of critical lawyers, but I think we ought to construe it according to a business view. The charter-party does not fix specifically any time when the unloading is to begin. It is not as if they were to take delivery immediately on the ship being anchored or immediately on the ship being in an unloading berth, or anything of that sort. There is no express moment stated in which the unloading is to begin. Then it is to begin reasonably; a reasonable time after the ship has arrived. Now in this case, when you begin to think what is reasonable, there comes in the observation of Quain, J., that in this charter-party the charterers are to have as the case turned out here seven lay days at the port of discharge. Apply that to the question as to when it was reasonable to begin. He says seven lay days mean seven whole lay days. I agree with him. I think, therefore, that if nothing else had happened here the charterers were not bound to take delivery when the captain asked them to take delivery, because they would not have the whole of the Saturday, which they were entitled to have, and they might have said, "No, we will not count a part of the day; it is not reasonable that we should. The lay days, therefore, will begin on Monday." When the days did begin I cannot entertain any doubt that the days were days, and that to go into the superfine criticism that in one part of the charter-party they have talked of forty-eight hours cannot alter the plain stipulation that they are to have seven days, and that means seven whole days—days in the ordinary sense. If you expand it that would be, if nothing else had happened, Monday, Tuesday, Wednesday, Thursday, Friday, Saturday, Monday. That is what it would be. Seven days means those seven days, and when you talk of Monday, I cannot think that you are carrying into Monday half of Tuesday. Here, although they were not obliged to treat Saturday as a lay day, let us see how they did treat it. The captain went to them not very late, I think early in the morning, and asked them to come and take delivery. They said "No." They were right. They were not bound, I think, but then they changed their minds, and at 1 o'clock they do go and take delivery. What is the meaning of that? The captain said, "Come, agree with me to take delivery," and they did agree to take delivery, and they did it. Is that, or is that not, agreeing to treat the Saturday as one of the lay days? The lay days for this purpose I may call unloading days. They agree to treat it in that way. I think the meaning of the proposition was, "Now come here and treat this as a lay day;" they say "No" at first, but afterwards they agree to treat it as a lay day, and if it once is a lay day, to my mind it does not signify how much of it was left. The whole of that day is a lay day, and if they neither did nor could take delivery during half of it, it is only one time—it is a lay day. I say it is only one time because if, for instance, on the Monday or Tuesday something happens, such as a storm of rain, so that it would have been extremely dangerous to a cargo of maize or wheat in bulk to be landed over the side of the ship in the pouring rain, because it would have to be dried afterwards or it would be spoilt; therefore they might have been prevented upon the Tuesday from taking delivery, but that is their misfortune. It is the charterer who must pay for anything of that kind; therefore on the Saturday, if they chose to take it as a lay day, they must take the whole of it, and the fact that they did not take delivery until 1 o'clock does not prevent them from having to treat the Saturday as a lay day. There was an advantage to themselves to be taken into account, it seems to me. Being a cargo of wheat or maize in bulk, it was for the advantage of the consignee to get such a cargo as that out of the ship as soon as possible; first of all because it is a cargo extremely likely to heat of itself, and secondly because it is a cargo that will easily damage if wet comes upon it, if the hatches are open. I should say also, as regards that, if the consignees or the charterers had a cargo coming to them at that time, and in that position, it would be an advantage to them to have the delivery as soon as possible, and I cannot help thinking that if shipowners are to use their crew, and their materials and implements on a day when they are not obliged to, it is a burden upon them. It certainly is a burden upon their crew. So that I cannot think, with great deference to those who suggest it, that you can say that this matter makes no difference to the ship or the consignee, and is to be treated as if it was a mere matter of courtesy. I cannot help thinking that the proper inference to be drawn is that both sides agree to treat that Saturday as one of the lay days, and if so it did not signify how much of

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that lay day was or could be employed by the consignees for the discharge of the cargo. I, therefore, am obliged to disagree with the judgment given by the President, and to say that here the lay days began on the Saturday, so that there must be two demurrage days, and the shipowner was entitled so to treat it, and to have judgment entered for him for the amount claimed.

LOPES and RIGBY, L.JJ. concurred.

Appeal allowed.

Solicitors: *Botterell* and *Roche*; *Field, Roscoe*, and *Co.*, for *Batesons, Warr*, and *Wimshurst*, Liverpool.

Thursday, Dec. 13, 1894.

(Before Lord ESHER, M.R., LOPES and RIGBY, L.JJ.)

THE ORIENTA. (*a*)

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

Necessaries — Master's liability — Maritime lien on ship—Merchant Shipping Act 1889 (52 *&* 53 *Vict. c.* 46), *s.* 1.

Disbursements and liabilities of the master of a ship which give rise to a maritime lien are those for which, by virtue of his general authority, and without express authority, he can pledge his owners' credit; and a liability cannot be created in the master, as drawer of a bill of exchange in respect of necessaries, within the meaning of the Merchant Shipping Act 1889, *for the purpose of attaching a lien to the ship.*

APPEAL from a decision of the President (Sir F. H. Jeune), reported 71 L. T. Rep. 343.

Pickford, Q.C. and *Dawson Miller*, for the plaintiff, in support of the appeal, referred to the following cases in addition to those dealt with by the President (*ubi sup.*):

The Ocean, 2 W. Rob. 368; 9 Jur. 381;
The Caledonia, Swabey, 17;
The Mary Ann, 13 L. T. Rep. 384; 2 Mar. Law Cas. 294; L. Rep. 1 Adm. 8;
The Glentana, Swabey, 415;
Webster v. *Seekamp*, 4 B. & Ald. 352.

Sir *Walter Phillimore* and *Laing*, for the interveners, were stopped.

Lord ESHER, M.R.—This is a perfectly easy case. I apprehend it has been common knowledge for nearly 200 years that the captain is only authorised to pledge his owners' credit for what may be called "things necessary" for the ship. He is only authorised to pledge his owner's credit for them if he is in a position where it is necessary for the purposes of his duty that these things should be supplied, and he cannot have recourse to his owners before ordering them. In respect of what disbursements can he have a lien upon the ship? He can have no lien upon his ship here. He can only give a bottomry bond on the ship where the necessity arises in the sense which I have just stated. But then there came these Acts of Parliament, which say he should have a lien for disbursements. Now, if he should have a lien upon the ship, then the ship is bound to him, and it seems intolerable to suppose that the captain can bind the ship to himself by ordering goods which he was not authorised to order at all, so as to pledge his owners' credit for them. The real meaning of the word "disbursements" in Admiralty jurisdiction is disbursements by the captain which he makes himself liable for in respect of necessary things for the ship, for the purposes of navigation, which he as master of the ship is there to carry out—necessary in the sense that they must be had immediately—and when the owner is not there, able to give the order, and he is not so near to the captain that the captain can ask for his authority, and the captain is therefore obliged, necessarily, to disburse in order to carry out his duty as master. Here we have no disbursements made by the master; we have no goods ordered by the master at all; we have no liability of the master in respect of these goods at all from beginning to end. He is not liable for the price of the coals. It may be that the bill is drawn for the exact price, but he has no liability for the coals. What he has done is at the request of his owners, to make himself drawer of the bill of exchange which the owners were to accept, but it does not make the master liable to anybody unless the owners dishonour it when it becomes due, and the proper notices have been given. That is not a liability in respect of the coals, that is a liability in respect of the bill of exchange. It is not a liability incurred by him in his office as master, but by his being the drawer at the request of his owners. The appeal must be dismissed.

LOPES and RIGBY, L.JJ. concurred.

Appeal dismissed.

Solicitors: *Botterell* and *Roche*; *Ince, Colt*, and *Ince*.

Nov. 30 *and Dec.* 18, 1894.

(Before Lord HALSBURY, LINDLEY and SMITH, L.JJ.)

THE MECCA. (*a*)

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

Necessaries—Jurisdiction—Foreign ship—Foreign port—High seas—Admiralty Court Act 1840 (3 *&* 4 *Vict. c.* 65), *s.* 6.—*Admiralty Court Act* 1861 (24 *&* 25 *Vict. c.* 10), *s.* 5.

The High Court of Admiralty has jurisdiction over a claim in respect of necessaries supplied to a foreign ship in a foreign port, even although that port be not upon the high seas.

The India (9 *L. T. Rep.* 234; 1 *Mar. Law Cas.* 390; 33 *L. J.* 234, *Adm.*) *overruled.*

APPEAL from a decision of Bruce, J.

The plaintiffs were respectively Messrs. Cory Brothers and Co. Limited, coal merchants, carrying on business in London, and having depôts at Alexandria and Port Said; and Antonio Legembre, also a coal merchant, of Algiers. The defendants were the Hamidieh Steamship Company Limited, owners of the Turkish steamship *Mecca*.

In March 1894 the *Mecca* was supplied by Messrs. Cory Brothers, at Alexandria and Port Said, with coals, and they also advanced her Suez Canal dues at the latter place. The master of the *Mecca*, W. G. Crockhart, gave a bill of exchange, dated Alexandria, March 6, for 176*l.* 5*s.* for the coals there supplied, and another, dated March 10, for 194*l.* 8*s.* for the coals and dues at

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Port Said. The bills were payable thirty days after sight, and the first was drawn on C. A. Theodoridi, and the second on the owners of the *Mecca*, both at Constantinople.

In Aug. 1894 the *Mecca* was supplied with coals at Algiers by the plaintiff, Antonio Legembre, and he received from the master a bill drawn upon his owners, and dated Aug. 28, for the sum of 101*l.* 4*s.* 6*d.*, payable at thirty days sight. All these bills were dishonoured on presentation, and notarial charges incurred amounting to 3*l.* 7*s.* At all three ports the coaling is done by means of lighters. At Port Said the vessels lie in the Ismail Basin, which is practically part of the Canal; at Algiers and Alexandria there is an open roadstead slightly protected by breakwaters.

The plaintiffs brought an action against the master of the *Mecca*, in the Queen's Bench Division, to recover the amount of the bills, and the master in chambers allowed him to defend on payment of 400*l.* into court. This was paid with a denial of liability as regarded the claim of Messrs. Cory Brothers, on the ground that they had been paid by the Turkish owners of the *Mecca*, but admitting the claim of Legembre.

The plaintiffs also instituted an action *in rem* in the Admiralty Division, and the defendants moved that the proceedings be set aside or stayed pending the determination of the common law action.

Sect. 6 of the Admiralty Court Act 1840 (3 & 4 Vict. c. 65) provides that:

> The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvages for services rendered to or damage received by any ship or seagoing vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or seagoing vessel, and to enforce payment thereof, whether such ship or vessel may have been within the body of a county, or upon the high seas, at the time when the services were rendered or the damage received, or necessaries furnished, in respect of which such claim is made.

Sect. 5 of the Admiralty Court Act 1861 (24 & 25 Vict. c. 10) provides that:

> The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales. Provided always, that if in any such cause the plaintiff do not recover 20*l.* he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said court.

The motion was heard before Bruce, J. on the 5th Nov.

Pyke, Q. C. and *Nelson* supported the motion on behalf of the defendants.

Bucknill, Q.C. and *Gerard Ince* for the plaintiffs.

Bruce, J., in granting the motion, said that so long ago as the *India* (*ubi sup.*) Dr. Lushington had certainly intimated an opinion that the 3rd & 4th Vict. did not give this court jurisdiction in a case where necessaries were furnished to a foreign ship in a foreign port. That authority had never been questioned since, nor had this court ever entertained a suit for necessaries so furnished. With regard to the Act of 1861 he felt himself bound by a long series of decisions which held that it applied only to British and Colonial ships. Then it was intimated by council for the plaintiffs that evidence might be adduced to show that Port Said was not in territorial waters, but he thought it would require a strong affidavit to satisfy the court that it was on the high seas. If any doubt arose on that point and the case went to the Court of Appeal, that court would exercise its discretion to allow affidavits to be filed to show that Port Said was not in territorial waters.

The plaintiffs appealed.

Nov. 30.—*Bucknill*, Q.C. and *Gerard Ince*. for the plaintiffs, in support of the appeal.—A series of cases have decided that before 1840 the Admiralty Court had no jurisdiction with respect to necessaries supplied to a ship under any circumstances:

> *The Heinrich Bjorn*, 52 L. T. Rep. 560; 5 Asp. Mar. Law Cas. 391; 11 App. Cas. 270.

It is now settled beyond power of appeal that supply of necessaries does not give a maritime lien. The second point is that these ports were on the high seas. [Lord Halsbury referred to *Reg.* v. *Cunningham*, 32 L. T. Rep. O. S. 287; 8 Cox C. C. 104.] See the old statutes of Richard in *Reg.* v. *Keyn* (13 Cox C. C. 403; L. Rep. 2 Exch. Div. 63):

> *The Neptune*, 3 Hagg. 129; 3 Knapp. 94;
> *The Pacific*, Br. & Lush. 243;
> *The India* (*ubi sup.*).

Sect. 6 of the Act of 1840 seems to draw a distinction between things done within the realm and things done on the seas; it was not intended to rob the Admiralty Court of its jurisdiction over things done on the seas:

> *The Courier*, Lush. 541;
> *The Diana*, Lush. 539;
> Kennedy on Salvage, p. 45.

In *The Wataga* (Swabey, 165) Dr. Lushington allowed the Act of 1840 to take in goods supplied in a foreign port. [Lord Halsbury.—That would seem, if correct, to carry you all the way. Lindley, L.J.—*The Anna* (34 L. T. Rep. 898; 3 Asp. Mar. Law Cas. 237; 1 P. Div. 253) follows *The Wataga*, and pulls you through]:

> *The Flecha*, 1 Spink, 438;
> *The West Friesland*, Swabey, 454.

"High seas" means all that body of water surrounding the coast which is without the body of the county, *i.e.*, below high-water mark:

> *General Iron Screw Collier Company* v. *Schurmanns*, 29 L. J. 877, Ch.;
> *The Mali Ivo*, 20 L. T. Rep. 681; 3 Mar. Law Cas. 244; L. Rep. 2 Adm. & Eccl. 356;
> *Reg.* v. *Anderson*, L. Rep. 1 Cr. Cas. Res. 161:
> *The Franconia*, 35 L. T. Rep. 721; 3 Asp. Mar. Law Cas. 435; 2 P. Div. 8.

As to what is a port, see Coke's Institutes, Part iv. p. 134. *The India* (*ubi sup.*) was not properly decided, and this motion should have been dismissed.

Pyke, Q.C. and *Nelson* for the defendants.—The proviso in the Act of 1861 does not seem to apply to foreign ships. The decision in *The Ella A. Clarke* (8 L. T. Rep. 119; Br. & Lush. 36) has never been questioned. Sect. 5 refers to British ships. [Lord Halsbury.—You wish to introduce by construction the word "British" in every case

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where it does not occur.] Not where collision is referred to. The coals were certainly not supplied on the high seas at Port Said. The *Mecca* was loaded in the Ismail basin, which is an artificial body of water. [Lord HALSBURY referred to the Territorial Waters Jurisdiction Act 1878 (41 & 42 Vict. c. 73).] *The Wataga* and *The Anna* are not in point:

The Sara, 61 L. T. Rep. 26; 6 Asp. Mar. Law Cas. 413; 14 A. C. 209.

Bucknill, Q.C., in reply, referred to

The Merchant Shipping Act 1854 (17 & 18 Vict. c. 104), ss. 476, 529;
Reg. v. *Carr*, 47 L. T. Rep. 450; 10 Q. B. Div. 76;
The Saxonia, Lush. 417.

Judgment was reserved and delivered on the 18th Dec.

Lord HALSBURY.—The question in this case arises, as to coal supplied in foreign ports to a ship now here, whether the Admiralty Division has jurisdiction to detain the ship for the price of the coals so supplied. Practically it resolves itself into the question whether Dr. Lushington's decision in the case of *The India* (*ubi sup.*), is to be followed in this court. In the view I take of that question I think it unnecessary to enter into the cases which have arisen between the Common Law Courts and the Admiralty, and, indeed, I will assume that up to the year 1861 the Court of Admiralty would have had no jurisdiction in this case, though, as applicable to the supply at Alexandria and Algiers, I am by no means prepared to say that the high seas do not include those places of supply; but, as the Act of 1861 appears to me conclusively to dispose of the question, I would rather rest my judgment upon the language of that statute. Now the 5th section of that statute provides that the High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs. Then follow qualifications which are immaterial in respect of this case, and which seem to me to give no materials for qualifying or cutting down the generality of the language I have quoted. The learned judge who decided *The India* held the words I have quoted to apply to a colonial ship in a foreign port, and I search in vain throughout the whole statute for anything which can justify the construction that you must imply the words British or colonial ship in the 5th section. The language of the 7th section, "any ship," is admitted to apply to any ship all over the world, and I am wholly unable to see why the same words employed in sect. 5 ought not to receive an equally extended application. It cannot be alleged that the statute is only intended to apply to British ships, inasmuch as it is admitted that some of its provisions apply to all ships anywhere. Where the Legislature intended to exclude foreign ships and to apply its provisions solely to British ships or ships in British waters it has been careful to say so in terms (see sects. 8, 9, and 11), and, upon ordinary principles of construction, where the Legislature has enacted something in respect to any ship and something else as to any British ship it would be improper to assume there was no intentional distinction. Neither is it possible to suggest any reasonable ground for the supposed limitation. Dr. Lushington seems himself to have been unable to suggest any reason for it. The Act itself professes to be an Act for the extending of the jurisdiction of the High Court of Admiralty, and the nature of the thing dealt with seems to me to point in the direction of extension rather than restriction. I am, therefore, of opinion that the decision in the case of *The India* was wrong. The authority of Dr. Lushington treating of such a subject makes one hesitate to overrule a decision of his, particularly when it has remained unchallenged for so many years; but, on the other hand, the case turns upon the construction of a statute only thirty-three years old. Reluctant as one may be to disturb a decision acquiesced in so long, yet that decision involves principles of construction so serious that I think it is the duty of the court to pronounce its disagreement with them. I am therefore of opinion that this appeal should be allowed.

LINDLEY, L.J.—The question raised by this appeal is whether a foreign steamship supplied with coal in foreign ports, but which ship was in this country when this action was commenced, can be proceeded against in the Admiralty Division of the High Court for the price of such coals. Without investigating the early history of the Admiralty jurisdiction in civil cases, it is sufficient to start from the doctrine well settled in the time of Blackstone, viz.: (1) That the Court of Admiralty had no jurisdiction to entertain any causes of action arising within the precincts or body of a county; (2) that the court had jurisdiction over some causes of action arising on the high seas. (3 Bl. Com., 106). I say "some" because their number was limited to what are commonly called maritime causes. It must also be borne in mind that the Court of Admiralty had no jurisdiction over any causes of action arising in foreign countries beyond the seas, but not on the high seas. (Com. Dig. Admiralty, F 3). In 1840 an Act was passed to extend the jurisdiction in certain causes of action (3 & 4 Vict. c. 65, sect. 6). The causes of action enumerated are salvage, damage to ships, towage, and necessaries supplied to foreign ships. Necessaries supplied to English ships are not within the section, and the jurisdiction of the court as to them was not extended. In fact, it had none: (see *The Two Ellens*, 26 L. T. Rep. 1; 1 Asp. Mar. Law Cas. 208; L. Rep. 4 Prob. Cas. 161.) In *The Robert Pow* (Br. & Lush. 99) Dr. Lushington said that the object of this enactment was to give the Court of Admiralty jurisdiction over certain causes of action, although they might arise within the body of a county, and in cases of damage he confined the jurisdiction to collisions between ships. There is no doubt that one of the main objects of the Act was to extend the jurisdiction as above stated. But this was not all, for, as pointed out in *The Heinrich Bjorn* (*ubi sup.*), the jurisdiction to entertain a suit for necessaries supplied to a foreign ship was conferred for the first time, and it was confined to them. The limited construction put by Dr. Lushington on the jurisdiction of the court in cases of damage was not adopted by the House of Lords: (see *The Zeta*, 68 L. T. Rep. 40; 7 Asp. Mar. Law Cas. 237; (1893) A. C., 468.) The statute was held to apply to other cases of damage; and, what is more important on the present occasion, the Act was held to define the jurisdiction of the Court of Admiralty on the high seas as well as within the body of a county. The expression "high seas"

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when used with reference to the jurisdiction of the Court of Admiralty included all oceans, seas, bays, channels, rivers, creeks, and waters below low water-mark and where great ships could go, with the exception only of such parts of such oceans, &c., as were within the body of some county: (see as to this 28 Hen. 8, c. 15; 4 Inst., 134; Com. Dig. Admlty., E 7 (1) (7) (14); *Reg.* v. *Anderson* (*ubi sup.*); *Reg.* v. *Carr* (*ubi sup.*). A foreign or colonial port, if it was part of the high seas in the above sense, would be as much within the jurisdiction of the Admiralty as any other port of the high seas. The jurisdiction, however, is necessarily limited in its application. It can only be exercised over persons or ships when they come to this country. An artificial basin or dock excavated out of land, but into which water from the high seas could be made to flow would not, I apprehend, be in any sense part of the high seas, whether such basin or dock was in this country or in any other. Apart, then, from authority and on general principles of law, I should arrive at the conclusion that in this case the Court of Admiralty had under the Act of 1840 jurisdiction to proceed against the *Mecca* when in this country for the coals supplied to her in Alexandria and Algiers, she being supplied on the high seas at those places, although they are also ports. But the basin at Port Said, not being part of the high seas, the Court of Admiralty would have no jurisdiction under the Act of 1840 if it stood alone. The subsequent Act of 1861 has again, however, extended the jurisdiction of the court. This statute was passed expressly for that very purpose. Nothing can be wider than the language of sects. 4, 5, 6, 7, and 10. The expression used in them is "any ship," and when this language is contrasted with the language used in sects. 8, 9, and 11, in which British ships are expressly mentioned, the inference is very strong that "any ship" means any ship, whether British, colonial, or foreign. Sects. 4, 5, 6, 7, and 10 do not refer to the high seas, and I see no justification for limiting the jurisdiction conferred on the court by these sections to ships on the high seas. I read the sections as applying to any ships anywhere, although, until they come to this country, they cannot be proceeded against here. Sect. 5, which deals with necessaries, is only applicable, it is true, to some ships—viz., to those supplied elsewhere than in the ports to which they belong; but even then they are not excepted if any of their owners or part owners are domiciled in England or Wales when proceedings in the Admiralty are instituted. This limitation, however, points not to the nationality of the ship nor to any distinction between high seas and other places not on the high seas, but to the port of supply. The exception includes English ships supplied at the ports to which they belong, but the larger class of ships from which the exception is taken is not confined to other English ships, but extends to all ships. If the ship, whether English, colonial, or foreign, is supplied with necessaries in her own port the probability is that there are persons there to whom credit is given and who can be sued there. But if, as in the present case, the ship is supplied in some other place, the supplier of necessaries (if he does not obtain cash on delivery, which may be impossible) is very likely never to get paid at all. There is good reason therefore, both in the interest of the supplier and in the interest of the shipowner, for giving the supplier a remedy against the ship if she comes to this country. If there were no such remedy supplies would often be refused, however urgently required. Apart, then, from authority, I am of opinion that under this statute of 1861 the court would have jurisdiction to entertain this action for the coals supplied to the *Mecca* in the basin of Port Said as well as for those supplied in the ports of Alexandria and Algiers. Even if these two ports are not parts of the high seas, as I think they are, still the Act of 1861 goes further than the Act of 1840, and is wide enough to give the court jurisdiction to arrest the ship for the price of the coals supplied at all three places. I turn now to the authorities, and I find that in *The India* (*ubi sup.*), Dr. Lushington held that even under the Act of 1861 the Court of Admiralty had no jurisdiction to entertain a suit for necessaries supplied to a foreign ship in a foreign port. The same learned judge had expressed an opinion to the same effect in *The Ocean* (*ubi sup.*), decided in 1845. Dr. Lushington, however, decided in 1856 that the court had jurisdiction under the Act of 1840 to entertain a suit for necessaries supplied to a foreign ship in a colonial port, *The Wataga* (*ubi sup.*), and this case was approved and followed by this court in *The Anna* (*ubi sup.*). The same point had been decided in the same way in 1854 as regards necessaries supplied to a foreign ship in the Thames—*The Flecha* (*ubi sup.*). Sect. 6 of the Act of 1840 and sect. 5 of the Act of 1861 and these decisions show that it is not the nationality of the ships which is important, but the place of supply. Unless, however, the place of supply is the port to which the ship belongs, the place of supply is not made material. But the authority of Dr. Lushington on all Admiralty matters is deservedly so high that I should hesitate long in differing from him on the construction of the statutes in question if the House of Lords had not held that he construed the Acts of 1840 and 1861 erroneously in other cases. It was, however, so held in *The Zeta* (*ubi sup.*), *The Sara* (*ubi sub.*), and in *The Heinrich Bjorn* (*ubi sup.*). These decisions, it is true, do not overrule *The India*, they relate to other matters—viz., damage and lien for necessaries, but they show that the construction put on the statutes of 1840 and 1861 by Dr. Lushington was in some respects incorrect. Guided by these decisions and applying my own mind to the statutes in question I have arrived at the conclusion that the decision in *The India* was erroneous and ought no longer to be followed. The appeal, therefore, must be allowed.

Smith, L.J. concurred.

Solicitors for the appellants, *Ince, Colt,* and *Ince.*

Solicitors for the respondents, *Lowless* and *Co.*

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July 26 *and* 27, 1894.

(Before Lord ESHER, M.R., KAY and SMITH, L.JJ.)

THE MINNIE. (a)

APPEAL FROM THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

Collision—Thames estuary—South-west Reach—Swin—Proper course of navigation—Narrow channel—Regulations for Preventing Collisions at Sea, art. 21.

A collision between an outgoing and an incoming steamship occurred in the Swin to the westward of a line between the Maplin Spit Light and the Middle Lightship.

Held, that the outgoing steamer was to blame for breach of art. 21 *of the Regulations for Preventing Collisions at Sea, and that she ought to have kept to that side of the fairway which lay on her starboard hand.*

The space between the Middle Lightship and the Middle Sands is a narrow channel, within the meaning of art. 21 *of the Regulations for Preventing Collisions at Sea.*

THIS was an appeal by the defendants in a collision action *in rem* from a decision of Bruce, J., finding the defendants' vessel, the *Minnie*, alone to blame.

The collision occurred about 11.30 p.m., on the 10th May 1894, in South-west Reach, above the Swin Middle Lightship, between the plaintiffs' steamship the *Freda* and defendants' steamship the *Minnie*. The *Freda* was proceeding up the channel, and the *Minnie* was going down. The plaintiffs' case was, that the *Freda* was on a course of S.W. by W. ¾ W. magnetic below the Middle Lightship, when those on board of her saw the masthead light of the *Minnie* between two and three miles distant, and bearing about two points on the port bow, and that shortly afterwards the green light of the *Minnie* came into view. The *Freda* was kept on her course until she approached the Middle Lightship, when her helm was starboarded and steadied, and she passed the Lightship to the southward in the usual course. Meanwhile the *Minnie* had drawn ahead, and then across the bows of the *Freda*, and was well clear on the starboard bow of the *Freda* showing her green and masthead lights, and in a position to pass starboard side to starboard side. The *Freda's* helm was then starboarded to put her on a course for the West Swin, but directly afterwards the *Minnie* opened her red light, and although the *Freda* reversed her engines and steadied her helm, the collision occurred.

The case of the *Minnie* was, that she was proceeding on her course for the Middle Lightship, about N.E. by N., and the *Freda* having passed on to the port bow of the *Minnie*, and got nearly two points on the bow, at a time when the vessels were in a position to pass clear port to port, suddenly starboarded across the course of the *Minnie*, and so caused the collision.

Bruce, J. found that at the collision the two vessels were a little to the westward of the direct course from the Middle Lightship to the East Maplin Buoy, that the *Minnie* was to the northward and westward of her course, and was coming down showing her green light to the *Freda*, and that the *Freda* was justified in following the course of the channel under the starboard helm, and shaping her course so that the vessels might pass starboard to starboard. His Lordship pronounced the *Minnie* alone to blame for the collision.

From this judgment the defendants appealed.

Sir *R. Webster*, Q.C. and *Aspinall*, Q.C. (*A. Pritchard* with them) in support of the appeal.

Sir *Walter Phillimore* and *Butler Aspinall*, *contrà*.

Lord ESHER, M.R.—The question here must be what is the proper navigation for two steamships, one coming in from the sea, and the other going out to sea, when they are passing each other between the Middle Lightship and the North-east Maplin? It is an admitted part of that navigation that they are both to pass to the eastward of the Middle Lightship, but the space between the Middle Lightship and the Middle Sands is a very narrow passage. It is a narrow passage, not within the river Thames so as to make any legislation with regard to the river apply, but it is on the sea approaching a port through a narrow channel; and in my opinion, in those circumstances, the 21st rule applies. The 21st rule is this: "In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such ship." If they do so pass, that is, if they keep to that side of the fairway or midchannel of the narrow channel which lies on the starboard side of the ship, then, of course, they are to pass each other port side to port side. That follows necessarily. Therefore ships which are to pass through this channel between the Middle Lightship and the Middle Sands ought each of them to pass through on the starboard side of the fairway which, I suppose, is the centre of the narrow channel, and so pass red to red, or port side to port side. The space is all clear, and the ships can see each other, as one is coming in and the other is going out, in plenty of time for both of them to judge whether they are likely to meet so as to pass each other somewhere between the Middle Lightship and the North-east Maplin Buoy. They cannot see the sands, which narrow the channel, but there is no promontory of land which prevents them from seeing each other. The question is, how ought they to navigate? Taking first the outward vessel. Before she gets up to the Middle Lightship, she is in a narrow channel. The narrow channel does not begin at the Lightship, which is at the narrowest part. We are advised by our nautical assessors that the outward vessel should steer to pass the East Maplin Buoy—I think by that is meant the Old Maplin Buoy, which had a light at that time, that is, the Maplin Spit Buoy—giving it half a cable's length; then she should steer for the Middle Lightship, keeping it slightly on the port bow. But that does not mean that she is to steer for the Middle Lightship till she gets to it, because then, instead of being on the starboard side of that channel between the Middle Lightship and the Middle Sands, she would be as far as she possibly could be on the port side. Therefore before she gets there she must turn. In the daytime it would be perfectly easy for her to turn, because she would see the Bell Buoy; but at night, even if she does not hear the Bell Buoy, if she sees the light of the Middle

(a) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

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Lightship, she would know that before she approaches it she must port her helm so as to get on the starboard side of the channel. She must port her helm gradually to go round, so as to keep on the east side of that middle channel. Therefore she has to steer for the Middle Lightship until, in the daytime, it is perfectly easy for her to see the Bell Buoy—and then she ought to round it as close as she can; or, at night, when she has gone so near to the Middle Light that a mariner who knows the chart must be aware that he is then safe with regard to the Bell Buoy, he ought to port his helm so as to keep on the starboard side of that narrow channel. That was the duty of the *Minnie*. The inward vessel should pass the lightship close, and then steer the channel course, keeping the Maplin Spit Light a little on the starboard bow, so as to be safe from that; and though for her own safety she may keep the Maplin Spit Light a little on her starboard bow, so as to enable her to pass the North-east Maplin Buoy, she will be doing nothing wrong with regard to the other ship if she goes more to the westward than that line. She puts herself into a difficulty, but not the other vessel, by doing that. Therefore she ought to go close to the Middle Light, which is for the purpose of giving all possible room for the other vessel to pass her port side to port side. When she has passed the Middle Light she ought not to go to the eastward. but may go somewhat to the westward of the line of which I have spoken. That being the proper navigation, was the *Minnie* to the westward of that line? That is a matter of evidence and of fact, and is not a question for the nautical assessors. It is for us. Upon that we have the evidence of the man on the lightship, and if his evidence be correct, it is impossible for us to say that the learned judge in the court below, with the assistance of the Trinity Masters, came to a wrong conclusion when he found that the collision took place to the westward of that line. Arguments have been used to show that the vessels after the collision might have drifted one way or the other, but nobody can say for certain how they would drift, and Bruce, J., and the Trinity Masters, having come to the conclusion that the collision took place to the westward of that line, I can see nothing which enables us to say, or justifies us in saying, that it was wrong. I have asked the nautical assessors whether, if the collision took place to the westward of the line of the Maplin Spit Buoy gas light, was the *Minnie* on the wrong side of the channel with regard to the *Freda*; and we are advised that if it took place to the westward of that line, the nautical result is that the *Minnie* was on the wrong side of the channel at the time the collision took place. If she was on the wrong side, it is impossible to say that that did not conduce to the collision. Therefore that puts the *Minnie* in the wrong. If she got on the wrong side of the line it must have been by inadvertently starboarding her helm, or keeping it to starboard longer than she ought to have done. If she did, and turned too short into the bight, it seems to me clear that she would probably show her green light to the *Freda*, and the learned judge has found on the evidence that she did. I think she did, and if she did, and showed that green light on the starboard bow of the *Freda*, I cannot even bring myself to ask the question of the assessors, because I cannot doubt that the *Freda* was not wrong in starboarding her helm, and deciding to pass as she did. She blew two whistles to give notice of what she was doing, and I think she could not be wrong in starboarding her helm then, so as to go green light to green light. She gave notice that that was what, under the circumstances, and in consequence of the place where the *Minnie* was, she was going to do. That the *Minnie* was found too far to the westward seems to me to be fortified by the way in which another vessel passed her. That vessel passed the *Minnie* green to green, and that strongly fortifies the proposition that she was too far to the westward and out of the proper part of the channel, and makes me feel that that part of the evidence too, is almost conclusive against her. I do not think we can overrule the judgment of the court below, and this appeal must be dismissed.

Kay and Smith, L.JJ. concurred.

Appeal dismissed.

Solicitors for the appellants, *Pritchard* and *Sons*.

Solicitors for the respondents, *Thomas Cooper* and *Co.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Nov. 1, 3, *and* 6, 1894.

(Before Chitty, J.)

Re Negus. (*a*)

Costs—Preparation of agreement for lease—Agreement for letting for three years—Taxation—Solicitors' Remuneration Act 1881 (44 & 45 *Vict. c.* 44), *ss.* 2, 4—*General Order* 1882, *r.* 2, *sched.* 1, *part* 2.

On an agreement for letting for a term not exceeding three years, the lessor's solicitor is entitled to the scale fee under sched. 1, *part* 2, *to the General Order of Aug.* 1882, *under the Solicitors' Remuneration Act* 1881, *as for an agreement for a lease. The lessor's solicitor, having prepared an agreement for letting certain premises for a term of three years, delivered a bill with items in respect thereof to the tenant, who obtained an order to tax the same. The taxing master applied the first scale in sched.* 1, *part* 2, *to the General Order to the transaction and certified for the scale fee. On a summons to review the taxation:*

Held, that the scale applied, but that, as the tenant was not liable for the duplicate or counterpart, a reasonable reduction from the scale fee ought to have been made in respect thereof.

This was a summons by a lessee to review the taxation of the bill of costs of the lessor's solicitor.

By an agreement the landlord agreed to let, and the tenant to take certain rooms on the second and fifth floors of a house in Bond-street, for a term of three years at a rack rent. The landlord's solicitor delivered to the tenant an item bill of his costs relating to the agreement, and the tenant thereupon obtained a third-party order to tax the bill. The taxing master considered that the first scale in part 2, of sched. 1, to the General Order under the Solicitors' Remu-

(*a*) Reported by G. Welby King, Esq., Barrister-at-Law.

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neration Act 1881, applied to the transaction as being an agreement for a lease, and allowed the scale charge which was within a few shillings of the amount of the bill as delivered. The tenant objected to the view taken by the taxing master, contending that the scale did not apply to a tenancy agreement for a term not exceeding three years, and that the costs were regulated by sched. 2, and took out a summons to review the taxation.

Whitehorne, Q.C. and *Edward Ford* for the tenant.—The solicitor having delivered an item bill is bound to have it taxed in that form:

Re Heather, L. Rep. 5 Ch. 694.

The agreement in this case is not an "agreement for a lease" within the meaning of that term in part 2, of sched. 1; the term there means an agreement for a lease which the law requires to be in writing. The scale charge includes the costs of the counterpart, for which the tenant is not liable to pay, and therefore the scale is inapplicable. They referred to

Re Emanuel and Simmonds, 55 L. T. Rep. 79; 33 Ch. Div. 40;

Savery v. *Enfield Local Board*, 68 L. T. Rep. 722; (1893) App. Cas. 218.

Manson, for the solicitor, assented to a reduction for the costs of the counterpart.

CHITTY, J.—The taxing master has applied to this transaction the first scale in part 2, of sched. 1, to the General Order under the Solicitors' Remuneration Act 1881, and the tenant objects to the application of the scale. One point which was raised by Mr. Whitehorne was founded upon that which took place before the taxing master. The solicitor had delivered a bill on the footing of the scale not applying, and that was the bill referred to in the order for taxation, and that is the bill which, it is contended, the tenant is entitled to have taxed on the principle on which it was framed, namely, that the scale did not apply. Both parties adopted the view that it was an item bill which had to be taxed, but the taxing master considered that the scale applied to the transaction. It is contended that, even if the taxing master was right, he could not under the circumstances apply the scale, and the case of *Re Heather* (*ubi sup.*) was referred to, where it was held that a solicitor could not withdraw a bill which he had once delivered. It was said that the solicitor in this case was bound by the bill which he had delivered, and therefore he must submit to have the bill taxed as an item bill. It appears to me that the decision in *Re Heather* does not apply to this case. According to the present practice, where an item bill is taken in for taxation, and the taxing master sees that the scale is applicable, he applies the scale and taxes by that, and this practice seems right. The taxing master is bound to tax according to law, and bound to apply the law to the facts and circumstances of the case. Although the solicitor submitted an item bill in the first instance, it was competent for him to acknowledge that it was an error on his part; and to have the bill taxed according to the scale, and this is what has been done. This objection cannot be maintained. The next point is, whether this document is a lease or an agreement for a lease within the meaning of the first scale. The Court of Appeal in *Re Emanuel and Simmonds* (*ubi sup.*) put a construction on the meaning of the term "agreements for leases." The point arose on a case where the solicitor contended he could charge for both the lease and the agreement, and the only point decided was, that the solicitor could not make a double charge, and that the term "agreements for leases" was not to be confined to its strict technical meaning in law, but included agreements for leases on which the parties intended to rely as sufficient for the purpose of stating the terms on which the property is held. The argument for the tenant in this case was, that the term "lease or agreement for a lease" applies only to such leases or agreements for leases as the law requires to be in writing; but there are no words to justify the court in putting that interpretation on the material parts of the schedule. The argument is really founded on supposed cases of extreme hardship, and the contention is that the words ought to be so read as to exclude these cases of hardship. The term "lease" may be properly used to denote any demise however short or however long. It is sufficient to refer to the 1st section of the Statute of Frauds, which enacts that parol leases shall have the effect of leases at will only, with the exception (sect. 2) of leases under three years at two-thirds rack rent at least. In that statute a demise by parol for less than three years is termed a lease. The statute 8 & 9 Vict. c. 106, provides that a lease required by law to be in writing shall be void in law unless made by deed. The argument on behalf of the tenant comes to this, that the scale does not apply except to leases which the law requires to be made by deed. I cannot find leases by deed mentioned on the face of the schedule. I need hardly say that the schedule applies only where there is a document. The schedule is headed, "For preparing, settling, and completing lease and counterpart;" it is plain, therefore, that there must be a writing; but it does not follow that there must be a deed. That its application is not confined to deeds is shown plainly from the fact that "agreements for leases" are mentioned, and having regard to the interpretation put by the Court of Appeal on that expression, I cannot put the construction contended for on behalf of the tenant on the schedule. Although in common parlance there may be a difference between a tenancy and a lease, I cannot recognise such a difference in construing these rules, which were made by the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, and the President of the Incorporated Law Society, and have the force of an Act of Parliament. I must lay cases of hardship aside. They seldom arise. If a cottage is let at 7*s.* a week, the parties as a rule do not need to consult a solicitor. The rules are not addressed to cases of that kind. But if a solicitor is consulted as to the preparation for a lease of less than three years, a minimum charge of 5*l.* does not seem wholly unreasonable. Many solicitors would not insist on the scale in such a case. In the letting of flats many special stipulations are inserted, often giving rise to litigation, and much skill is required on the part of the solicitor in settling the agreement. I cannot say the minimum charge of 5*l.* is so excessive as to justify the court in saying that the schedule applies only to a case of a letting which the law does not require to be by deed. I think the document in this case amounts to a lease; but, if in consequence of the parts not having been ex-

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changed it is to be looked upon as an agreement for a lease, then it comes within the definition given by Cotton, L.J. of such a document where the parties do not intend to have a more formal instrument. The remaining point is as to the third-party taxation. The general rule is, that as regards the solicitor, the third party stands in the position of the party chargeable, but that rule does not prevent the taxing master from considering the question of the liability of the third party. If a *cestui que trust* taxes a solicitor's bill against his trustee, he is allowed to point out on taxation that there are items which the trustee cannot charge against the trust estate. This is shown by the case of *Re Brown* (16 L. T. Rep. 729; L. Rep. 4 Eq. 464). Now a lessee is not bound to pay for the counterpart. The first schedule includes the counterpart. The decisions show that the business contemplated by the rules must be wholly perfected. There is included in the business a counterpart, and it is plain the landlord must pay for it. The taxing master, however, in applying the scale, has necessarily included the charge for the counterpart in respect of which there is no liability on the part of the tenant to the landlord, and it was argued that the scale could not apply. Now these rules are made, as stated by Lord Halsbury in *Savery* v. *Enfield Local Board* (*ubi sup.*), to avoid dispute and discussion, but, according to the argument, although the landlord is bound to pay according to the scale, the tenant is not so bound. When a tenant enters into such a transaction, he would think he had only to pay scale charges, and then he would be told he must pay non-scale charges, because a portion of the scale charge did not apply to him. This contention cannot be sustained. I think the taxing master was right in taxing this bill as he has done, as being a bill which the landlord has to pay; but there is a novelty as regards the counterpart, and seeing that the tenant is liable only for the costs of the lease he should have made a reasonable reduction for the counterpart. The sums which have been agreed upon for the counterpart will be deducted from the bill as against the tenant. The tenant has substantially failed, and must pay the costs of the application.

Solicitors: *Daubeny* and *Mead*, for *Smith* and *Sons*, Weston-super-Mare; *William Negus*.

Nov. 21 *and* 22, 1894.

(Before STIRLING, J.)

BASSET *v.* ST. LEVAN. (*a*)

Will—Construction—Direction to disentail and resettle—"All other estates and hereditaments subject to the limitations of" a settlement—Money liable to be laid out in purchase of lands to be settled to the uses of the same settlement.

G. L. B. by his will directed his son A. F. B. within six months of the testator's death or of his said son attaining twenty-one whichever should last happen to effectually disentail the manor of T., and certain estates in the county of Cornwall held therewith "and all other estates and hereditaments then subject to the limitations of a settlement of the 3rd March 1854, *and the will of J. F. B. deceased or either of them and to execute an effectual resettlement thereof" to the uses thereinafter declared.*

G. L. B. was at the date of his will and of his death, which happened in the year 1888, *tenant for life and A. F. B. tenant in tail in remainder expectant on the death of G. L. B. of the said manor and estates under the settlement of* 1854. *Under the provisions of that settlement and of the will dated the* 15*th Jan.* 1859 *of J. F. B., large sums of money were in the hands of the trustees of the settlement to be laid out in the purchase of other lands convenient to be held therewith to be settled to the uses of the settlement.*

Held, having regard to the terms of the will of G. L. B. and the use of the expression "all other estates and hereditaments then subject to the limitations of the settlement of the 3rd March 1854," *that the testator was referring to that which was to become vested in A. F. B. by virtue of the limitations of the settlement, and consequently that a proper disentailing assurance and resettlement must include the funds in the hands of the trustees of the settlement.*

Re Duke of Cleveland's Settled Estates (69 *L. T. Rep.* 735; (1893) 3 *Ch.* 244; 62 *L. J.* 955, *Ch.*) *discussed and applied.*

THE manor of Tehidy and certain other estates in the county of Cornwall held therewith, were at the date of the will, hereinafter referred to, of Gustavus Lambart Basset, and at the date of his death, limited in strict settlement under an indenture of settlement dated the 3rd March 1854. Under the provisions of that settlement, and of the will dated the 15th Feb. 1859 of John Francis Basset deceased, large sums of money were in the hands of the trustees of the settlement to be laid out in the purchase of other manors, lands, or hereditaments in fee simple in possession in England or Wales, or leaseholds, or copyholds, convenient to be held therewith or with the other settled lands to be settled to the uses of the settlement.

At the date of his death, hereinafter mentioned, G. L. Basset was under the said limitations tenant for life and the plaintiff his son Arthur Francis Basset was tenant in tail in remainder expectant on the death of G. L. Basset.

G. L. Basset, being desirous that A. F. Basset should execute a re-settlement of the family estates, by his will dated the 6th March 1888 provided as follows:

Now I do hereby desire and direct my said son A. F. Basset within six months of my death or of his attaining the age of twenty-one years whichever shall last happen to effectually disentail the said manor and estates, and all other estates and hereditaments then subject to the limitations of the said settlement of the 3rd day of March 1854, and the said will of John Francis Basset or either of them and to execute within the time aforesaid an effectual re-settlement thereof to the uses upon the trusts and subject to the powers and provisions hereinafter declared.

The testator then gave directions for the insertion in the resettlement of such powers and provisions as his trustees should think fit, and gave them power to extend within certain limits the period for disentailing and resetlement, and proceeded:

I hereby further declare that in case any Act of Parliament should be passed rendering compliance with

(*a*) Reported by JOHN SANDERSON, Esq., Barrister-at-Law.

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the aforesaid direction impossible, the said direction shall be deemed to be, and the same is hereby cancelled and revoked, and the trust contained in my will of the said surplus proceeds of my real and personal estate for my said son absolutely on his attaining the age of twenty-one years, shall take effect free from any and every gift over consequent on non-conpliance with such direction, and in case any Act of Parliament should be passed rendering strict and entire compliance with such direction impossible, but not preventing some partial compliance therewith, then such direction shall be complied with, as far as the law for the time being permits, and such compliance shall be, and the same is hereby declared to be a complete compliance for the purposes of vesting in my said son the absolute interest in the said surplus proceeds free from any and every gift over consequent on non-compliance.

The testator then devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and investment, and to pay certain annuities, and proceeded:

And, subject as aforesaid, I direct that the capital of the said investments shall, in case my son Arthur Francis Basset shall attain the age of twenty-one years, and shall within six calendar months after my death or his attaining the age of twenty-one years, whichever shall last happen, execute the disentailing assurance and resettlement hereinbefore directed, be held in trust to raise and pay thereout [7000*l.* to the testator's wife, if living at the time of execution of the disentailing assurance and resettlement] and subject thereto that the said capital or the residue thereof shall be held upon trust for my said son A. F. Basset absolutely . . . , but if my said son . . . shall attain the age of twenty-one years, and shall refuse or neglect for the space of six calender months after my death or of his attaining the age of twenty-one years, whichever shall last happen, to execute or shall die within such space before executing the resettlement hereinbefore directed to be executed by him, then I direct that the capital and income of the investment shall be held

upon trust for the benefit of William Henry Campion and his issue as therein mentioned.

The testator died on the 25th July 1888, and his will with three codicils not material to this case were duly proved on the 5th Sept. 1888.

In 1889 a private Act of Parliament called "the Bassets Estates Act 1889" was passed, under the provisions of which the trustees of the settlement expended 10,400*l.* in the purchase of certain chattels and effects. Under this Act the chattels and effects were to be held on the usual trusts to deliver with the settled lands; but it was provided that if A. F. Basset should attain twenty-one and die without having barred his estate in tail male under the settlement of 1854, then the articles purchased should not vest in him absolutely, but should on his death devolve as if he had died without attaining twenty-one.

A. F. Basset attained the age of twenty-one years on the 29th Jan. 1894, and by an indenture dated the 16th Feb. in that year he barred his estate tail in the settled lands, and also barred the *quasi*-entail in the settled moneys, and declared that they should be held in trust for himself absolutely.

The plaintiff admitted that in order to comply with the condition of the testator's will he must bring into the proposed settlement the manor of Tehidy and all real estate, which was in specie to the use of the settlement of the 3rd March 1854 on the 29th Jan. 1894, but he did not admit that he was bound to bring into settlement the moneys in the hands of the trustees of the settlement of 1854, and liable to be invested in the purchase of lands to be settled to the settlement uses.

The summons raised the question (among others) what was to be included in the resettlement.

Graham Hastings, Q.C., *Ingle Joyce*, and *H. W. Challis* for the plaintiff.—The first question raised on this summons is what ought to be included in the subject-matter of the resettlement to be made by the plaintiff. The doctrine of equitable conversion is not applicable here. It is restricted to the parties taking under a settlement, and not applicable in the interests of persons taking *dehors* the settlement. The context of the will does not favour the contention that there was any intention of the testator, that the money should be re-settled. The testator's object was to preserve the estate to the Basset family. He has not described the personal estate by words applicable to it, and there is nothing to show that he had it in his contemplation. He has not made a gift of his own personal estate to the remaindermen in case his son refused to re-settle the trust moneys in question for their benefit. Equity does not say that money liable to be laid out in the purchase of lands is a hereditament, but orders it to be paid to the heir. The word "hereditament" means anything capable of being inherited at common law. The case of *Leach* v. *Jay* (39 L. T. Rep. 242; 9 Ch. Div. 42; 47 L. J. 876, Ch.) shows that technical words of law occurring in a will, must be construed according to their strict meaning. *Re Duke of Cleveland's Settled Estates* (69 L. T. Rep. 735; (1893) 3 Ch. 244; 62 L. J. 955, Ch.) is not in point here, except so far as it states generally the limits within which the doctrine of equitable conversion is applicable. They referred also to

Chandler v. *Pocock*, 43 L. T. Rep. 112; 15 Ch. Div. 491:
Curteis v. *Wormald*, 40 L. T, Rep. 108; 10 Ch. Div. 172;
Ackroyd v. *Smithson*, 1 Wh. & T., 6th edit, 1027.

Giffard, Q.C. and *R. F. Norton* for the trustees of the settlement.—The testator's directions are that what is to be disentailed must be re-settled. Money in the hands of trustees to be laid out in the purchase of land, must be treated as real estate.

Guidot v. *Guidot*, 3 Atk. 254;
Re Greaves' Settlement Trusts, 48 L. T. Rep. 414; 23 Ch. Div. 313;
Re Duke of Cleveland's Settled Estates, 69 L. T. Rep. 737; (1893) 3 Ch. 250.

Leach v. *Jay* (*ubi sup.*) was a case dealing with the word "seisin," a term of far stricter meaning than hereditament. The condition for forfeiture of residue in the will is a condition precedent. The provisions as to satisfaction of the testator's directions in the case of legislation rendering complete or partial performance impossible, does not make it a condition subsequent. We rely on the judgment of the Court of Appeal in *Re Duke of Cleveland's Settled Estates* (*ubi sup.*).

W. Freeman for William Henry Campion and his issue.

Hastings in reply.—It is hardly credible that the money was not in the mind of the testator. The case before Lord Hardwicke (*Guidot* v. *Guidot*, 3 Atk. 254) turned entirely upon the word

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"land." *Re Greave's Settlement Trusts* did not carry the matter any farther. This is an attempt to impose a fetter on Arthur Basset which is not justified by the terms of the will. We submit that a proper and effectual resettlement may be made in accordance with the testator's directions, without including the moneys in the hands of the trustees.

STIRLING, J.—The question with which I have to deal is this, namely, what property is to be comprised in the disentailing deed and resettlement which the testator desires and directs his son Arthur Francis Basset to execute within the period prescribed by the testator's will. Before stating more fully the question to be decided, it may be desirable to refer to some of the other provisions contained in the will, which it may be thought may have some bearing upon it. The testator gives some legacies and devises and bequeaths all the residuary real and personal estate to which at his death he should be entitled upon trust for conversion and investment, and then he directs the trustees to stand possessed of the investments in trust out of the income to pay certain annuities and then he proceeds: [His Lordship then read the provisions of the testator's will above set out as to the disposal of his residuary real and personal estate, and continued:] The only thing which I need remark as to the gifts over of the residuary estate is that they are not in any way in favour of the persons for whose benefit the resettlement of the Basset estates was directed. There is a clause which has been a good deal referred to in the argument which provides for the event of an Act of Parliament being passed rendering compliance with the directions either wholly or in part impossible. [His Lordship then read the clause in question.] There are one or two other passages in the will which may be referred to. I mention them only to show that I have not forgotten the argument founded on them. There the testator makes use of the phrase to which he had given an express meaning in the first clause of his will, namely the term "Basset Estates," but I think that really and truly I do not get much help from any of those passages, and that the real question which I have to consider is, what is the meaning of the direction contained in the will to effectually disentail the said manor and estates and all other the estates and hereditaments then subject to the limitations of the said settlement of the 3rd March 1854. Now, first of all, the question arises, are the funds in question comprised in the words "the said manor and estates?" If the will had stopped there I should have felt great difficulty in holding that they were. The manor and estates which are referred to previously are the manor of Tehidy and certain estates in the county of Cornwall and it does not seem to me, at all events in the absence of a context, that I ought to extend the meaning of these words to include funds which although they are liable to be invested in the purchase of land need not be applied in the purchase of land in the county of Cornwall. It would require as it appears to me some context in the will to enable me to give such an effect to the words, but in truth it is not contended that these words have the effect of making the funds in question subject to the direction to disentail. The words which are relied on are those which follow: "and all other the estates and hereditaments then subject to the limitations in the said settlement of the 3rd March 1854," and what is contended is that these funds are estates or hereditaments which at the time when Arthur Francis Basset attained his age of twenty-one years, were subject to the limitations of the settlement of the 3rd March 1854. Now, first of all let me consider what is the meaning of the word "hereditaments." In Sheppard's Touchstone at page 91 I find this statement: "The word 'hereditament' is of as large extent as any word, for whatsoever may be inherited, be it corporeal or incorporeal, real, personal or mixed is a hereditament." Mr. Challis in his very able argument remarked that that meant capable of being inherited, and that those words must be read as "whatsoever may be inherited according to common law;" and he truly said that these funds in question were not capable of inheritance at common law. I think that that remark is well founded. But the question is whether I ought in construing the will to put such a construction upon the words? Certainly the court has in recent times gone a considerable length in putting a strict construction upon what may be called terms of art. A striking example of this was that case which was referred to in the course of the argument, *Leach* v. *Jay* (*ubi sup.*), in which a person seised of freehold houses died intestate in 1864 leaving his sister his sole heiress at law. Upon R.'s death his widow wrongfully entered into possession and remained in possession until her death in 1869, when her devisees entered. A. died in 1871 without ever having entered into possession of the property having devised to L. all real estate (if any) of which she might die seised. Then an action was brought by L. against the devisees of R.'s widow, and it was held on demurrer, it being a decision of the Court of Appeal, affirming a decision of Sir George Jessel, the Master of the Rolls, that "seisin," being a purely technical word, and there being no qualifying context, must be construed according to its technical meaning, and that as A. at the time of her death had no seisin at law or in fact, the property did not pass under her devise. The decision is based upon this, that (as was said by James, L.J. in the Court of Appeal) the word "seisin" was one of the technical words in our law. I do not think in the absence of authority that it would be right in me to put such a strict construction on the word "hereditaments." But I have not really to consider in this case whether I ought in strictness so to do or no, because the words are estates and hereditaments, and whatever amount of technicality may attach to the word "hereditaments," I do not think any such technicality can attach to the word "estates." Now by way of illustration of the effect of the use of such words, I may refer to a case which was put in argument: suppose that in the present case Mr. Gustavus Lambert Basset, the testator, had had an ultimate remainder in fee reserved to himself in the settlement of 1854, although he had not in fact because it was reserved to his brother —but suppose for the sake of the illustration there had been an ultimate limitation to him the testator and his heirs, and suppose further that Mr. Gustavus Lambart Basset instead of making his will in the terms in which he did, had devised the said manor and estates, and all other the estates and hereditaments at his death, subject to the limitations of the said settlement of the 3rd

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March 1854, would or would not the estate and interest of Mr. Gustavus Lambart Basset in the funds which are liable to be laid out in the purchase of land pass under the devise? Mr. Challis, as I understood him, conceded, and I think rightly conceded, having regard to the authorities, that under such a devise the interest of Mr. Gustavus Lambart Basset would have passed. I do not think that anything else could have been expected, having regard to the decision of the Court of Appeal in the case of *Re Duke of Cleveland's Settled Estates* (*ubi sup.*). There the late Duke of Cleveland was entitled under a settlement for life with remainder to his first and other sons in tail with remainders over, and by virtue of the dealing with those remainders over at the date of his will, the duke had become entitled in remainder expectant upon his own death and in default of issue, which event happened to the remainder in fee simple in those estates. These were funds which had arisen from the sale of land subject to the settlement, and which were liable to be re-invested in the purchase of land not confined to any county in England, but anywhere. That being so the duke made his will by which he devised certain specified estates, and "all the manors, advowsons, and other messuages, lands, and hereditaments in the counties of Middlesex, Durham, Northampton, Salop, and Stafford or any such counties, which at my death I shall be entitled to, or have power to dispose of for an estate in fee simple, legal or equitable, to the use of trustees upon trust to settle them as therein mentioned." Then after a devise of the real estate in other counties, and giving certain pecuniary and specific legacies, he devised and bequeathed "all the real and personal estate not hereinbefore or otherwise disposed of, to which at my death I shall be beneficially entitled, or over which I shall have any general power to dispose beneficially by will to trustees upon trust for the benefit of the Hay family." Then a question arose under which of these gifts contained in the will certain funds which had arisen from the sale of the Staffordshire estates passed. In the Court of Appeal the judgment was delivered by Lindley, L.J., and after stating what the property in question was, his Lordship says this: "The testator had no children, but he could not in his lifetime call upon the trustees to pay the money over to him. He could, however, have disposed of the reversion by deed or will, and he could not have treated his reversionary interest in the money either as real or as personal estate as he might have thought proper. Had he died intestate the money would have devolved upon his heir-at-law. All this we take to be clear." Then he goes on to state what is the question with which they had to deal, and at the bottom of p. 249 (1893) 3 Ch.) (69 L. T. Rep. 737) his Lordship says this: "First, can the moneys be regarded as lands at all. We have no doubt they can. The trustees were bound to lay the money out in land unless directed not to do so by some person entitled to give such a direction. The testator might have given such a direction by his will or even prospectively in his lifetime, for after his death without issue he was master of the fund. But in the absence of any indicated intention by him to treat the fund as personal estate, the fund ought to be regarded as land at the time of his death, and as land which he had power to dispose of in fee. Then he refers to and makes some observations upon the judgment of Sir George Jessel, M.R. in *Chandler* v. *Pocock* and expresses some disagreement with him. But he refers to the oldest authorities, such as *Guidot* v. *Guidot*, and Fry, J. in *Re Greaves' Settlement Trusts* as showing clearly what is the true view of the law. These cases have been cited to me to day and they bear out as it seems to me the view, if I may be allowed to say so, expressed by Lindley, L.J. in *Re Duke of Cleveland's Settled Estates*, namely, that these moneys might be regarded as lands in a will. Therefore, it seems to me they may be equally regarded as estates or hereditaments. From the point of view of equity these moneys are subject to an imperative trust for investment in land, and are therefore capable of descending or of devolving, to use the word used by Lindley, L.J., if descending be not an accurate term, on the heir in a court of equity although no doubt it would not be so at common law. I think that having regard to what is laid down in the case by the Court of Appeal and Mr. Challis' admission that such an interest as I have indicated, if it had existed in Mr. Gustavus Lambart Basset would have passed by a disposition in his will of the said manor and estates and all other estates and hereditaments subject to the limitations of the settlement of the 3rd March 1854. But then it is said and truly said that that is not the present case. Mr. Gustavus Lambart Basset was not disposing of his own property at all. He could not dispose in any way of the "Basset Estates," using the expression for the moment. What he is doing is directing his son to disentail and re-settle the manor and estates and all other the estates and hereditaments subject to the limitations of the settlement of the 3rd March 1854; and it is said that a narrower meaning ought to be placed upon the language of the testator when used for such a purpose especially as it is to be borne in mind that the object of the testator is not to carry into effect the settlement of 1854, but to put an end to it and cause a different devolution of the estates from that which was contemplated by the framers of the document. Now I must certainly bear these circumstances in mind. Nevertheless it is to be observed that what the testator is dealing with in this part of the will is that which is coming to Mr. Arthur Francis Basset under the limitations of the settlement in question and he is directing him to take something which is coming to him under and by virtue of those limitations and to deal with it in a particular way which the testator desires. Now it is perfectly true that the doctrine of equitable conversion is a doctrine which is invoked for the benefit of persons claiming under the settlement and not for the benefit of persons outside it. To refer to a very common instance it has been frequently said, I believe, that equity treats land as converted into money or money as converted into land for the purposes of a will in which there is to be found an imperative direction for conversion, but not for the purposes of an intestacy. That is perfectly true. I in no way dispute or deny that that law exists and is binding upon me. But again I say that the testator here is referring to that which is to become vested in his son, Arthur Francis Basset by virtue of the limitations of the settlement

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That is the subject-matter which he is describing in this clause of the will, and I cannot see for myself, that being so, why less effect should be given to the words "other estates and hereditaments subject to the limitations of the settlement" than if he Gustavus Lanbart Basset had himself been capable of disposing of some estate or interest in the property, and had been by this clause attempting to dispose of it. In my judgment, therefore, the funds in question are described by those words to which I have referred, "all other the estates or hereditaments subject to the limitations of the settlements of the 3rd day of March 1854," and in order that a proper disentailing assurance and re-settlement may be made in accordance with the directions in the will, it is necessary that both the disentailing assurance and the resettlement should include those funds.

Solicitors: for the plaintiff, *Bell, Brodrick*, and *Gray*; for the trustees of the settlement, *Lawrence, Graham, Gray*, and *Sutherland*; for the Campion family, *Senior, Attree, Johnson*, and *Son*.

Friday, Dec. 7, 1894.

(Before KEKEWICH, J.)

BOAKE, ROBERTS, AND CO. *v.* STEVENSON AND HOWELL. (*a*)

Practice—Chambers—Motion to discharge order—Appeal—Rehearing—Jurisdiction—Judicature Act 1873 (36 & 37 *Vict. c.* 66), *s.* 50—*Supreme Court of Judicature* (*Procedure*) *Act* 1894 (57 & 58 *Vict. c.* 16), *ss.* 1 *and* 4.

There being no provision in the Supreme Court of Judicature (*Procedure*) *Act* 1894 *taking away the right of a judge of the Chancery Division to hear a motion to discharge an order made in chambers, the court still has jurisdiction to hear such a motion; the court, however, should discourage such motions with a view to avoiding increase of costs.*

THIS was a motion on behalf of the plaintiffs to discharge an order made in chambers on the 19th Nov. 1894, by Kekewich, J., disallowing interrogatories which the plaintiffs sought to administer to the defendants.

Sir *R. Webster*, Q.C. and *Carpmael* for the plaintiffs.—[KEKEWICH, J.—Have I jurisdiction to hear the motion? Sect. 4 of the Supreme Court of Judicature (Procedure) Act 1894 says that in matters of practice and procedure every appeal from a judge shall be to the Court of Appeal.] It is a proper procedure to apply to rehear and vary. This is not an appeal:

Re Giles; Real and Personal Advance Company v. *Michell*, 62 L. T. Rep. 375; 43 Ch. Div. 391.

The interrogatories ought to be allowed, and the costs should be costs in the action.

J. C. Graham for the defendants.—I do not object to the interrogatories being administered, but the motion is wrong. Your Lordship's order disallowed the plaintiffs' interrogatories. Now they move to discharge or vary the order, when what they want is to substitute new interrogatories. I ask for the costs of the motion.

Sir *R. Webster*, Q.C. replied.

(*a*) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

KEKEWICH, J.—A motion which involves practice and costs is important. The point of practice, so far as I am aware, is entirely new. Until last session of Parliament it was competent for any litigant in the Chancery Division to move to discharge any order made by the judge in chambers provided he did it within twenty-one days. Upon that proceeding he could reopen the whole subject, but only on the materials used before the judge in chambers. He was not at liberty to adduce new evidence, or use new documents or materials; all that he was at liberty to do was to argue in court that the hasty conclusion arrived at in chambers was wrong. That right was expressly reserved by sect. 50 of the Judicature Act 1873, which might have been construed as taking away the privilege, which was unknown in the other courts which became divisions of the High Court. Then came the Judicature Act 1894 dealing, in sects. 1 (*b*) and 4, with interlocutory appeals of all characters, and in all divisions of the High Court, and it was provided that all such interlocutory matters should go straight to the Court of Appeal, and should not be subject to a series of intermediate appeals. The object of the enactment was to prevent scandal, and a large increase of costs. No reference was made in the Act to the liberty to move to discharge an order made in chambers by a judge of the Chancery Division. I suppose it was intended that the judges of that division should still be left to follow the old practice which let an unsuccessful litigant in chambers have three alternatives: first, leaving him to move to discharge the order; secondly, to adjourn the matter into court; thirdly, giving him leave to appeal direct on the certificate of the judge that no further argument was required. I am certainly still competent to adjourn a matter into court. I am still competent to give a certificate for leave to appeal direct to the Court of Appeal. There being no provision taking the right away, it seems to me that it is still competent for me to hear a motion to discharge an order made in chambers provided notice is given within twenty-one days, but on the same materials, that being essential to such an application. As at present advised, and subject to any opinion expressed by my brother judges, or the Court of Appeal, I shall think it my duty to discourage motions to discharge orders made in chambers. I think it was intended by the Act of 1894, founded as it is on the report of the judges, that all matters should go straight to the Court of Appeal, and that there should be no intermediate appeals. But a motion to discharge an order made in chambers is not an appeal: (*Re Giles; Real and Personal Advance Company* v. *Michell* (*ubi sup.*). I think I have a right to hear the motion. But this is not a motion to discharge an order. Sir R. Webster says he cannot support the interrogatories, and really asks to substitute new interrogatories. This is a new application, which might be made in chambers. In substance there is no motion to discharge an order made in chambers before me, and the costs incurred are unnecessary. Therefore I must make the applicant pay the costs.

Solicitors: *Wilson, Bristows*, and *Carpmael*; *Neish, Howells*, and *Macfarlane*.

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Friday, Nov. 2, 1894.

(Before WILLIAMS, J. sitting as an additional Judge of the Chancery Division.)

Re TUTICORIN COTTON PRESS COMPANY LIMITED. (a)

Company—Winding-up—Shares in English company—Shareholder—Sequestration in Scotland—English personal representative—Title to shares—Contributory—Companies Act 1862 (25 & 26 *Vict. c.* 89), *ss.* 30, 77—*Order XVI., r.* 46.

A., a domiciled Scotchman, was at the date of his death the registered owner of certain shares in an English company, which shortly afterwards went into voluntary liquidation. These shares were held by him as a trustee for other persons. After his death sequestration was issued in Scotland against his estate, and in the sequestration proceedings a trustee was appointed. No personal representative to his estate had been constituted in England. The assets of the company had been realised, and after payment of debts and liabilities, there remained a balance in the hands of the liquidator, which he was desirous of distributing amongst the shareholders.

Held, that the legal title to the shares in question was vested in the trustee in the Scotch sequestration; that, that being so, it was unnecessary to make any order under Order XVI., r. 46, *dispensing with the English representative; and that the money distributable in respect of the shares might be paid to the trustee in the Scotch sequestration upon the joint receipt of himself and the beneficiary.*

THE Tuticorin Cotton Press Company Limited was incorporated in 1882, and went into voluntary liquidation in 1892.

At the commencement of the winding-up, 1230 shares stood registered in the books of the company in the sole name of John Patrick Alston, a domiciled Scotchman. He died on the 29th May 1891, having by a trust disposition and settlement in Scotch form, dated the 1st Sept. 1883, nominated W. H. Alston and others trustees and executors thereof. W. H. Alston alone accepted office.

J. P. Alston was, at his death, a partner in the firm of Campbell, Rivers, and Co., merchants of the city of Glasgow, the other partners in that firm being J. Brown, W. Gibson, and W. H. Alston.

The firm of Campbell, Rivers, and Co. and H. C. Buchanan and F. W. Bois carried on business in partnership under the style of Alstons, Scott, and Co., at Colombo, in the colony of Ceylon.

On the 6th Aug. 1891, after the death of J. P. Alston, his estates were sequestrated in Scotland, and on the 31st Aug. 1891 the estates of W. H. Alston were likewise sequestrated, and J. Muir was appointed trustee in both sequestrations.

Buchanan and Bois were both rendered bankrupt, according to the laws of Ceylon, as partners of Alstons, Scott, and Co., and as individuals on the 6th Sept. 1891, and R. L. M. Brown was appointed assignee of their estates.

The firm of Campbell, Rivers, and Co. was rendered bankrupt according to the Scotch bankruptcy statutes, and J. Muir was appointed trustee on their estates, and on those of the individual partners.

In the course of the proceedings in the sequestrations it was alleged that the 1230 shares in the company, standing in the name of J. P. Alston, and certain shares standing in his name in other companies, were held by him in trust for the firm of Alstons, Scott, and Co.

Having regard to the conflicting claims to the shares, Muir and W. H. Alston raised an action of multiplepoinding and exoneration in the First Division of the Court of Session in Scotland against Muir, Brown, the firms of Alstons, Scott, and Co. and Campbell, Rivers, and Co., and J. B. Alston and divers other persons, to have in effect the beneficial title to the said shares determined.

By the judgment of the Lord Ordinary, on the consideration of the action on the 2nd June 1893, his Lordship found that the claimant Muir, as trustee on the sequestered estate of Campbell, Rivers, and Co., and the claimant Brown, as official assignee of the insolvent estates of Buchanan and Bois, were entitled to be ranked and preferred jointly to the fund *in medio* (the shares in question), and, therefore, to that extent and effect sustained the claims of Muir and Brown, and repelled the claims of the other claimants.

W. H. Alston, the Scotch executor of W. P. Alston's estate, made no claim in this action to the shares, and no legal personal representative had been constituted in England.

The liquidator of the company had realised almost the whole of the company's assets, and out of the proceeds thereof had paid the debts of the company and the greater portion of the costs of the liquidation, and had now in hand the sum of 3690*l.*, applicable as a dividend at the rate of 3*l.* per share on the 1230 shares. But having been advised that, under the circumstances, and having regard to the want of a legal representative in this country to the estate of J. P. Alston, he could not pay over or deal with the dividend except under the direction of the court, he took out the present summons against J. Muir and R. L. M. Brown, asking for directions (*inter alia*) as to who was entitled to receive the dividend or share of the net surplus assets of the company in respect of the 1230 shares.

As regards the legal effect of the Scotch sequestration, an affidavit of J. A. Clyde, an advocate of the Scotch Bar, was filed, in which he deposed as follows:

5. The effect of the sequestration of the late J. P. Alston's estate was to vest in J. Muir, as trustee of the said J. P. Alston's sequestrated estate, the whole of the said J. P. Alston's estate, whether included in the inventory given up by the executor for confirmation or not, and to divest the executor entirely. This effect operated from the date of the first deliverance on the petition for sequestration, namely, from the 6th day of Aug. 1891. The said J. Muir, as trustee aforesaid, therefore had an absolute legal title to the whole of the said John Patrick Alston's estate, whether included in the inventory in the confirmation or not, from said date. The legal estate which the late J. P. Alston held in the shares in question, and to which his executor might, as explained in paragraph 4 hereof, have made up a title, thus came to vest in the said J. Muir as trustee on his sequestrated estate. It does not affect this result, that what is so vested is a legal estate, which, being affected by a latent trust, may be or can be of no value to the creditors. The beneficial interest of the firm of Alstons, Scott, and Co. under the latent trust is preserved intact.

(a) Reported by W. IVIMEY COOK, Esq., Barrister-at-Law.

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7. In my opinion (first) the said J. Muir as trustee on the sequestrated estate of J. P. Alston, and (second) the said J. Muir as trustee of the sequestrated estates of Campbell, Rivers, and Co. and partners thereof, jointly with the said R. L. M. Brown as official assignee on the estates of H. C. Buchanan and F. W. Bois, the other partners (along with Campbell, Rivers, and Co.) of Alstons, Scott, and Co., represent respectively the whole (1) legal and (2) beneficial estate of the shares in question.

8. If the "dividend or share of the net surplus assets of the company in respect of the 1230 shares" is now paid to the said J. Muir as trustee on the sequestrated estates of Campbell, Rivers, and Co. and partners thereof, and R. L. M. Brown as official assignee on the estates of H. C. Buchanan and Frederick William Bois, jointly, in exchange for a receipt or discharge granted by them, with express consent of J. Muir as trustee on the sequestrated estate of the late J. P. Alston, such receipt or discharge will in my opinion be a valid and sufficient receipt or discharge to the liquidator, and will absolutely secure him and the company from all further claims or questions in respect of the said shares and dividend.

The affidavit of W. J. Cullen, also an advocate of the Scotch Bar, was to a similar effect.

J. G. Wood for the summons.—The evidence shows that according to Scotch law the title of the trustee in the sequestration relates back to the death of J. P. Alston, and that the effect of the sequestration was to divest his property out of his Scotch personal representative, and to vest the legal title to it in the trustee. The Scotch sequestration has, however, no extra-territorial operation, and cannot, therefore, affect the right of an English legal personal representative to demand a transfer of the shares, which are shares in an English company, to him in accordance with the company's articles. The question, therefore, is whether the court can, in this case, dispense with the personal representative under Order XVI., r. 46. Under sect. 30 of the Companies Act 1862, a company is not bound to recognise any trust. [WILLIAMS, J.—In whose name do you say these shares ought now to be registered?] In that of J. P. Alston's English legal personal representative. If that be so, such legal personal representative is the only person who can give a valid receipt for a dividend on the shares. [WILLIAMS, J.—Suppose the sequestration had taken place in the lifetime of J. P. Alston, who would be the proper person to put on the register?] No doubt the trustee in the sequestration. [WILLIAMS, J.—Why then should not his name be put on the register?] The effect of a Scotch sequestration is not, I submit, to vest in the trustee *choses in action* in England. To obtain such a vesting he must come here and establish his title. If the trustee in bankruptcy of a shareholder requires to have his name put upon the register in the place of the bankrupt, the company must do so. [WILLIAMS, J.—If a Scotch sequestrator is entitled to have his name put upon the register in the case of a sequestration before the death of the shareholder, it seems to me that he is also entitled to have it put upon the register if the sequestration takes effect after the death.]

A. W. Watson for Muir.—The evidence, I submit, shows that Muir is in a position to require the liquidator to put his name upon the register in the place of J. P. Alston. Both the Scotch advocates who have given evidence agree that the legal title to the shares is vested in Muir as the trustee in the sequestration of J. P. Alston's estate, and that whether or not it was originally vested in the Scotch executor. By sect. 50 (3) of the Bankruptcy Act 1883, power is given to a trustee in bankruptcy to transfer shares originally belonging to the bankrupt, and that power is consequential on the shares being vested in the trustee. And the Scotch law is similar in this respect in the case of a sequestration. Here I submit the shares never vested in the executor. By sect. 77 of the Companies Act 1862, "if any contributory becomes bankrupt, either before or after he has been placed on the list of contributories, his assignees shall be deemed to represent such bankrupt for all the purposes of the winding-up, and shall be deemed to be contributories accordingly." J. P. Alston having become a bankrupt would have been a contributory, and it is clear under the section that in such a case the proper persons to transfer the shares would have been his assignees, and who consequently would have been the proper persons to give a receipt for dividends. Under sect. 125 of the Bankruptcy Act 1883, the estate of a deceased debtor can be administered in bankruptcy, and where so administered the official receiver has power under sect. 50 (3) to transfer shares. If a legal personal representative of J. P. Alston were duly constituted in England, the liquidator would not be justified in paying him. Shares in a company being personal property, the title to them follows the domicile of the owner. Here the domicile of the owner was Scotch, and the Scotch court has found that the legal title to the shares was in Muir, and the beneficial ownership in Muir and Brown. Muir is therefore entitled to require the liquidator to put him on the register. An English legal personal representative, if constituted, could therefore have no claim to these shares.

J. D. Crawford for R. L. M. Brown.

Wood in reply.—The liquidator has no desire to take up a hostile position in this matter, and I would therefore suggest that the court should dispense with the English legal personal representative of J. P. Alston's estate under Order XVI., r. 46. The liquidator's difficulty is this, that if such a representative came to the company and required to have his name put upon the register in accordance with the articles, the company would have no answer to his requisition.

WILLIAMS, J.—I do not think I need make any order under Order XVI., r. 46, dispensing with the legal personal representative of J. P. Alston. Having regard to the affidavits as to the Scotch law which have been filed in this case, I am of opinion that the title to the shares is now vested in the Scotch sequestrator Muir, and, as he is willing to give a joint receipt of himself and Brown, I direct the liquidator to pay over the moneys, being 3*l*. per share on the 1230 shares, to him on such joint receipt.

Solicitors: *Faithfull* and *Owen*; *Munton* and *Morris*.

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QUEEN'S BENCH DIVISION.

Wednesday, Nov. 21, 1894.

(Before WRIGHT and COLLINS, JJ.)

THE ATTORNEY-GENERAL v. JACOBS-SMITH AND OTHERS. (a)

Inland Revenue—Account duty—Marriage settlement—Children of widow by former marriage included in settlement—Interests given to trustees upon trusts of settlement—"Voluntary disposition" or "settlement"—Customs and Inland Revenue Act 1881 (44 *Vict. c.* 12), *s.* 38, *sub-sect.* 2 (*a*), (*c*); *Customs and Inland Revenue Act* 1889 (52 *Vict. c.* 7), *s.* 11.

When, in a settlement made by a widow on her remarriage her children by a former marriage are included as beneficiaries, such children are not volunteers, but are to be treated as being within the marriage consideration, and therefore limitations in their favour are not "voluntary dispositions" within the meaning of sect. 38, *sub-sect.* 2, *of the Customs and Inland Revenue Act* 1881, *or sec,* 11 *of the Customs and Inland Revenue Act,* 1889.

The settlor, being entitled to shares in a company, by the marriage settlement gave certain of such shares to her four adult sons by a former marriage absolutely, and assigned the residue to trustees upon trust as to part thereof for her two married daughters and two infant sons by her former marriage, and as to the residue upon the trusts of the settlement, which reserved for the settlor the income of such shares for her life subject to the payment of an annuity to the husband. Upon the death of the wife (the settlor) the Crown claimed, under the above sections, account duty in respect of (1) *the shares given to the sons absolutely, and* (2) *the shares assigned to the trustees upon the trusts of the settlement.*

Held, that neither the dispositions in favour of the children of the former marriage nor the dispositions in favour of the trustees were "voluntary dispositions," or "dispositions under a voluntary settlement" within the meaning of the sections, and that therefore the Crown was not entitled to such account duty.

INFORMATION by the Attorney-General claiming a declaration that account duty and estate duty are payable in respect of certain property included in a marriage settlement.

The duty was claimed in respect of certain property settled by Anne Smith, a widow, by a deed of the 18th March 1890, and the settlement was on the occasion of the second marriage of Anne Smith, the property being settled upon herself, her intended husband and her eight children by a former marriage.

At the date of this settlement Anne Smith was entitled to the goodwill of several businesses, and the real estate used and occupied in connection therewith, of the estimated value of 195,000*l.* The settlement recited that a marriage was intended to be solemnized between the said Anne Smith and the defendant George Edward Jacobs-Smith, and that it was agreed that the whole of the aforesaid property of Anne Smith should be settled as soon as might be after the marriage upon such trusts in favour of Anne Smith, George Edward Jacobs-Smith, and the eight children of Anne Smith by her former marriage; and in this settlement these arrangements were made. Anne Smith was to found a limited liability company to take over these businesses with a capital of 20,000 shares of 10*l.* each. The consideration payable to her for parting with these businesses to this limited company was to be 19,500 fully paid shares, and the new company was to take over the debts of the old businesses, and there was also a reservation to her of the right to occupy a certain mill house and premises for her life. The sale was to be as from the 1st May 1890, and it was to be completed by the 30th June 1890.

The 19,500 shares which were to come to Anne Smith, as the consideration of her parting with the businesses to the company, were to be dealt with as follows: 15,500 of them were to be allotted to the present defendants, Jacobs-Smith and Gould, as trustees of the settlement; 1000 were to be given to each of the four other defendants, who, in fact, are the adult sons of Anne Smith by her first marriage, making 4000 shares.

As to the limitations affecting these 15,500 shares, which were to go into settlement in the hands of these two trustees, who are two of the present defendants, they were to be allotted to the trustees in the following manner, and under the following conditions: 1000 of them were to be held on trust for an infant son of Anne Smith by her first husband; 1000 for another infant son; 600 were to be settled upon Mrs. Wood, and 600 upon Mrs. Hammond, daughters of Anne Smith by her former marriage. So that of the whole shares, 4000 were given in the first place to the four adult sons, and then 3200 were settled in the hands of trustees for the benefit of the other children of the former marriage.

As to the balance, namely, the 12,300 shares (that is to say, the 15,500 less the 3200 shares), these were to be held as "the wife's trust fund," on these trusts: in the first place, to provide an annuity of 1000*l.* to Jacobs-Smith, the second husband, for life, or until he should charge, alienate, or anticipate the same, or become bankrupt; the rest of the income was to go to Anne Smith for life for her separate use without power of anticipation, and after her death the sum of 25,000*l.*, part of the wife's trust fund, was to go to such persons as Anne Smith should by will appoint under the general power of appointment, and the residue of the wife's trust fund (including any part thereof which should be unappointed under the general power of appointment) to the eight children of Anne Smith by her former marriage, or their issue, as she should by will appoint. There was, therefore, 25,000*l.* with general power of appointment by will, and the residue with power of appointment by will amongst her children of the former marriage or their issue.

The 1000 shares for each infant were settled, so that if any son attained twenty-five they were to be made over to him, and in certain events he had only a power of appointment by will. The 600 shares for each of the married daughters were settled on the usual trusts, and the rest went over to their brothers and sisters and their issue.

By another indenture of even date, a sum of 1000*l.* and certain leaseholds belonging to the defendant Jacobs-Smith were settled upon trusts in favour of himself, Anne Smith, and the issue of the intended marriage.

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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The marriage was duly solemnised, and the company was incorporated on the 26th June 1890, and the businesses taken over by the company. Shares were duly allotted and issued, and in pursuance of the agreement 15,500 fully paid-up shares in the company were issued to the two trustees upon the trusts of the settlement, and 1000 fully paid-up shares were paid to each of the four adult sons of Anne Smith pursuant to the terms of the settlement.

Anne Smith died on the 2nd Aug. 1890, having by her will exercised both the general power of appointment of 25,000*l.* given to her under the settlement, and also the power of appointment in favour of the said eight children over the residue of the wife's trust fund.

The Crown claimed on the death of Annie Smith: (1) Account duty under the Acts 44 Vict. c. 12, s. 38, sub-sects. (*a.*) and (*c.*), and 52 Vict. c. 7, s. 11, from the two trustees on the value of the 15,500 shares allotted to them under the settlement (after deducting the said sum of 25,000*l.*, on which probate duty had been paid as part of the estate of Anne Smith, and any sum properly invested to secure the annuity of 1000*l.* to the husband during his life); (2) Account duty under the Acts 44 Vict. c. 12, s. 38, sub-sect. (*a.*), and 52 Vict. c. 7, s. 11, from each of the four adult sons of Anne Smith by her former marriage, on the value of the 1000 taken by him under the settlement; (3) Estate duty under 52 Vict. c. 7, s. 5, sub-sect. (2), from the trustees on the value of the 12,300 shares, part of the said 15,500 shares (less the said sum of 25,000*l.*, and the amount invested to secure the said annuity of 1000*l.* per annum); and interest on the above amounts at 4 per cent.

The estate duty was admitted, and no question now arises with respect to such duty, the question being as to the account duty.

The Customs and Inland Revenue Act 1881 (44 Vict. c. 12) provides:

Sect. 38 (1). Stamp duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or movable property to be included therein according to the value thereof.

(2) The personal or movable property to be included in an account shall be property of the following descriptions, namely:—(*a.*) Any property taken as a *donatio mortis causâ* made by any person dying on or after the 1st June 1881, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been *bonâ fide* made three months before the death of the deceased; (*c.*) Any property passing under any past or future voluntary settlement made by any person dying on or after such day by deed or any other instrument not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property.

The Customs and Inland Revenue Act 1889 (52 Vict. c. 7) provides:

Sect. 11. Sub-sect. 2 of sect. 38 of the Customs and Inland Revenue Act 1881 is hereby amended as follows:

The description of property marked (*a*) shall be read as if the word "twelve" were substituted for the word "three" therein, and the said description of property shall include property taken under any gift whenever made, of which property *bonâ fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise:

The description of property marked (*c*) shall be construed as if the expression "voluntary settlement" included any trust, whether expressed in writing or otherwise, in favour of a volunteer, and, if contained in a deed or other instrument effecting the settlement, whether such deed or other instrument was made for valuable consideration or not as between the settlor and any other person, and as if the expression "such property" included the proceeds of sale thereof.

Sir *R. T. Reid*, Q.C. (A.-G.) and *Vaughan Hawkins* for the Crown.—We say that this is a voluntary settlement, because these persons who take beneficially paid nothing whatever for the gift. It is not a voluntary settlement as between husband and wife, but it is a voluntary settlement in regard to these persons who got a gift and gave no consideration whatever. That was so under the Act of 1881, and that position is strengthened by the Act of 1889. Referring to the first paragraph of sect. 11 of the Act of 1889, where there is one of two things, either retention of possession by the donor, or some benefit reserved "to him by contract or otherwise," then the parties come within the Act; and the third paragraph is more important still in this case. There may be a perfectly valid consideration and a perfectly valid deed, but if a particular person benefit by a gift or disposition, it is brought within the net. If the person taking the benefit is a volunteer—that is, a person who has given no consideration—the fact that consideration is present in other parts of the deed is immaterial. With regard to the disposition of the 19,500 shares, we say that the 4000 shares given to the four adult sons at once, and the 3200 shares given upon trust for the daughters and infant sons, come within sect. 38, sub-sect. 2 (*a*), because there is no life estate reserved and they are immediate gifts *inter vivos*, and are therefore voluntary dispositions within the meaning of the sub-sect. (*a*). Then, as to the residue, the 12,300 shares, which were held on trust for Anne Smith for life, we say that these shares (less the 25,000*l.*) come within sub-sect. (*c*), as being property passing under a voluntary settlement—and this is a voluntary settlement so far as regards these children—where an interest for life is reserved to the settlor; and this sub-section is strengthened by sect. 11 of the Act of 1889, because these children of the former marriage, being volunteers, come directly within the section, as the trust here is a "trust in favour of a volunteer." Those within the marriage consideration are the husband, and wife, and children of the marriage, but children of a former marriage are not, and the question what is a voluntary settlement under these Customs Acts is not to be determined by a consideration of what would be a *bonâ fide* conveyance on good consideration under the statute of Elizabeth. The question is not whether there is a good conveyance under the statute of Elizabeth, but whether in substance there is a gift in favour of a volunteer: *Crossman* v. *The Queen* (55 L. T. Rep. 848; 18 Q. B. Div. 256), a case decided before the Act of 1889. With regard to the cases relied on by the defendants,

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the first is *Newstead* v. *Searles* (1 Atk. 265). That case has been so long law that it must be treated as law, but it is an established exception to the general rule that courts will not enforce settlements at the instance of volunteers, showing that the children in that case were volunteers, and it is so regarded by Fry, J. in *Gale* v. *Gale* (36 L. T. Rep. 690; 6 Ch. Div. 144). In *Mackie* v. *Herbertson* (9 App. Cas. 303) Lord Selborne was of opinion that *Newstead* v. *Searles* (*ubi sup.*) was decided by Lord Hardwicke on special grounds, namely, that the trusts in favour of the children of the marriage were so mixed up with the trusts in favour of the children of the former marriage, that both would have to be enforced together; and that is the explanation of *Newstead* v. *Searles* (*ubi sup.*) given by Lord Selborne. In the case of *Re Cameron and Wells's Contract* (57 L. T. Rep. 645; 37 Ch. Div. 32) Kay, J. professes not to understand *Newstead* v. *Searles* (*ubi sup.*), and refuses to extend it to the children of a widower by a former marriage, but he intimates a clear opinion there that the former children of the widow are volunteers. In *De Mestre* v. *West* (64 L. T. Rep. 375; (1891) A. C. 264) Lord Selborne again criticises *Newstead* v. *Searles* (*ubi sup.*), and adheres to the opinion that it was decided on special grounds; and he also criticises the case of *Clarke* v. *Wright* (6 H. & N. 849). Those cases are all upon the statute of Elizabeth and are no direct authority in the present case, and they are met by the language of sect. 11 of the Act of 1889, which says that voluntary settlements shall include trusts in favour of a volunteer, even though other persons give consideration in the same deed.

Jelf, Q.C. and *Micklem* for the defendants.—If sub-sect. (*a*) hits anything at all, it is the gifts to the four adult sons; but this is not the case of a voluntary disposition within that sub-section, which refers to a totally different class of dispositions. So, sub-sect. (*c*), even with the extension it has received by the Act of 1889, does not affect the present settlement as being a voluntary settlement within its meaning. These statutes were to prevent evasions of probate duty, and are therefore very analogous to the statute of Elizabeth, which was to prevent frauds, so that the cases under that statute are in point here. There is no definition of the word "volunteer," and that being so, we must, to ascertain its meaning, go to that branch of law or equity which has been in the habit of using the word. No other meaning can be given to the words "volunteer" and "voluntary settlement" than that given to them by courts of equity, and this case is not brought within the principles upon which equity has proceeded, and we cannot, as the Attorney-General contends, treat the current of authorities for more than one hundred years as being of no use in construing this statute. The only case on this Act which the Attorney-General can bring forward is the case of *Crossman* v. *The Queen* (*ubi sup.*), which was a plain case of an evasion of the duty, as the transaction there really amounted to a bargain between a father and his son, which had the effect of making a gift from the father to the son, obviously for the purpose of evading the duty. If the argument is to prevail that all are volunteers who give nothing from themselves as for themselves, then the children of the marriage itself would come within the description of volunteers, as they give no consideration. Our argument as to this is well expressed in Vaizey, pp. 76-*et seq.*, where all the cases are collected and discussed. The only meaning we can give to the word "volunteers" is that given by legal writers and judges, and the question is not necessarily settled by the fact that no consideration was given:

Green v. *Paterson*, 54 L. T. Rep. 738; 32 Ch. Div. 95.

[WRIGHT, J.—It is stated in Leake on Contracts (3rd edit., p. 545) that the children of a former marriage of either parent are not within the marriage consideration, but are volunteers.] So long ago as 1737, it was decided by Lord Hardwicke, in *Newstead* v. *Searles* (*ubi sup.*), that the children of the widow by a former marriage were not volunteers, and were to be treated as children of the marriage. That has never been overruled; on the contrary, it has been followed in the Exchequer Chamber in *Clarke* v. *Wright* (*ubi sup.*), and by Fry, J. in *Gale* v. *Gale* (*ubi sup.*), and we submit that these authorities are conclusive of the question.

WRIGHT, J.—In this case the question of the estate duty is admitted, and the only questions we have to deal with are questions as to the account duty. The question as to the account duty arises first, on the item of 4000 shares and 3200 shares. The marriage settlement did not, in respect of this, in my judgment, purport to operate as an "immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust, or otherwise," because it was, as I read it, an ordinary settlement, giving a life estate to the intended wife, and, in the events which have happened, to particular persons. I do not think that that is the meaning of sub-sect. (*a*) of sect. 38 of the Customs and Inland Revenue Act 1881. Nor does it appear to me to be brought within that provision by sect. 11 of the Customs and Inland Revenue Act 1889, because, as it seems to me, that applies only where the trust was such that in the ordinary course of things possession might have been taken under the settlement when it was made. Then as to the account duty on the 12,300 shares, after deducting the 25,000*l.*—which it is agreed ought to be deducted—I myself should have said, apart from authority, that no valuable consideration had been given by the *cestui que trusts* in question, although it must be conceded that in the case of *Gale* v. *Gale* (*ubi sup.*), and at least one of the cases there cited by Fry, J. there is language which seems to go the length of saying that even as between these parties and the settlor valuable consideration might be considered to be given. However that might be, it is not necessarily conclusive. I think we are bound by the cases from *Newstead* v. *Searles* (*ubi sup.*) downwards, which show that, although *cestui que trusts* under settlements of this kind may not take for valuable consideration, nevertheless, they are protected against subsequent purchasers as if they had been parties to the marriage consideration, and are, therefore, for the greatest and most important of all the purposes of a settlement of this kind, treated as not volunteers. There is no doubt a great deal in the judgment of the Privy Council in the case of *De Mestre* v. *West* (*ubi sup.*), in 1891, and something also in the judgment of Lord Selborne in the case in the House of Lords of *Mackie* v. *Herbertson* (*ubi sup.*), tending to show that the case of *Newstead* v. *Searles* (*ubi sup.*) is

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to be supported on special grounds. I am not at all sure that the same special grounds do not arise in this case, because some money or property valued at 1000*l.* was brought into the settlement by the husband. But, apart from that, I think we are bound by the course of the decisions, whatever criticisms may have been made in some of the later cases as to the grounds on which those decisions were based. To my mind common sense requires, unless there is something contrary to the language of the statute, that we should apply the same construction to the word "volunteer" in this statute as has been applied to it in relation to the only other purposes as to which any legal meaning, or effect, has been given to that word; and, as I have said, effect has been given to that word in such a sense as to make the children of the former marriage not within the ordinary rule as to volunteers. A provision for the children of a former marriage often is a proper, and sometimes a necessary, part of a settlement on a second marriage. A woman who marries a second time certainly alters very materially the possibilities of succession on the part of the children of her former marriage. She makes it much less likely that such children will receive the benefits which they might have received if she had not married a second time. In the absence of any facts found in this case to show that there is anything in the nature of an attempted evasion of the law—which, of course, would be an entirely different matter—I think we ought not to hold that such a reasonable part of the marriage settlement would be within the mischief of the Act. Of course this judgment would not apply to any class of beneficiaries who are not within the kind of rule laid down in *Newstead* v. *Searles* (*ubi sup.*). It would not apply to any class of beneficiaries who have not been brought within the scope of the marriage consideration. I think, therefore, that, as regards both parts of the case in relation to the account duty, the prayer of the Crown fails.

COLLINS, J.—I am of the same opinion. The argument for the Crown is, as I understand it, that the particular trusts which are included here are mainly in favour of persons who, giving no valuable consideration themselves, must be deemed to be volunteers; and the Attorney-General, while admitting that the instrument in which these provisions are contained cannot itself be described as a voluntary settlement, contends that the particular disposition in favour of these individuals can be isolated from the rest of the settlement, and that, inasmuch as they have given no consideration, it must, as against them, be deemed to be, and brought into the account as, a voluntary settlement. I think that when we are construing the word "volunteer" in sub-sect. 3 of sect. 11 of the Act of 1889, we must look to the meaning which that word, as a term of art, bore in courts of equity when dealing with a subject-matter similar to that now in question, and it seems to me that the courts of equity did at that time regard the offspring of the former marriage as not coming within the category of volunteers. I think the case of *Newstead* v. *Searles* (*ubi sup.*), decided by Lord Hardwicke a long time ago, and commented upon in several of the more recent cases—*Gale* v. *Gale* (*ubi sup.*) amongst them—shows that the wife's children by her former marriage do not come within the category of volunteers. Now, in both those cases of *Newstead* v. *Searles* (*ubi sup.*), and *Gale* v. *Gale* (*ubi sup.*), there was an application on the part of the wife's children by a former marriage to have the trusts contained in the settlement between her and her future husband executed in their favour. They applied both to have those trusts executed in their favour, and also to avoid any subsequent trusts which, under the statute of Elizabeth, would have defeated the trust in their favour if they had been volunteers. If they had been volunteers they would not have been in a position to demand the assistance of the Court of Equity—that is thoroughly well established—and, therefore, the first point, namely, whether or not they were entitled to the relief claimed, that is, to specific performance of the settlement in their favour, could not be decided without deciding whether they were volunteers or not. It was decided in their favour by Lord Hardwicke, which involved the decision that they were not volunteers. He then decided the other question as to whether or not they had lost their right by reason of the subsequent conveyance for value to a purchaser. Upon that question he had to decide whether or not they came within the exception of purchasers for value, and whether the exception took them out of the statute of Elizabeth. He decided that also in their favour; and, therefore, it seems to me that on both points he was of opinion that they did not come within the category of volunteers. That case is dealt with in *Gale* v. *Gale* (*ubi sup.*) by Fry, J., who refers to a series of other decisions—one of them, *Clarke* v. *Wright* (*ubi sup.*), a decision of the Exchequer Chamber—to the same effect, and he points out, as I have now pointed out, that in *Newstead* v. *Searles* (*ubi sup.*), Lord Hardwicke did decide these two points; and, having reviewed that authority, and the authority of *Clarke* v. *Wright* (*ubi sup.*), he came to the conclusion in *Gale* v. *Gale* (*ubi sup.*), that the children of the wife by a former marriage could enforce provisions in a settlement in their favour. That, of course, does not deal with the point under the statute of Elizabeth; but he lays down, as it has been laid down repeatedly in a number of cases, that a mere volunteer cannot come to the Court of Equity and ask it to enforce some voluntary disposition in his favour. He repeats that, and he comes to the conclusion that the children in that case were in a position to enforce such a provision. That involves a direct decision, as it seems to me, that in his judgment they were not volunteers. He explains that such persons are deemed to come within the consideration of the marriage, and if you get them within the consideration of the marriage the rule that brought them in appears to be an arbitrary rule, and one that is incapable of being based upon any very well defined principle. If you once get them within the consideration of the marriage, that is tantamount to saying that they are not volunteers. They are within the consideration; they are persons deemed to be giving consideration, and therefore they are not volunteers. Therefore it seems to me clear that at the time this statute was passed, persons in the position of the wife's children here were persons who could not have been described as volunteers, and who could not have been defeated if they had sought to enforce the trusts for their benefit in a settlement

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upon an application to a court of equity. That being so, did this Act intend to cut at the rights of such persons or not? It seems to me that in using the term "volunteers," without giving any definition of it, they must be taken simply to have been dealing with the class of persons who, having regard to the decisions of courts of equity, would, at the time, have been deemed volunteers; and for the reasons I have given I do not think that these persons are volunteers. I have pointed out that the decision in *Newstead* v. *Searles* (*ubi sup.*), was a decision of the Lord Chancellor: that that was followed by a decision of the Exchequer Chamber, and also followed by Fry, J. Under these circumstances it would be quite impossible for us in any way to refuse to follow that case, and nothing short of a decision of the House of Lords would destroy its authority. No doubt certain *dicta* of Lord Selborne have been cited from a decision of the Privy Council. These are merely, so far as we are concerned, dicta, entitled to the very greatest weight and the greatest possible respect, but they cannot in any way affect the authority—as upon us—of the judgment of the Exchequer Chamber or of the Lord Chancellor. Then the other authorities cited are also *dicta* in a Scotch appeal to the House of Lords, which would be no authority upon us because the English decisions are not binding in the Scotch Court of Session, and are only prayed in aid as founding some analogy by one of the learned lords, Lord Selborne. Here again, Lord Selborne has put an interpretation upon *Newstead* v. *Searles* (*ubi sup.*), which was not the view adopted of it in the court of Exchequer Chamber, which followed it. Again professing the most profound respect for anything coming from Lord Selborne upon that subject, I feel that I am not at liberty to act upon it, if I were prepared even to accept it. It seems to me that the matter before us stands on the authority of *Newstead* v. *Searles* (*ubi sup.*), *Clarke* v. *Wright* (*ubi sup.*), and the case of *Gale* v. *Gale* (*ubi sup.*), decided by Fry, J. Under these circumstances I think that the case of the Crown fails.

Judgment for the defendants with the costs of the information.

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Solicitors for the defendants, *Tarry, Sherlock,* and *Co.*, for *Blyth*, Norwich.

Wednesday, Nov. 14, 1894.

(Before Lord Russell, C.J., Hawkins and Wright, JJ.)

Treadgold (app.) *v.* The Town Clerk of Grantham and White (resps.).(*a*)

Parliament—Registration of voters—Borough vote—Lodger franchise—Old lodger—Notice of claim—Omission of name of borough—Validity of claim—Power to amend—Parliamentary and Municipal Registration Act 1878 (41 & 42 *Vict.* c. 26), *s.* 28, *sub-sects.* 2 *and* 6.

A notice of claim delivered by a voter already on the old lodgers list was not made out in accordance with Form H., No. 2, *in the Order in Council of* 1889, *inasmuch as the name of the borough in respect of which the claim was made was omitted. In every other respect the claim was in accordance with the prescribed form. The overseers inserted the claimant's name on the list, but the revising barrister expunged it on the ground that the claim was bad, and he refused to amend it.*

Held, that the omission was a pure mistake, and was not misleading, and that the revising barrister should have exercised his discretionary power to amend.

Mere technicalities should not be allowed to defeat the claims of voters where the substance of the claim is good.

This was a case stated by the revising barrister for the borough of Grantham.

The appellant, Thomas George Treadgold, claimed under the Representation of the People Act 1867 (30 & 31 Vict. c. 102), sect. 30, sub-sect. 2, to have his name entered on the old lodgers list.

On or before the 25th July 1894, the following notice of claim was served on the overseers:

Parliamentary Boroughs.—Old Lodgers.

To the overseers of the parish [or township] of Little Gonerby.

I claim to have my name inserted as a lodger among the parliamentary electors for the borough of . . . in respect of the qualification named below:

Name of claimant in full, surname being first:—Treadgold, Thomas George.

Description of rooms occupied, and whether furnished or not: Bedroom, first floor, furnished; use of sitting-room, ground floor.

Street, lane, or other place, and number (if any) of house in which lodgings situate:—8, Park-terrace.

Amount of rent paid:—6*s.* per week.

Name and address of landlord or other person to whom rent is paid:—Lydia Marion Treadgold, 8, Park-terrace.

This was followed by the declaration of the appellant that he had resided during the qualifying period in "the above mentioned lodgings," that their value was over 10*l.*, and that he was "on the register of parliamentary voters for the said parliamentary borough in respect of the same lodgings as above mentioned," dated the 24th July, and signed Thomas George Treadgold. This was followed by the attestation to the signature in the following words:

I, the undersigned, hereby declare that I have witnessed the above signature of the above named claimant at the date stated above, and that I believe the above claim to be correct.—Dated the 24th July 1894.—(Signed) James Thomas Slater.—Residence, 123, Dudley-road, Grantham, calling or occupation, ironmonger.

There was no statutory or formal objection to the claim in writing served on the appellant or the overseers by or on behalf of any person whose name was on the list of voters for the borough.

The revising barrister on examining the claim found that the name of the borough had not been filled in. In every other particular the claim was according to the form. It was contended on behalf of the appellant that, in the absence of a notice of objection, the revising barrister had no power to examine the claim, or to expunge the appellant's name from the old lodgers list, and that, if he had the right to examine the claim, he should amend it by inserting the name of the borough (Grantham) after the words "for the borough of," in the claim.

(*a*) Reported by Henry Leigh, Esq., Barrister-at-Law.

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The revising barrister decided, in accordance with *Hersant* v. *Halse* (56 L. T. Rep. 337; L. Rep. 18 Q. B. 412), that to have claimed to be registered is a necessary constituent of qualification of a lodger, whether old or new; and that the necessity for so claiming could not be waived by the overseers' publication of a name in the old lodgers' list. He held that there was no claim duly made by the appellant to be registered for the borough of Grantham, as it was defective by reason of the omission of the name of the borough, as required by Form H. of No. 2, in the Orders in Council of 1889 (*vide* Rogers on Elections, 15th edit., part 1, p. 656). He therefore held that the claim was bad, and refused to amend it under sect. 28, sub-sect. 2, of the Parliamentary and Municipal Registrations Act 1878 (41 & 42 Vict. c. 26), as he considered that he had no power to make such an amendment, and that even if he had he would not have done so, because by inserting the name of the borough he would be creating a claim for a particular borough, and would also be amending the declaration by importing the word "Grantham" into it. He expunged the appellant's name from the list.

T. Terrell for the appellant.—The appellant in this case sent in his claim as an old lodger, and as such is entitled to have notice that his claim is objected to. The fact that the name of the borough was omitted in the claim is only an informality, and did not thereby render the claim a nullity, and it is submitted that the revising barrister should have amended under sub-sect. 2 or 6 of sect. 28 of the Parliamentary and Municipal Registration Act 1878 (41 & 42 Vict. c. 26). [Stopped by the Court.]

T. Willes Chitty, for the respondents, contended (1) that the document sent in by the appellant was no claim at all; (2) that the revising barrister was quite right in expunging the name of the appellant, because in making a claim the name of the borough is an essential part of the claim; (3) the revising barrister has a discretion which he had exercised here in a judicial manner, and it is submitted the court ought not to interfere:

Hersant v. *Halse*, 56 L. T. Rep. 337; 18 Q. B. Div. 412; 56 L. J. 44, Q. B.;
Jones v *Kent*, 60 L. T. Rep. 320; 22 Q. B. Div. 204;
Smith v. *Chandler*, 60 L. T. Rep. 327; 22 Q. B. Div. 208.

This is not a claim at all, for the name of the borough is of the essence of the claim, and the omission of it is not a mere trivial mistake, but a material omission. [Hawkins, J.—Suppose the claim was sent in in respect of "the" or "this" borough, do you say that the revising barrister could not amend?] You cannot omit in the formal claim the name of the place in respect of which your qualification is claimed. It is submitted that the the claim must be in accordance with the statutory form. The revising barrister has exercised his discretion under sub-sect. 2 of sect. 28 (41 & 42 Vict. c. 26):

Pickard v. *Baylis*, 41 L. T. Rep. 509; 5 C. P. Div. 235.

Lord Russell, C.J.—In this case the appeal must be allowed. The appellant, who was already on the old lodgers list for the borough of Grantham, made on the 25th July 1894, a claim to be put on the parliamentary register. He sent in this claim in the form to which our attention has been called as an old lodger, addressed to the overseers of the parish of Little Gonerby, claiming to have his name inserted as a lodger among the parliamentary electors for the borough of " ." He then stated his name, the description of the rooms he occupied, the address, the rent he paid, and the name and address of his landlord. The claim was duly attested by a person who described his residence as being in Grantham. The overseers receiving this in the borough of Grantham, undoubtedly understood the claim, and inserted the appellant's name on the list. When the matter came before the revising barrister the point was made that in the absence of notice of objection he had no power to examine the claim. We think, however, that he was quite right in considering it. Then the question arose whether the claim as made was a valid one or not, and we think that the revising barrister was perfectly right in holding that it was not a valid claim. But then came the further question whether, if not a valid claim, the revising barrister should have exercised a discretionary power, and have amended it. This he declined to do, and gave as his reason that if he had done so, he would have been creating a new claim for a particular borough out of an old one. I do not take that view. There was undoubtedly an omission in the claim, but it was not deliberately made; it was a pure mistake which did not and could not mislead the overseers or any other person. That being so the question is, ought not the revising barrister to have exercised his discretionary power to amend? He has got a discretionary power to amend, but it has not been contended that this court could not overrule that discretion, which must be exercised in a judicial manner. I am of opinion that in this case he ought to have amended the claim by inserting the word "Grantham," because, in the first place, the appellant was already on the old register; and, secondly, because the overseers were not in any way misled, but were perfectly well aware which was the borough in respect of which the appellant was claiming. It is unnecessary to deal at length with the cases cited, as the circumstances were different. In *Jones* v. *Kent* (60 L. T. Rep. 320; 22 Q. B. Div. 204) it appeared that the declaration of residence and the attestation were dated the 9th July, six days before the 15th July, the date of the expiration of the year of residence to which they referred. Upon the face of it this was entirely wrong, and the court there was of opinion that the revising barrister was right in erasing the claimant's name, and the judgment amounted to this, that the claim was not a valid one. There was no application to amend. In the case of *Smith* v. *Chandler* (60 L. T. Rep. 327; 22 Q. B. Div. 208) the point raised was, that the date of the attestation was omitted in the claim. The statute requires the claim to be attested and dated. There the court held that the claim was invalid as the omission was material, and was not due to mistake, but was deliberately made. In *Pickard* v. *Baylis* (41 L. T. Rep. 509; 5 C. P. Div. 235) a claim was sent in by a lodger for the first time (it hardly amounted to a claim), but he omitted to state the amount of rent and the address of his landlord, and thus did not state the qualification on which his claim was based. There was no right shown in the claim to be on the register at

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all. These cases therefore differ from the present one. I think that while this court must, on the one hand, be very vigilant in not allowing amendments to claims which in substance and on the face of them are not shown to be claims at all, yet on the other hand, it must be very vigilant in seeing that mere technicalities should not be allowed to defeat the claims of voters where the substance of the claim is good.

HAWKINS, J.—I am so entirely of the same opinion that I shall not add a word.

WRIGHT, J.—I agree.

Appeal allowed with costs.

Solicitor for the appellant, *W. H. Norledge*, Newark.

Solicitors for the respondents, *Paterson, Snow, Bloxam*, and *Kinder*, for *W. F. M. White*, Grantham.

Wednesday, Nov. 14, 1894.

(Before Lord RUSSELL, C.J., HAWKINS and WRIGHT, JJ.)

WARREN *v.* MAULE. (*a*)

Parliamentary registration—Two names on voters list in respect of same qualifying property.

The names of two persons were on the occupiers list as parliamentary electors in respect of the same qualifying property. Objection was raised against one of them, but the revising barrister found he was duly qualified, and retained his name on the list. No objection was raised against the other, and no evidence was given as to his qualification.

Held, that the mere fact that another person, whether qualified or unqualified is on the register in respect of certain premises, is not enough to keep a person off who is properly qualified in respect of the same premises.

CASE stated by the revising barrister for the Southern or Huntingdon division of Huntingdon.

An objection was entered by William Warren to the name of Arthur Chapman, being retained on the occupiers list as a parliamentary elector for the divisions.

The sole ground of objection stated in the notice of objection, and raised before the revising barrister, was that Arthur Chapman was not the tenant of the qualifying property.

The facts as set out in the stated case were as follows:

Arthur Chapman was on the list as a voter in respect of a dwelling-house, and was entitled in all respects to be on such list. In respect of the same dwelling-house another person William Chapman was also entered on the list as a voter. No notice of objection had been given to the retention of the name of William Chapman upon the list, and there was no evidence before the revising barrister as to whether William Chapman was or was not entitled to be so entered.

The barrister disallowed the objection, and retained the name of Arthur Chapman on the list.

G. E. Tyrrell for the appellant.—The revising barrister should have taken evidence as to which of the two names should remain on the list as being qualified in respect of these premises, and he should have gone into the value of the qualifying property, and he would then have found that the value was under 20*l.*, and consequently that both the names could not remain on the list in respect of these premises. William Chapman was on the list and was not objected to, and it is submitted that the barrister was wrong in retaining a second name on the list.

No one appeared for the respondent.

Lord RUSSELL, C.J.—This appeal must be dismissed. The case stated finds that the claimant, Arthur Chapman, was on the list as a voter, and was in all respects duly qualified as a tenant, subject to the fact that there was another person, William Chapman, also entered on the list as a voter in respect of the same premises. That fact makes no difference whatever. Whether William Chapman was or was not entitled to have his name entered on the list in respect of these premises is of no importance in this case as no notice of objection to the retention of his name had been given, and there was no evidence before the revising barrister one way or the other. The barrister has found that Arthur Chapman, the man objected to, is properly qualified as the tenant, and no objection other than that he was not the tenant of the qualifying property was raised by the notice. The notice given was not sufficient to raise the question of the value of the premises as is now contended. The mere fact that another person, whether qualified or unqualified, is on the list as a voter in respect of certain premises is certainly not sufficient to keep a person off who is found duly qualified in respect of such premises, as is the case here.

HAWKINS, J.—I entirely agree with what has been said.

WRIGHT, J.—I am of the same opinion.

Appeal dismissed.

Solicitor for the appellant, *Walter Maskell*, for *Cranfield* and *Wheeler*, St. Neots.

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Nov. 10 *and Dec.* 4, 1894.

(Before the PRESIDENT (Sir Francis Jeune) and BRUCE, J.)

KELLY AND HARDY *v.* THE ISLE OF MAN STEAM PACKET COMPANY LIMITED.

THE TYNWALD. (*a*)

ON APPEAL FROM THE LIVERPOOL COUNTY COURT.

Practice — County Court — Collision — Mode of trial—Jury or assessors—County Courts Admiralty Jurisdiction Act 1868, *ss.* 10, 11, 34—*County Courts Act* 1888, *s.* 101.

In an Admiralty cause of collision in a County Court, where one party asks for a jury and the other demands assessors, the trial must be by judge and assessors.

Semble, *in salvage and towage causes the same rule applies.*

Per Bruce, J.: Semble, *sect.* 101 *of the County Courts Act* 1888 *does not apply to Admiralty causes.*

THIS was an appeal by the defendants in a

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

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collision action *in personam* on the Admiralty side of the County Court, from an order of the judge of the Liverpool County Court, on an application to him for directions.

The plaintiffs claimed damages for injuries to their flat *Gibson* by a collision with the screw-steamer *Tynwald* on the river Mersey on the 16th Aug. 1894.

The plaintiffs demanded a jury, and the registrar of the court issued a notice of jury. The defendants filed a request that nautical assessors should be summoned.

On an application to the judge for directions as to the mode of trial, the judge said that it appeared to him that, under the Acts, he had no choice in the matter; if a jury was asked for, he was obliged to allow the case to be tried by a jury. The fact that nautical assessors had been summoned did not exclude a jury. He made no order except that the costs of the application should be costs in the action, and gave leave to the defendants to appeal.

The defendants appealed.

The following Acts of Parliament were referred to in argument:

County Courts Act 1846 (9 & 10 Vict. c. 95), s. 70; County Courts Equitable Jurisdiction Act 1865 (28 & 29 Vict. c. 99), ss. 2 and 7; County Courts Admiralty Jurisdiction Act 1868 (31 & 32 Vict. c. 71), ss. 10, 11, 34, and 35; County Courts Act 1888 (51 & 52 Vict. c. 43), ss. 101, 186, and 188, sub-sect. 3.

Sir *Walter Phillimore* and *A. G. Steel* for the appellants.—The County Courts Act 1888 repeals all County Courts Acts except those dealing with Admiralty. They are neither incorporated nor in the schedule of repeal. There are two questions in this case. Do assessors exclude juries? If not, which prevails? The first part of sect. 101 of the County Courts Act 1888 is the same as in sect. 70 of the County Courts Act 1846. The County Courts Admiralty Jurisdiction Act incorporated the Act of 1846. If there is a right to a jury now, there has been since 1868. In the general orders issued under the Acts of 1868 and 1888 there is no mention of a jury in Admiralty. The words "ordinary civil causes" in sect. 10 of the Act of 1868 would include equity, as County Courts then had equity jurisdiction, and this is why in sect. 101 of the Act of 1888 equity causes or matters are specifically excepted. [BRUCE, J. refers to sects. 2 and 7 of the County Courts Equitable Jurisdiction Act 1865.] At common law there was a jury as of right; at equity only of discretion. The Act of 1868 gives an absolute right to assessors, and the presence of assessors excludes that of a jury. [The PRESIDENT.—By sect. 10 assessors are to assist the judge in the same way as they do the judge in the High Court; how can they do this with a jury? BRUCE, J.—The jury having by their oath to give their verdict according to evidence, would be found to disregard the opinion of the assessors.] The other side will object that the words "all actions" cover this one. But see definition of "action" in sect. 186 of the Act. "Prescribed" there means prescribed by the County Court Rules. Admiralty causes, unlike every other case, begin with a præcipe, then a plaint note, then a summons. Common law actions begin with a plaint:

The Princess Royal, L. Rep. 3 A. & E. 27.

There are various County Court Rules all pointing to the tribunal which is to try Admiralty causes being either a judge alone or a judge assisted by assessors.

Joseph Walton, Q.C. and *Horridge* for respondents.—The Court of Appeal has just decided that the Act of 1888 applies to Admiralty causes:

The Delano, 71 L. T. Rep. 544.

This supports

The Eden, 66 L. T. Rep. 387; 7 Asp. Mar. Law Cas. 174: (1892) P. 67;

The Hero, 65 L. T. Rep. 499; 7 Asp. Mar. Law 81; (1891) P. 294.

Where the Act of 1888 does not alter the Act of 1868 the latter stands. [The PRESIDENT.—Is there anything in the County Courts Acts which shows that a judge ever sits with a jury and assessors? The Employers' Liability Act 1880 gives you assessors or jury, but not both. BRUCE, J.—Your argument is that, though there are two kinds of procedure available, still the provision for a jury is to prevail?] Yes. As to the point of convenience, why should not a judge sit with both? The judge in the Admiralty Court finds facts, and has skilled opinion to help him; why cannot the jury find facts? Assessors are merely impartial experts to help the court. By sect. 10 of the Act of 1868 Admiralty causes are to be heard and determined as ordinary civil causes are. Rule 77 of the Rules of 1869 is headed "Common Law Rules." The other side would say that all common law rules apply to Admiralty except this one—of a jury by right. The option of a party asking for a jury must prevail over a party demanding assessors even under the Act of 1868. [BRUCE, J.—Was not the procedure of judge and assessors as opposed to judge and jury a fundamental distinction of Admiralty and common law?] What are regarded as fundamental matters in Admiralty in the High Court are not so in County Courts. Take the case of the arrest of a ship. Again the County Court has no preliminary act and no pleadings. [BRUCE, J.—The reason for limiting the arrest of a ship in County Courts was inconvenience and the absence of necessity for detaining a ship for small claims.] The County Courts and Admiralty Jurisdiction Amendment Act 1869, sect. 2, sub-sect. (1) gave County Courts a jurisdiction as to charter-parties and bills of lading, which the Admiralty Court did not possess. The provision for mercantile assessors was meant to give jurisdiction to try business other than that given by the 1868 Act on the Admiralty side. The fact that the court may, at the discretion of the judge, appoint assessors on the application of either party does not take away the right to a jury. If under the Act of 1868 my right to a jury is doubtful, under the Act of 1888 it is clear.

Sir *Walter Phillimore* in reply.

Cur. adv. vult.

Dec. 4.—The PRESIDENT.—In this case a question arises as to the mode of trial, in a County Court, of a cause of collision, within the Admiralty jurisdiction of the court. It is whether, where one party asks for a jury and one party asks for assessors, the trial should be by a judge and jury, by a judge and assessors, or by a judge, jury, and assessors. The learned judge of the County Court has decided in favour of the third of these mode

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of trial, and, accordingly, he has expressed no opinion as between the other two. The question turns on the construction of the County Courts Admiralty Jurisdiction Act of 1868 and the County Courts Act of 1888. By the former of these Acts jurisdiction was given to the County Courts to try Admiralty causes, and by the 3rd section of the Act claims relating to salvage, towage, necessaries, wages, damage, and collision were enumerated as Admiralty causes. The effects of sects. 10 and 11 of the Act appears to me to be clear, so far as is necessary for the decision of this case. With regard to Admiralty causes other than causes of salvage, towage, or collision, the cause is to be heard and determined in the same manner as ordinary civil causes are heard and determined in County Courts. I do not think it necessary to decide what the phrase "ordinary civil causes" imports. We are dealing with an Admiralty cause of collision, and with regard to Admiralty causes of salvage, towage, or collision the rule appears to me to be clearly laid down by the words of the exception. In these causes, the trial is to be by the judge, unless either party, or the judge, desire there should be assessors, and then it is to be by a judge and assessors. It is clear that the exception in sect. 10 modified any right to a jury which the previous words may be supposed to have given. It could modify such right only in one of two ways—that is to say, by allowing assessors either as an addition to, or in substitution for, a jury. Now, I confess it seems impossible to suppose that it was intended by the words of this exception to introduce into our judicial system trial by a judge *plus* assessors *plus* a jury. The words do not appear to be apt for the purpose, because it is the judge who is to be assisted by assessors, and he is to be assisted by them in the same way as the judge of the High Court of Admiralty is assisted by them. But I cannot for a moment suppose that it was intended by this provision to create so novel a tribunal as a judge, jury, and assessors. I am not sure that a jury and assessors are not inconsistent in principle, because assessors exclude expert evidence, at least in the Courts of Admiralty, and a jury is bound to decide according to the evidence, so that they must give a verdict without any evidence on the most material points. The only answer suggested to this is that the advice of the assessors, which the judge would, I suppose, convey to the jury, is evidence; but it is not; it is a substitute for evidence. I am sure, however, that the practical difficulties in trying a cause of collision or salvage with a jury, the sole judge of fact, would be great. I do not say the thing would be impossible, but it implies a novel system of procedure in the conduct of such a trial on which the Act is wholly silent. Trial by assessors has, I think, always been regarded by the Legislature as an alternative of trial by jury. It is so, I think, under sect. 5 of the County Courts Admiralty Jurisdiction Amendment Act 1869 and under sect. 103 of the County Courts Act of 1888, and it is so, in terms, under the 6th section of the Employers' Liability Act 1880 and the Rules of the Supreme Court: (Order XXXVI.. r. 7 (*a*). It is not worth while to further elaborate this point, because it does not appear that a construction compelling a County Court judge to sit with a jury and assessors in Admiralty causes has ever till this case been placed on the Act of 1868, and, indeed, it was only faintly, if at all, suggested before us that such a construction could be maintained. I think, therefore, that it follows that the exception in sect. 10 enables any party, or the judge, in cases of collision, towage, or salvage, to say that the trial shall be by a judge and assessors; and so the law stood from 1868 to 1888. But it is said that the language of sect. 101 of the County Courts Act of 1888 gives to either party an absolute right to a jury in all actions other than the Chancery cases, which are specially excepted, and that, therefore, if, on the view above taken, trial by judge, jury, and assessors cannot be supposed to be intended, there must at the demand of a party be trial by judge and jury. I do not think it is possible to say that the term actions, as defined by sect. 186—that is to say, "actions shall include suits, and shall mean every proceeding in the court which may be commenced by plaint"—does not include Admiralty causes. Nor does it appear to me that there are any inferences to be drawn from the rules which really throw light on the matter. It is also an argument of force that the single exception of certain Chancery actions appears to show that the section was intended otherwise to be exhaustive. It is further clear, from the decision of this court in *The Eden* (*ubi sup.*) and *The Hero* (*ubi sup.*), and from the recent decision of the Court of Appeal in *The Delano* (*ubi sup.*), that as regards Admiralty causes the Act of 1868, which is not one of those expressly repealed by the Act of 1888, must be read with it. Must, then, sect. 101 of the Act of 1888 be construed to repeal sect. 10 of the Act of 1868 and to establish a new rule for the trial of Admiralty causes of collision, towage, and salvage? I do not think that it need be so read, and I think that the exception in sect. 10 of the former Act may stand as an exception to the general provision of sect. 101. I agree that this takes from sect. 101 the general application of which the words in themselves are capable. But I think that, on principles similar to those approved by a majority of their Lordships in the House of Lords, in the case of *Cox* v. *Hakes* (63 L. T. Rep. 392; 15 App. Cas. 506), especially as stated by Lord Halsbury, a limitation ought to be placed on the generality of the language of sect. 101. In that case, although the words of sect. 19 of the Judicature Act 1873 gave in terms jurisdiction to hear appeals from any judgment or order of the High Court, and also made an exception in certain cases afterwards mentioned, it was held that no appeal lay from an order of the Queen's Bench Division in a matter of *habeas corpus*. The decision may be stated generally to have proceeded on the nature and history of the writ of *habeas corpus*, and on this ground, that it could not be supposed that the Legislature intended by general words to alter the previous procedure without more specific provision than is to be found in the Act. On similar principles it appears to me impossible to suppose that the Legislature intended that, whenever any parties so desired, Admiralty causes of collision and salvage in County Courts should be tried by a jury. Such an enactment would have worked a change more complete than I can believe would have been so carried out. It is true that cases of collision between ships have in some cases been tried at common law by juries, and it is also true that there was a power under the Act 3 & 4 Vict. c. 65 (though I believe only once employed), to send an issue from the Admiralty Court for trial

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by a jury, and quite recently my learned brother Barnes, J. tried an Admiralty cause of collision—in which no scientific question was involved, but the whole matter turned on an alleged conspiracy—with a jury. But in the Admiralty Court collision cases have, with this exception, been invariably tried by a judge, and almost invariably by a judge with assessors. It cannot, I think, have been intended at the option of any party to a cause, not only to bring in a jury, but also (if I am right in thinking assessors and jury incompatible) to oust the assessors, and thus provide for trial of Admiralty collision cases in the County Court in a manner wholly different from that in force in the High Court of Justice. The difficulty appears to me to be greater still as regards salvage cases. An action for salvage services at common law proceeds on a *quantum meruit*, and I should suppose the compensation would be assessed on the same principles as in any other case of implied contract. But in the Admiralty court salvage services are remunerated on principles of a very special kind, into which considerations of public policy largely enter, and which do not proceed on any such basis as that of contract between the parties. Such principles have never yet, so far as I know, been submitted to a jury, and it would be extremely difficult, if not impracticable, to submit them to that tribunal. It is, perhaps, only another way of expressing the views I have just indicated to say there is something in the subject of certain Admiralty causes within the meaning of the definition clause of the Act of 1888 (sect. 186) repugnant to the inclusion of such causes in the "actions" referred to in sect. 101 of that Act. For these reasons I think that in an Admiralty cause of collision in a County Court, if one party asks for a jury and the other for assessors, the trial must be by judge and assessors. The judgment of the County Court must accordingly be reversed.

BRUCE, J.—I agree with the President, and perhaps I might be content to add nothing to the judgment he has delivered; but, as I have arrived at the same conclusion by a somewhat different method, it is, I think, right that I should state my reasons for concurring in his judgment. In order to arrive at a right conclusion as to the construction of the County Courts Act 1888 we must consider the earlier statutes. The Act of 1868 (31 & 32 Vict. c. 71) conferring Admiralty jurisdiction on the County Courts enacts, by sect. 10, that "in an Admiralty cause in a County Court the cause shall be heard and determined in like manner as ordinary civil causes are now heard and determined in County Courts; save and except in any Admiralty cause of salvage, towage, or collision, the County Court judge shall, if he think fit, or on the request of either party to such cause, be assisted by two nautical assessors in the same way as the judge of the High Court of Admiralty is now assisted by nautical assessors." By sect. 34 of the same Act it is enacted that the Act "shall be read as one with so much of the County Courts Act 1846, and the Acts amending or extending the same, as is now in force." Sect. 69 of the County Courts Act 1846 enacts "that the judge of the County Court shall be the sole judge in all actions brought in the said court, and shall determine all questions as well of fact as of law, unless a jury shall be summoned as hereinafter-mentioned." Sect. 70 of the last-mentioned Act enacts "that in all actions where the amount claimed shall exceed five pounds it shall be lawful for the plaintiff or defendant to require a jury to be summoned to try the said action; and in all actions where the amount claimed shall not exceed five pounds it shall be lawful for the judge, in his discretion, on the application of either of the parties, to order that such action be tried by a jury." The County Courts Equitable Jurisdiction Act (28 & 29 Vict. c. 99) conferred on the County Courts a limited equitable jurisdiction, and by that Act the County Courts were given all the powers and authority of the High Court of Chancery in the suits or matters which fell within the equitable jurisdiction so conferred. It followed, therefore, that, as the Court of Chancery had in certain cases the power to summon a jury for the trial of certain matters, the County Court, in the exercise of its equitable jurisdiction, had a similar power; but, as in the Court of Chancery, the usual mode of trial was by the judge alone, so also in equity proceedings in the County Court the usual mode of trial was by the judge alone; 24 & 25 Vict. c. 134, which in 1868 regulated the proceedings in bankruptcy, conferred by sect. 3 upon the judge of every County Court other than the Metropolitan County Courts the jurisdiction in bankruptcy previously vested in the Commissioners of the District Courts of Bankruptcy. And I cannot find that any provision was in force at the time for the trial of bankruptcy matters by a judge and jury. There was, therefore, vested in the County Courts, at the time of the passing of the County Courts Admiralty Jurisdiction Act, jurisdiction to hear and determine civil causes of various kinds. There can, I think, be no doubt that the phrase "civil causes" is wide enough to comprehend all the various matters included in the jurisdiction of the County Courts. Lord Selborne, C.J., in the case of *Green* v. *Lord Penzance* (45 L. T. Rep. at p. 357; 16 App. Cas. at p. 671), says of the word "cause": "It is not a technical word signifying one kind or another; it is *causa jurisdictionis*, any suit, action, matter, or other similar proceeding competently brought before and litigated in a particular court." What then is the meaning of the provision of sect. 10 of the County Courts Admiralty Jurisdiction Act 1868, which enacts that Admiralty causes shall be tried in like manner as ordinary civil causes? It would be, I think, to put a very narrow and strained construction upon the words "ordinary civil causes" to hold that they applied only to common law causes; they obviously, as it seems to me, apply to all the causes or matters over which the judge ordinarily exercised jurisdiction. Then, if these words apply to all classes of causes, in what manner were such causes heard and determined? The "manner" no doubt refers to the procedure of hearing causes in a summary way without pleadings; but I think it also refers to the mode of trial, and, as the mode of trial is now the matter to be determined, we must consider what was the mode of trial common to all classes of cases. The only mode of hearing and determining common to all classes of cases was the hearing and determining by the judge alone. In some common law actions a jury might be demanded by either of the parties, and, in some causes on the equity side, the court in its discretion might order a trial by judge and jury. But, unless special application was made by either party, the judge

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himself determined all matters brought in the court, and many of the matters brought in the court could not in any case be determined save by the judge alone. I think, therefore, that where in the first part of the section the Legislature referred to the manner in which ordinary civil causes were then heard and determined in County Courts, it meant to refer to the hearing and determining of causes by the judge alone. That was the ordinary manner of trial; it was the method by which many causes could alone be tried, and by which all causes were tried in the absence of any special application by one of the parties. But, for the purpose of the question now before the court, it is not, I think, necessary to rest alone upon the earlier words of the section. The provision for the judge being assisted by nautical assessors is, as it seems to me, absolutely inconsistent with trial by jury. The section provides that the judge shall, if he think fit, or on the request of either party, be assisted by nautical assessors "in the same way as the judge of the High Court of Admiralty is now assisted by nautical assessors." But, if the judge is not to determine the facts, it is difficult to understand how assessors could assist him; certainly they could not assist him in the same way as assessors assist the judge of the Court of Admiralty. Assessors could not assist him in charging the jury, because the jury can only give their verdict in accordance with the evidence before them, and I apprehend it would be in contravention of their oaths if the jury were to be guided in their verdict by the opinion of the assessors on matters of nautical skill. Questions of nautical skill are matters of fact, not of law, and, if they are to be determined by a jury, are matters upon which the evidence of experts should be received; but, if these questions are to be determined by a jury on the evidence of experts, there can be no advantage in having assessors. According to the practice of the Admiralty Court, where the judge is assisted by assessors, evidence is not admissible on points in which it is the province of the assessors to advise the court: (*The Kirby Hall*, 48 L. T. Rep. 797; 5 Asp. Mar. Law Cas. 90; 8 P. Div. at p. 75.) One of the great advantages of the presence of assessors is the saving of expense and difficulties which almost always arise upon the reception of the conflicting evidence of experts on technical questions. For these reasons I cannot resist the conclusion that the Legislature, when it conferred the right to have in certain Admiralty causes nautical assessors to assist the judge, intended the mode of trial by judge and assessors to exclude the mode of trial by judge and jury. But, apart from these reasons, some of the matters to be tried are from their very nature unsuitable for trial by judge and jury. It is impossible to suppose that the Legislature could have contemplated the trial of a cause of salvage by a judge and jury. What directions would it be possible for the judge to give to the jury as to the principles to guide them in the assessment of the amount of the salvage award? It cannot, I think, be said that the salvage award is to be assessed upon the principle of a *quantum meruit*, because the causes mentioned in the County Courts Admiralty Jurisdiction Act 1868 are spoken of as "Admiralty causes," and the very title of the Act is "An Act for conferring Admiralty Jurisdiction." The value of the property salved, the nature of the risk incurred, and all the various elements which have been recognised as fit for the consideration of the court in awarding salvage, must be dealt with by the tribunal which is charged with the fixing of the amount of salvage award, and it seems to me to be incredible to suppose that Parliament could have intended to remit such a question to be determined by a jury. The County Courts Jurisdiction Act 1868, s. 26, provided that "an appeal may be made to the High Court of Admiralty of England from a final decree or order of a County Court in an Admiralty cause." This right of appeal, which still exists, is not limited to matters of law, but includes matters of fact. But it would be contrary to all experience and principle to allow an appeal from a finding of a jury on matters of fact. From 1860 down to the passing of the County Courts Act 1888, the practice, so far as I can ascertain, was universal to have Admiralty causes in the County Courts tried before a judge alone, or before a judge assisted by nautical assessors. The question to be decided is whether the County Courts Act 1888, which is entitled "An Act to consolidate and amend the County Courts Act," operates to abrogate the practice which, founded upon the Act of 1868, regulated up to 1888 the procedure in Admiralty causes. I may observe in passing that I am not prepared to expect in an Act which is substantially a consolidation Act a change of so vital a character as that involved in the substitution of trial by jury in the place of trial by a judge with or without assessors. But the particular provisions of the statute of 1888 demand consideration. The 101st section provides that in all actions where the amount claimed shall exceed 5*l.* it shall be lawful for the plaintiff or defendant to require a jury, unless the action is of the nature of the causes or matters assigned to the Chancery Division of the High Court of Justice. The word "action" is, by the interpretation or supplementary section (186), to mean "every proceeding in the court which may be commenced as prescribed by plaint." This is, I think, wide enough to include an Admiralty cause. But the supplementary section is introduced by a provision that the words used in the statute shall have the prescribed meaning, unless there is anything in the subject or context repugnant thereto. Is, then, the application of the word "actions" to Admiralty causes in the 101st section repugnant to the subject or context? For the reasons I have already given I think it is. I think, therefore, that the interpretation clause does not apply to extend the word "actions" to Admiralty causes, and that the words in the 101st section of the Act of 1888 have no more application to Admiralty causes than had the same words in the 70th section of the earlier Act of 1846, which has already been referred to. But the same result may, I think, be arrived at in another way. The Act of 1888, by sect. 188, sub-sect. 3, enacts that "any enactment or document referring to any Act or enactment hereby repealed shall be construed to refer to this Act, or to the corresponding enactment to this Act." The 34th section of the Act of 1868 enacts, as before stated, that the Act of 1868 shall be read as one Act with so much of the County Courts Act 1846, and the Acts amending or extending the same. The Act of 1846 and all the Acts amending or extending the same referred to in the Act of 1868,

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sect. 34, are repealed by the Act of 1888. The County Courts Admiralty Jurisdiction Act 1868 is therefore to be read as one with the Act of of 1888, and as if the Act of 1888 were referred to in the 34th section of the former Act. We therefore find in the earlier of the two Acts one special provision giving a complete rule as to the manner of hearing and determining "Admiralty causes," and in the later of the two Acts, which is to be read as part of the earlier Act, a general provision as to the mode of trial of "actions." It would, I think, be contrary to all the recognised principles of interpretation to treat the special provisions of the earlier Act as repealed by the general provisions of the later Act incorporated with it. It is to be observed that it is not merely that the two Acts are to be read as one; but the earlier Act, the Act of 1868, is to be read as if it incorporated the later Act of 1888. It would be doing violence to the rules of construction to hold that the provisions of an Act which specially provides for the trial of Admiralty causes by a judge, or by a judge assisted by assessors, are to be overruled, and, in many cases, rendered nugatory, by a general enactment, contained in the same Act, providing for the trial of "actions" by a judge and jury (see the observations of Lord Selborne, L.C. in *Seward* v. *The Vera Cruz*, 52 L. T. Rep. at p. 476; 5 Asp. Mar. Law Cas. at p. 389; 10 App. Cas. at p. 68; 54 L. J. Adm. at p. 13), and the remarks of Lord Westbury in *Ex parte St. Sepulchre* (33 L. J. 372, Ch.) The conclusion at which I have arrived is, I think, not in conflict with the decision of this court and the Court of Appeal in *The Delano* (*ubi sup.*). That decision was on sect. 120 of the County Courts Act 1888. That section took the place of sect. 6 of the County Courts Act 1875. The section was held to apply to appeals in Admiralty: (*The Humber*, 49 L. T. Rep. 604; 5 Asp. Mar. Law Cas. 181; 9 P. Div. 12; 53 L. J. 7, Adm.). It was held that the appeal given by the County Courts Act 1875 might well co-exist with the mode of appeal provided by the County Courts Admiralty Jurisdiction Act 1868, ss. 26 and 27. There was nothing, therefore, inconsistent in holding that the word "actions" in sect. 120 of the Act of 1888 included all those proceedings which were included in the Act of 1875. The decision was in accordance with the established practice and the previous course of legislation.

Appeal allowed.

Solicitors for the appellants, *Pritchard* and *Sons*, agents for *Bateson, Warr*, and *Wimshurst*.

Solicitor for the respondents, *J. W. Thompson*.

RAILWAY AND CANAL COMMISSION COURT.

Tuesday, Nov. 27, 1894.

(Before Collins, J., Sir F. Peel and Viscount Cobham, Commissioners.)

Glamorgan County Council (applicants) *v.* Great Western Railway Company (resps.). (*a*)

Practice—Costs—Taxation—Three counsel.

The costs of more than two counsel will not be allowed upon taxation between party and party unless it can be shown that the questions involved were of a very complicated nature, and that it was essentially necessary for the purpose of doing justice that three counsel should be employed.

This was an appeal by the respondents from the decision of the registrar refusing to allow the costs of three counsel on taxation between party and party.

An application was made by the Glamorgan County Council, in which they complained that the respondents, in monopolising certain railways for mineral and goods traffic to the exclusion of passenger and parcel traffic, had contravened the Railway and Canal Traffic Acts 1854, 1873, and 1888, and they applied to the court for an order enjoining the respondents to afford all reasonable and proper facilities for passenger traffic upon the railways, including proper and sufficient accommodation at certain named places, and not to give any undue and unreasonable preference to any description of traffic in any respect whatsoever, and not to offer any obstruction to the public desirous of using such railways for passenger traffic.

The application was heard on the 17th, 18th, and 19th April, before the commissioners, who on the last-mentioned day gave judgment dismissing the application with costs.

The respondents were represented at the hearing by Sir R. Webster, Q.C., Mr. Cripps, Q.C., and Mr. Moon.

Upon the taxation of the respondents' costs the registrar refused to allow the costs of more than two counsel, and gave the following reasons for his decision: "The defence to this action was prepared very ably, very fully, and very elaborately by the solicitor to the railway company. The plans showing the alterations which would be required to adapt this mineral line to a passenger line with passenger stations were very minute and very costly. But the evidence prepared by the railway company was confined within a comparatively narrow compass, and was directed to (1) the requirements of the Board of Trade in respect of a passenger line; (2) the cost of such requirements as applied to the Ely Valley Line; (3) the demand existing for passenger traffic facilities on the Ely Valley Line. I am of opinion that there was nothing in the case for the railway company as shown by the prepared evidence which justified three counsel being employed at the trial. There remains the defence on the question of law, viz., the jurisdiction of the Railway Commissioners to order the facilities asked for. The question of the jurisdiction of the commissioners to order facilities involving structural works had already been decided by the Court of Appeal in the *Hastings* case. However intricate or important a question of law may be, the court only hears the arguments of two counsel on it, and therefore I am opinion that the defence of want of jurisdiction did not justify the employment of three counsel. There are very few cases in this court where two counsel of the eminence employed cannot conduct a case without being "overweighted." Where three counsel are employed the burden of the case is almost invariably borne by two only. The case of *Kirkwood* v. *Webster* relied on in the objections was a case of considerable complication, and there were no less than eight distinct charges

(*a*) Reported by W. H. Horsfall, Esq., Barrister-at-Law.

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of fraud and misrepresentation made by the plaintiff against the defendant."

From this decision the present appeal was brought.

Ernest Moon for the respondents.—It is submitted that the decision of the registrar was wrong. The case was one in which a reasonable and prudent man acting with ordinary prudence would not have ventured to come into court without three counsel. It is necessary to consider the importance of the issues between the parties, the exceptionally large amount at stake, and the complicity of the questions involved:

Kirkwood v. *Webster*, 9 Ch. Div. 239;
London, Chatham, and Dover Railway Company v. *South-Eastern Railway Company*, 60 L. T. Rep. 753.

The matter was of great importance to both parties; if the order asked for had been made the cost to the respondents of the necessary alterations of their line would have been 75,000*l.*, and there were difficult engineering questions which had to be brought before the court. There was a large body of evidence prepared which from the way the case turned it was not necessary to lay before the court, and this evidence ought to be taken into consideration on taxation: see judgment of Kekewich, J., in *London, Chatham, and Dover Railway Company* v. *South-Eastern Railway Company* (*ubi sup.*). There were also important questions of law which might have arisen.

H. Sutton for the applicants.—The employment of three counsel is an unusual expense, and the cost is not allowed on taxation between party and party save in very exceptional cases. Such an expense is not even allowed between solicitor and client unless the solicitor has explained to the client that such expense will or may not be allowed on taxation between party and party, whatever may be the result of the trial:

Re Broad and Broad, 52 L. T. Rep. 888; 15 Q. B. Div. 420.

In *Kirkwood* v. *Webster* (*ubi sup.*) the facts were very complicated, and there were many charges of fraud involved. The rule that charges will not be allowed for employing more than two counsel will only be departed from in exceptional cases:

Smith v. *Buller*, 31 L. T. Rep. 873; L. Rep. 19 Eq. 473.

The questions of law had already been decided in

South-Eastern Railway Company v. *Railway Commissioners*, 44 L. T. Rep. 203; 6 Q. B. Div. 586.

Moon in reply.

Collins, J.—There were no doubt important questions of both law and fact in this case, but I do not think that they were of a very complicated nature. There were questions of some commercial importance, and it has to be decided whether the facts bring the case within the previous decisions of the courts upon the point now raised. The registrar has a better opportunity of going into the matter than the court has, as he can ascertain what papers and materials were laid before counsel. I do not think that the case comes within any of the authorities allowing the costs of three counsel on taxation between party and party. I find that in *Pearce* v. *Lindsay* (1 De G. F. & J. 573), although only two counsel were employed in the court below, that the costs of three were allowed in the Court of Appeal, but that was a very complicated case, and there was a large mass of evidence and correspondence extending over several years. Lord Campbell, L.C., in delivering judgment, says: "We do not know for what reason not more than two counsel were then employed, nor what effect the severe labour they undertook may have produced upon them." And Knight Bruce, L.J. says: "I also think the counsel employed upon original hearing were overweighted." I do not think in the present case that counsel can be said to have been overweighted. In *Kirkwood* v. *Webster* (9 Ch. Div. 239) the facts were very different from those in the present case; the trial of that action commenced on the 2nd July 1877, and continued from day to day until the 7th July, when the plaintiff abandoned his case, and judgment was given for the defendant with costs. Fry, J., in delivering his judgment, said: "I think that the case falls within the rule laid down by Turner, L.J., in *Pearce* v. *Lindsay*, and that it was essentially necessary for the purpose of doing justice that three counsel should be employed. I do not speak of a physical or a mathematical necessity, but I think that the case was one in which a reasonable and prudent man, acting with ordinary prudence, would not have ventured to come into court without three counsel. There were no less than eight distinct charges of fraud and misrepresentation made by the plaintiff against the defendant. No less than three contracts relating to no less than five patents were in question, and other patents entered into the history of the case. I do not think that it is necessary to take into consideration whether all three counsel attend in court during the hearing of the case, and if I remember right all three counsel did not attend during the whole of the hearing of this case." In order to justify the employment of three counsel the case must come within the rule laid down in *Pearce* v. *Lindsay* (*ubi sup.*), and *Kirkwood* v. *Webster* (*ubi sup.*), and I think that this case does not come within that rule. Nor does the case come within the dictum of Kekewich, J., in *London, Chatham, and Dover Railway Company* v. *South-Eastern Railway Company* (60 L. T. Rep. 753). For these reasons I think that the decision of the registrar was right, and that this appeal must be dismissed.

Appeal dismissed.

Solicitors for the applicants, *Cunliffes* and *Davenport*, for *R. W. Williams*, Cardiff.

Solicitor for the respondents, *R. R. Nelson*.

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Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 19 *and* 24, 1894.

(Before Lord ESHER, M.R., LOPES and RIGBY, L.JJ.)

GUILFORD *v.* LAMBETH. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Remitting action to County Court—Action of contract—Counter-claim for unliquidated damages—Jurisdiction to remit—County Courts Act 1888 (51 *&* 52 *Vict. c.* 43), *s.* 65.

An action of contract in the High Court, in which not more than 100*l. is claimed, may be remitted to the County Court, under sect.* 65 *of the County Courts Act* 1888, *though a counter-claim for unliquidated damages is set up by the defendant.*

APPEAL of the defendant from an order of the Divisional Court (Hawkins and Lawrance, JJ.), affirming an order of Mathew, J. at chambers: (71 L. T. Rep. 256.) (*b*)

This action was brought to recover the sum of 32*l.*, being the price of a horse sold by the plaintiff to the defendant, and the writ was specially indorsed with a claim for that amount.

Upon an application by the plaintiff, the master ordered the action to be tried in the County Court. At that time no defence had been delivered.

The defendant appealed, and before the appeal was heard delivered a defence and a counter-claim, claiming 35*l.* as damages for breach of a warranty that the horse was quiet.

The defendant's appeal was dismissed by Mathew, J., at chambers. The attention of the judge was not called to the fact that a counter-claim had been delivered.

The defendant appealed, and his appeal was dismissed by the Divisional Court (Hawkins and Lawrance, JJ.).

The defendant appealed.

W. E. Hume Williams for the appellant.—This action cannot be remitted to the County Court, under sect. 65 of the County Courts Act 1888. because there is a counter-claim for unliquidated damages. The case of *Knight* v. *Abbott* (49 L. T. Rep. 94; 10 Q. B. Div. 11) decided that, under sect. 26 of the County Courts Act 1856 there was no power to remit an action for unliquidated damages though a specified amount was claimed on the writ; and in *Mackay* v. *Bannister* (53 L. T. Rep. 567; 16 Q. B. Div. 174) it was decided, upon the same section, that an action of contract could not be remitted if there was a counter-claim for unliquidated damages. The provisions of sect. 65 of the Act of 1888 are practically identical with the provisions of sect. 26 of the earlier Act, and the above cases show that neither a claim nor a counter-claim for unliquidated damages can be remitted to the County Court. When the Act of 1856 was passed counter-claims were not known, and, therefore, could not be remitted; but in 1888, when counter-claims could be set up, the Legislature still used the same language as in 1856, thus showing that they did not intend to include counter-claims. It has been held that there is no power to remit an action for unliquidated damages, under sect. 65, though the writ is indorsed with a claim for a specified sum:

Bassett v. *Tong*, 71 L. T. Rep. 16; (1894) 2 Q. B. 332.

That being so, there must be still less power to remit a counter-claim for unliquidated damages.

Morton Smith, for the respondent, was not heard.

Lord ESHER, M.R.—I think that we must dismiss this appeal. We must act upon the simple words of sect. 65 of the County Courts Act 1888 in their ordinary grammatical construction. The words of the section are, "where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed one hundred pounds . . . it shall be lawful for either party to the action at any time . . . to apply to a judge of the High Court at chambers to order such action to be tried in any court in which the action might have been commenced, or in any court convenient thereto." Those are plain words, and this case is precisely within them. This is an action of contract, and the claim indorsed upon the writ is for a liquidated sum not exceeding 100*l.* This case, therefore, is within the plain words of sect. 65, and both the master and the judge at chambers had jurisdiction to send the action to be tried in the County Court. It has been argued that this power, which was given to the judge for the benefit of suitors, has been taken away by reason of the defendant having put in a defence with a counter-claim for unliquidated damages. If that is a true contention, any counter-claim, even for a liquidated sum however small, or which is really a defence, would take away this power from the judge at chambers. What words are there in sect. 65 which impose such a limitation upon the jurisdiction to remit an action to the County Court? I can find no such words. Such a limitation ought not to be introduced into sect. 65 unless there is good reason for so doing. It is said that such a reason is to be found in the history of the legislation upon the matter. That is the last resort in argument, and is about the feeblest argument of all, and one which cannot be entertained if the language of the statute is plain and clear. The history of legislation upon a particular matter cannot explain the plain words of a statute, or give the court authority to introduce words which are not within any words to be found in the Act. It is clear, therefore, to me that where an action, as originally brought, is within the terms of sect. 65, there is jurisdiction to remit it to a County Court whatever may subsequently happen to the action. Whatever the counter-claim may be, or however large it may be, it is pleaded in the action, and therefore cannot take away the clear jurisdiction to remit the action which is given by sect. 65. An extreme case was suggested in argument of an action for 20*l.* and a counter-claim for 1000*l.*, and it was said that, if this decision is right, there would be power to send that counter-claim to the County Court. There would, I say, be jurisdiction to remit it; but how would that jurisdiction be

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

(*b*) In the headnote to that report the words "has *no* power" are a misprint for "has *now* power."

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exercised? If the judge at chambers saw that there was a real counter-claim for 1000*l.* he would not send that counter-claim to be tried in the County Court. The jurisdiction of the judge would not be affected, but only the way in which that jurisdiction would be exercised. In a case like this, where the counter-claim is really a defence and is a matter easy to decide in the County Court, a judge would never hesitate to remit. That is my decision upon the plain words of sect. 65. It is said that there are authorities to the contrary. In *Knight* v. *Abbott* (*ubi sup.*) Field, J. said, speaking of sect. 26 of the Act of 1856, that "sect. 26 is not merely a permissive, but a restrictive enactment." I cannot see that that is so. The enactment was meant to be for the benefit of suitors. Such is not a restrictive, but a beneficial, enactment, which ought to be construed largely and not narrowly. Then the case of *Mackay* v. *Bannister* (*ubi sup.*) was cited. It is indeed clear that, if that case applied to this statute and was binding upon us, we should have to decide this case differently. The head-note to that case is as follows: "An action, though for a sum not exceeding 50*l.*, cannot be remitted under 19 & 20 Vict. c. 108, s. 26, to the County Court for trial if there is a counter-claim for unliquidated damages." That case, however, is not applicable to this Act of Parliament. If it were, I should not hesitate to overrule it. That decision is now, however, useless and obsolete, because it was decided upon another Act of Parliament. We may, therefore, disregard it, and need not overrule it. I am of opinion that this appeal must be dismissed.

LOPES, L.J.—This action was brought in the High Court, and the plaintiff sought to recover the sum of 32*l.*, the price of a horse sold to the defendant. A counter-claim was set up by the defendant by which he sought to recover the sum of 35*l.* as damages for breach of warranty in respect of the horse. Now it is to be observed that both the claim and the counter-claim are for sums within the jurisdiction of the County Court, and, therefore, this action and the counter-claim, if brought in the County Court, might have been tried there. It is contended that, because the counter-claim has been set up in the High Court, there is no jurisdiction to remit the action to be tried in the County Court. There are two answers to that contention. The first, and less important, answer is that when the matter came before the master no counter-claim had been set up, and therefore, even if the case would not be within sect. 65 when the counter-claim was set up, it cannot be said that the master had no jurisdiction to make the order. Another, and more important, answer is that sect. 65, as I read it, does not exclude actions in which a counter-claim is set up. The words of sect. 65 are: "Where in any action of contract brought in the High Court the claim indorsed on the writ does not exceed one hundred pounds . . . it shall be lawful for either party to the action at any time . . . to apply to a judge of the High Court at chambers to order such action to be tried in any court in which the action might have been commenced or in any court convenient thereto, and in the hearing of the application the judge shall, unless there is good cause to the contrary, order such action to be tried accordingly . . . and the action and all proceedings therein shall be tried and taken in such court as if the action had been originally commenced therein." Here the claim and counter-claim are both under 100*l.* There is nothing in the words of sect. 65 to exclude a counter-claim; on the contrary, the words seem to include a counter-claim, because a counter-claim is a "proceeding" in an action. But it is said that, in *Mackay* v. *Bannister* (*ubi sup.*), a contrary rule was laid down. That is true; but that case was decided, not upon this Act, but upon the County Courts Act 1856, which was passed when counter-claims were not known. That case is distinguishable upon that ground, and is no longer of any authority. The case of *Bassett* v. *Tong* (*ubi sup.*) was also cited where it was held there was no power under sect. 65 to remit an action for unliquidated damages, even if the writ were indorsed with a claim for a specified sum. That case does not apply to this case, where the claim indorsed on the writ is for a liquidated amount. I am of opinion, therefore, that the appeal must fail upon both grounds.

RIGBY, L.J.—I agree in the decision upon the words of sect. 65 of the County Courts Act 1888, and will add only a few words upon the cases which have been cited. When *Kight* v. *Abbott* (*ubi sup.*) was decided there was only one kind of indorsement upon a writ where a specified sum could be claimed, and that was a specially indorsed writ under the Common Law Procedure Act 1852; but that case is no authority now, when claims for unliquidated demands can be indorsed upon writs claiming specified amounts. The case of *Mackay* v. *Bannister* (*ubi sup.*) was decided upon an Act of Parliament passed when there were no counter-claims, and is, therefore, of no authority upon the construction of this Act. The case of *Bassett* v. *Tong* (*ubi sup.*) has nothing whatever to do with the question, because the claim there was for unliquidated damages. The appeal fails, and must be dismissed.

Appeal dismissed.

Solicitor for the appellant, *H. R. Newson.*

Solicitors for the respondent, *Pitman* and *Sons*, for *W. C. Lane*, Kettering.

Nov. 29, 30, *and Dec.* 1, 1894.

(Before Lord ESHER, M.R., LOPES and RIGBY, L.JJ.

REID *v.* WILSON AND WARD.

REID *v.* WILSON AND KING.(*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Lord's Day Observance Act 1781—*Entertainment or amusement—"Keeper" of hall—Persons "managing or conducting" entertainment—Lord's Day Observance Act* 1781 (21 *Geo.* 3, *c.* 49), *ss.* 1 *and* 2.

By sect. 1 *of the Lord's Day Observance Act* 1781, *the "keeper" of any house, room, or place, which is opened or used for public entertainment or amusement on Sunday, to which persons are admitted by payment, is liable to forfeit* 200*l.*, *and the person "managing or conducting such entertainment or amusement" is liable to forfeit* 100*l.*; *and, by sect.* 2, *any person who shall "appear, act, or behave himself as master, or as*

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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the person having the care, government, or management of any such house, &c., shall be deemed and taken to be the keeper thereof."

A hall, which belonged to a company in liquidation, was let to a society for Sunday lectures, which the jury found to be entertainments or amusements in contravention of the Act. Wilson, who had been secretary of the company before the liquidation, and afterwards acted as solicitor to the liquidator, let the hall to the society for these lectures. A licence for music and dancing on week days had been granted to him in respect of the hall, but he had no personal interest in the hall. Ward and King each acted as chairman at one of these lectures; each of them introduced the lecturer, and then left the platform and sat amongst the audience.

Held (affirming the judgment of Mathew, J.), that Wilson was not the "keeper" of the hall, and that Ward and King were not persons "managing or conducting" the entertainment or amusement within the meaning of the Act, and that they were not liable to the penalties.

THIS was an appeal by the plaintiff from the judgment of Mathew, J, upon further consideration after trial with a jury in Middlesex (71 L. T. Rep. 299).

The plaintiff appealed.

Sir *R. E. Webster*, Q.C. and *C. M. Chapman* for the appellant.

Robson, Q.C. and *Corrie Grant*, for the respondents, were not heard.

Lord ESHER, M.R.—I have no doubt at all what our decision ought to be. This Act of Parliament, which is a penal Act, ought to be construed strictly and applied strictly. The first question is whether the defendant Wilson was the "keeper" of this hall within the meaning of sect. 1 of the Lord's Day Observance Act 1781. The jury found that what took place was an "entertainment" within the meaning of the Act. We have, therefore, to see whether the defendant Wilson was the keeper of this hall which was to be deemed to be a disorderly house. He had been the secretary of the company which owned the hall, and, if the company had continued to exist, the company and not Wilson would have been the letter of the hall. After the company went into liquidation Wilson ceased to be the secretary, and he did not become secretary under the liquidator, because the liquidator did not so appoint him. He was a solicitor, and appears to have assisted and advised the liquidator; he let the hall to the Leeds Sunday Lecture Society on behalf of the liquidator. Even if Wilson had himself let the hall, he would not have been the "keeper" of the hall; not even if he had let it for the very purpose of giving an "entertainment," or in such a way that the tenant might use it for the illegal purpose; in such cases the tenant is the keeper of the hall. Therefore Wilson was in no sense the "keeper" of the hall. He had got a licence for music and dancing in the hall, in order that he might be able to use it for that purpose on days other than Sunday; but that fact is quite immaterial. Then did he "appear, act, or behave himself as master, or as the person having the care, government, or management" of the hall so as to be "deemed to be the keeper thereof" within sect. 2 of the Act? I think not, for he did nothing more than let the hall. The case against him, therefore, entirely fails. Then, as to the other defendants, Ward and King. Ward was made the chairman of the meeting, that is, of the audience, but as such he had no power to arrange, alter, or interfere with the entertainment. Even if he had power to prevent disorderly conduct, that was no part of the entertainment. He was, therefore, in no sense the person "managing" or conducting such entertainment or amusement, or acting as master of the ceremonies" so as to be liable to a penalty under the Act. The same observations apply to King, who was chairman at the second lecture. The plaintiff has proceeded against the wrong persons, and his appeal must be dismissed.

LOPES, L.J.—I am of the same opinion. This is a penal statute, and it is a well-established rule that, in proceedings under such statutes, the persons proceeded against must be clearly brought within the description given by the statute of persons who are liable to the penalty. First, as to the case of the defendant Wilson. It is said that he is liable, because he was the "keeper" of the hall. In my opinion he only let the hall as the agent of the liquidator of the company which was in liquidation. If Wilson were liable, any house agent who let a house, which was used for an entertainment of this kind, would be liable. The lecture for which this hall was let might have been as dull as anything could possibly be; and Wilson did not know what the nature of the lecture would be. Then it is said that the other two defendants are liable as the persons "managing or conducting such entertainment or amusement." They were the chairmen only, and, in my opinion, had nothing to do with the entertainment. The entertainment was in the hands of others, and the chairmen could not control the entertainment in any way. The Leeds Sunday Lecture Society controlled the entertainment. These defendants are not within the statute, and cannot be made liable to penalties.

RIGBY, L.J.—I am of the same opinion. There was not sufficient proved against the defendant Wilson. In such an action as this the plaintiff must prove conclusively that the case comes within the statute. As to the other defendants, everything was disproved in their case. They were not managing or conducting the entertainment at all. The appeal fails, and must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Desborough, Son, and Prichard.*

Solicitors for the respondents, *Darley* and *Cumberland*, for *E.* and *H. Wilson*, Leeds.

Dec. 4 and 5, 1894.

(Before Lord ESHER, M.R., LOPES and RIGBY, L.JJ.)

ALABASTER AND OTHERS *v.* HARNESS. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Maintenance—Maintenance of suit—Action for libel—Common interest.

The defendant advised T. to bring an action for libel against the plaintiff, and provided all the funds for carrying it on. The libel complained

(*a*) Reported by HENRY LEIGH and J. H. WILLIAMS, Esqrs., Barristers-at-Law.

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of was contained in an article reflecting upon the character of T., and also upon the character and business of the defendant. In that action the present plaintiff obtained a verdict, but was unable to recover any of his costs from T.; he thereupon sued the defendant in this action to recover damages for maintenance.

Held (affirming the judgment of Hawkins, J.), that the defendant had no such common interest in the action for libel as would justify his maintenance of that action, and that he was, therefore, liable in damages.

THIS was an appeal by the defendant from the judgment of Hawkins, J., at the trial without a jury in Middlesex.

The facts are stated in the judgment of Hawkins, J.

Lawson Walton, Q.C., *J. E. Bankes*, and *R. V. Bankes*, for the plaintiffs.

Jelf, Q.C. and *F. Dodd* for the defendant Harness.

Aug. 10.—The following written judgment was now delivered by

HAWKINS, J.—This is an action of maintenance brought by the plaintiffs, the proprietors of a newspaper called the *Electrical Review*, against the defendants Cornelius Bennett Harness and the Medical Battery Company Limited, of which company Mr. Harness was, at the times hereinafter mentioned, the managing director. The Medical Battery Company was incorporated for the purpose of carrying out the treatment of diseases by means of electric and magnetic appliances. They manufactured and dealt in the apparatus suitable for such treatment, and as a part of their establishment they founded and maintained an institute called "The Electric and Zander Institute," with Mr. Harness as its head. In Jan. 1892 the plaintiffs published in the *Electrical Review* an article by way of protest against certain apparatus, contrivances, and electric belts which had been publicly exhibited by the company at the Crystal Palace, as being constructed in direct opposition to the most elementary laws of electricity, and in July and September in the same year the plaintiffs published other articles highly disparaging to the institute and to Mr. Harness, its president. In respect of these publications the Medical Battery Company brought their action for libel against the present plaintiffs on the 23rd Sept. 1892. The pleadings in that action were completed, but no notice of trial was ever given, and on the 28th April 1893 it was discontinued. On that same 23rd Sept. another article appeared in the *Electrical Review* commenting in very strong and adverse terms upon a report which had recently been written and published by Dr. Herbert Tibbits, testifying to the great value of the institute and the efficiency of its apparatus and appliances, and the "Harness Electropathic Belt," and reflecting seriously upon the character and conduct of Tibbits in connection with that report, and also upon the Zander Institute and its appliances, and upon the conduct of Harness as its manager and the vendor of the belts bearing his name. In respect of this article, so far as it reflected upon his character and integrity, Tibbits on the 1st Oct. 1892 commenced an action of libel in his own name only against the now plaintiffs. That action came on for trial before Mathew, J. on the 15th Feb. 1893, and resulted in a verdict for the then defendants with costs. These costs Tibbits was unable to pay, and this action was subsequently brought against the now defendants (hereinafter called merely Mr. Harness) to recover them as damages sustained by the now plaintiffs incurred in defraying the expenses of their defence to Tibbits' action, upon the ground that the now defendants unlawfully maintained Tibbits in bringing and prosecuting his action. I shall not think it necessary, after the full and exhaustive judgment of Lord Coleridge in *Bradlaugh* v. *Newdigate* (11 Q. B. Div. 2; 52 L. J. 454, Q. B.) to occupy much time in considering what in law constitutes unlawful maintenance, because I do not understand Mr. Jelf, who argued for the defendant Harness, to deny that the defendant did in fact maintain Tibbits in his suit: but he insisted that such maintenance was not unlawful or actionable, inasmuch as he had common interest with Tibbits in bringing and prosecuting it, or at least honestly believed on reasonable grounds that he had such interest. Whether he had such interest or belief is the question I have to determine. The maintenance charged consisted in Harness' suggesting to Tibbits to commence his action, and in employing a solicitor nominated by him to issue the writ and conduct the case at his, the defendant's sole expense. Although there is no real difficulty in determining what amounts to maintenance, the solution of the question, whether such maintenance is justifiable or not, will be adjusted by directing attention to the definitions of unlawful maintenance to be found in Coke upon Littleton, 368*b*, and Hawkins' Pleas of the Crown, fo. edit. 1716, book 1, c. 83, s. 3, and two or three other sections from the same book. Lord Coke describes maintenance as "when one maintains the one side without having any part in the thing in the plea or suit." Hawkins describes it as "when one officiously meddles in a suit depending in any such court (*i.e.* of justice) which no way belongs to him, by assisting either party in money or otherwise in the prosecution or defence of any such suit." (See also *Radcliffe* v. *Anderson*, Ell. Bl. & Ell. 825.) In the same book, at sect. 35, is given the principle upon which the law against maintenance is based: "It seemeth that all maintenance is strictly prohibited by the common law as having a manifest tendency to oppression by encouraging and assisting persons to persist in suits which perhaps they would not venture to go on in upon their own bottoms; and therefore it is said that all offenders of this kind are not only liable to an action for maintenance at the suit of the party grieved, wherein they shall render such damages as shall be answerable to the injury done to the plaintiff, but also that they may be indicted as offenders against public justice." This principle is also stated by Lord Abinger, C.B., in *Prosser* v. *Edmonds* (1 Y. & C. (Exch.) 481, 497) thus: "That no encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce." In considering when and under what circumstances a maintainer can be said to have "part in the thing in the plea or suit," according to Lord Coke, or when the defending suit in some way "belongs to him" according to Hawkins, some assistance may be derived from a few of the paragraphs in Hawkins' Pleas of the Crown following his definition, in which are pointed out the only exemptions to

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which reference need here be made from the operation of the general law. I mean those exemptions in favour of certain neighbourly acts, of acts of charity, and of those who maintain suits in which they have a common interest. First, as to neighbourly acts. In sect. 9 Hawkins says, "However it seems clear that a man is in no danger of being judged guilty of an act of maintenance for giving another friendly advice what action is proper for him to bring for the recovery of a certain debt, &c., for it would be extremely hard to make such neighbourly acts of kindness, which seem rather commendable than blameworthy, to come under the notion of maintenance, which always seems to imply a contentious and over busy intermeddling in other men's matters." Sect. 24. But though one neighbour may assist another (as above) he "ought not to give him any money towards carrying on his suit." As regards justification out of charity, sect. 25 states it as follows: "It seems to be agreed that anyone may lawfully give money to a poor man to carry on his suit," and Lord Abinger, in *Findon* v. *Parker* (11 M. & W. 682), says "if a man were to see a poor person in the streets oppressed and abused, and without the means of obtaining redress, and furnished him with money, or employed an attorney to obtain redress for his wrongs, it would require a very strong argument to convince me that that man could be said to be stirring up litigation and strife, and to be guilty of the crime of maintenance." *Harris* v. *Briscoe* (55 L. T. Rep. 14; 17 Q. B. Div. 504, C. A.) especially upholds this ground of justification. In connection with this ground of justification, I may also call attention to that section which has reference to attorneys taking up the suit of poor persons. "It is certain," says Hawkins, "that they ought not to carry on a cause for another at their own expense with a promise never to expect repayment." So to carry on a suit upon the mere speculation of obtaining costs from the defendants in the event of success cannot, as it seems to me, be described as an act of charity within the mischief against which the law of maintenance is directed. It is carrying on the suit, in the subject-matter of which the attorney has no interest, for the chance of getting costs from the other side. In *Anderson* v. *Radcliffe* (Ell. Bl. & Ell. 818) Erle, J. said that the statutes relating to champerty were directed against speculations by attorneys in suits. It was not, however, and could not be, seriously suggested in the present case that the maintenance of Mr. Harness was at all due to neighbourly action or to the impulse of a charitable spirit. I will not dwell therefore upon such a justification, but will proceed at once to the consideration of the question whether Mr. Harness had, or upon reasonable grounds believed that he had, a common interest with Dr. Tibbits in the result of his action. If this question is answered in the affirmative, he is undoubtedly entitled to have the verdict entered for him, but not otherwise. The sort of interest required to absolve a person from a charge of unlawful maintenance is well illustrated by Hawkins in the following sections: In sect. 12 it is said: "How far some acts of this kind are justifiable in respect of an interest in 'the thing in variance' it seemeth to be clearly agreed, that if a tenant-in-tail or for life be impleaded, he in remainder or reversion may lawfully maintain the defence of the suit with his own money. That if, in an action of trespass brought by or against a lessee for years, the inheritance come into question, lessor may lawfully maintain his lessee; for though the judgment which may be given against the lessee cannot bind his inheritance, yet the verdict may be a prejudice to his title, being given on a supposal of his not having a good one." So again, by sect. 13, it is said that those who have a bare contingency of such an interest in the lands in question, which possibly may never come *in esse*, may lawfully maintain another in an action concerning such lands. So again, by sect. 17 if the maintainer has but a mere equitable interest in lands or goods or even in a *chose in action*. So a landlord may lawfully sue in the name of his tenant to try a right: (*Payne and Rogers*, 1 Douglas, 407.) And lastly, in sect. 18, it is said, "also it seemeth to be agreed that wheresoever any persons claim a common interest in the same thing as in a way, churchyard, or common, &c., by the same title, they may maintain one another in suits relating to the same." Many cases are to be found in the books in which persons have been held justified in contributing to the expenses of suits brought or defended by others with the object of defending or enforcing a common right in which all were interested. *Findon* v. *Parker* (11 M. & W. 675) is the only one of them I propose to refer to in detail. In that case a number of owners of titheable lands in a certain parish having let their lands to various tenants, and such owners and tenants having received notice from the Principal, Fellows, &c., of Jesus College, Oxford, the tithe owners, to set out their tithes in kind, held a meeting to discuss the advisability of resisting any suit brought against them or any of them to enforce obedience to these notices. The ground of such resistance being that such tithes were not payable in kind, inasmuch as they were covered by moduses. At the meeting it was stated that if one modus failed the whole must fail. It was then agreed that the claims should be resisted, and the expenses incurred in defending any legal proceedings, which might be instituted, should be borne by the owners in proportion to the value of their estates. This was held not to be maintenance by Wightman, J. at Nisi Prius, and afterwards by the Court of Exchequer, consisting of Lord Abinger, Gurney, B. and Rolfe, B. In giving his judgment, Lord Abinger said as to the test of maintenance (p. 681): "We ought to see whether there was any ground on which the parties making the agreement might reasonably suppose that they had a common interest in resisting the claim of the college." Later on, p. 683, he added: "I proceed upon the ground that there was reasonable evidence of a common link of interest uniting the proprietors of the lands in question at the time they made the agreement." Rolfe, B. put the case thus: "It appears that it was stated at the meeting that if one modus failed the whole must fail. That perhaps was wrong; but if it was the *bonâ fide* opinion of the proprietors, and they thought it was something in the nature of a farm modus, and that it was apportioned in different shares among the land owners of the district, and that they had a common interest in it, and, having formed that opinion, they entered into the agreement, the only question on these pleadings is, was that or was it not a legal agreement?" I merely mention the following authorities (*Oliver* v. *Bakewell and others*, Gwillim's Tithe Cases, 1381;

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2 Eagle on Tithes, p. 356; *Stone* v. *Yea*, Jacob's Chancery Reports, 426; *Wild v. Hobson*, 2 Ves. & B. 105) as further illustrations of the same principles. I find, however, no case whatever in which a person has been held justified in maintaining a suit in which he was not interested in "the thing in variance," nor any in which such a claim of common interest as this has been even suggested. I have now to ask myself, what is the "thing in the plea or suit," or the "thing in variance" in an action, a common interest in which, with a plaintiff or defendant, justifies maintenance of such action or defence? Surely it must be that which the plaintiff claims as the subject matter and object of his action, that which he will attain as the result of success in it. Whether such action be in detinue for goods, for disturbance of a right or any other imaginable right or grievance; and the common interest in such subject-matter must be in the attainment of such success. It must be something far beyond a mere wish for the success of the suit; it must be more than a mere hope or expectancy that he may, by upholding one of the parties, do great service to a friend, or that he may thereby acquire such control and influence over its conduct that he may turn it to his own advantage. All such hopes and expectancies would amount to nothing in the way of justification unless he had a real interest in the subject-matter of the suit, or "the thing in variance" in it. If such hopes or expectancies, without real interest in the matter, would suffice, maintenance would soon become very common. I have used the phrases "common interest in the subject-matter of the suit" and "common interest in the thing in variance" for this reason, that there is a difference between the "subject-matter of the suit," which means the very thing to be recovered in the action, and "the thing in variance." For instance, the action may be brought by any person directly and ostensibly in respect of the interference by the defendant of a right of way or of common in which the maintainer has a like interest. Maintenance in such a case would be clearly justified because of common interest in the subject-matter. Or the action may be brought to recover damages for a grievance; for instance, an assault in which damages could only be recovered for the trespass on the person of the plaintiff, in which there could be no common interest, and yet in the course of the case an issue might be raised in the determination of which another might have clearly a common interest to support or otherwise. I illustrate it thus: A. sues B. for a common assault. B. pleads simply "not guilty." C. would not be justified in maintaining A.'s action, because he could have no common interest in it. But if B. pleaded a justification that A. was trespassing upon his land, and refused to go off it, and so he laid hands on him and put him off, and to this plea A. replied he was on B.'s land exercising a right of way, common to himself and C., this would be a thing in variance, and C. would clearly be justified in maintaining A.'s right, as being one in which he and A. had a common interest. Let me now deal with the present case. No doubt the article containing the libel complained of by Dr. Tibbits contained also libellous imputations upon the defendant Harness and his institution; but the libels upon the defendant Harness did not form any part of the cause of action, nor was there any issue raised as to his character or conduct. Harness' character, and the worth of his appliances it is true might form a prominent topic for counsel to comment adversely upon; and he might naturally feel deeply interested, in the sense of being anxious to have them met and refuted, and the utility of his belts and appliances established before the world. This is the condition of many persons not parties to suits, whose character and actions are unavoidably made the subject of very free comment during the progress of a cause; but this does not constitute such a common interest in the suit as to justify maintenance. In Tibbits' character or success, so far as he was concerned, Harness had no legal interest, and his own character and conduct could neither be judicially condemned nor justified, and any issues raising questions touching them would have been immaterial. In no proper sense, therefore, could the libel on Mr. Harness be treated as the matter in variance in Tibbits' action. Tibbits' character alone was the subject-matter of the action, and his right to maintain his action was the sole matter in variance. Throughout the pleadings in that action the inuendoes were in the statement of claim limited to Dr. Tibbits, and there is no justification, except so far as regards Tibbits, and the substantial defence was that, so far as Tibbits was concerned, the article was fair and *bonâ fide* comment and criticism of a published book and pamphlet and of proceedings of public interest, and upon this defence alone the verdict was for the defendants, the now plaintiffs. I know it may be said that it is hard that when a man's character is attacked he should not be allowed to support by his money the cause of a man who in defending his own character must of necessity to some extent support that of the other who is attacked with him. It may be so. I can only say, in my opinion, to allow a person to assist another in litigation upon matters which do not immediately and directly concern him would lead to more strife and inconvenience than could possibly result from the present law that no man may intermeddle to support or defend a suit which, in the result, and by the judgment in it, can finally determine nothing which he desires to have determined, or which is not practically in issue. In the present case, however, I am pressed by no such feelings of hardship. For in the action brought by the Medical Battery Company against Alabaster and others, to which I referred at the commencement of this judgment, the defendant Harness had a full opportunity of completely vindicating not only the character of the company but his own. He thought fit, however, to abandon that action, for he discontinued it on the 28th April 1893, some months before Tibbits' action was tried, preferring to shelter himself under the wing of Dr. Tibbits. And even in Tibbits' action he did not do that which he might have done, namely, make himself co-plaintiff with Tibbits; had he done so he would have entitled himself to all the advantages and opportunities of clearing his own character, as he would have had had he brought a separate action: (see Order XVI., r. 1, and *Booth* v. *Briscoe*, 2 Q. B. Div. 496.) This would have given him a common interest in the action, which I think he had not under the circumstances. This was not a case in which a joint action by Tibbits and Harness could have been maintained. Had it been so perhaps each might have maintained the other.

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This was merely an action in which two persons being libelled in one article each might separately, under Order XVI. have recovered damages as though he had brought a separate action. But of course, if he had so joined as plaintiff, he would have been liable for costs in the event of failure. By acting as he did, although he made himself liable for Tibbits' costs, he took the chance of any advantage he might derive from the action, but saved himself from liability to the defendant for costs in the ordinary course. I know it is not necessary to establish conclusively that a joint interest in the action virtually existed, and that it is sufficient to justify the defendant in maintaining Tibbits' action if on reasonable grounds he *bonâ fide* believed he had such interest, that is, that he reasonably believed in the existence of that state of things which if true would in law have justified him in maintaining the action. His erroneous belief as to what in law would justify him, and his *bonâ fide* belief in a state of things which would support his erroneous view of the law, would amount to nothing. I am of opinion he had no such *bonâ fide* belief; that if he had such belief, he had no reasonable grounds for it; that he merely availed himself of Tibbits' action to save himself from the evils of liability for the defendants' costs; and his conduct in all these respects was unlawful. For all these reasons I think the verdict ought to be entered for the plaintiffs for the amount of the taxed costs of their defence, to be taxed as between party and party.

Judgment for the plaintiff with costs.

The defendants appealed.

Lord ESHER, M.R.—This is a perfectly clear case. An action was brought against Harness to recover damages for the maintenance by him of an action brought by Tibbits against the present plaintiffs. Tibbits brought an action for a libel upon himself. That is a personal action which concerns only the man who brings it; he cannot recover damages for injury to anyone else, but only for injury to himself. It was proved clearly that the action was commenced through a meeting at the office of Harness's solicitor; and at that meeting it was arranged that the action should be brought by Tibbits for the libel upon Tibbits, and that the solicitor should be Mr. Cridland, who was, however, to act under the orders and directions of Harness's solicitors, and that Harness should pay all the expenses. It was clearly proved, therefore, that Harness maintained that action. He suggested to Dr. Tibbits to commence the action and employed a solicitor, nominated by himself, to issue the writ and conduct the case at his sole expense. That was an action which ought, according to Lord Loughborough, upon principles of public policy, to be brought by the plaintiff upon his own bottom: (*Wallis* v. *Duke of Portland*, 3 Ves. 494.) In this case Harness instigated the bringing of an action by Tibbits and maintained it, when it ought to have been brought by Tibbits upon his own bottom, and at his own expense; that action in point of law concerned Tibbits only, and Harness could not be a party to it. If the action of Tibbits were unsuccessful, that could not have any legal effect of any kind upon any right of Harness. Is, then, this case one in which Harness is liable for maintenance? This doctrine of maintenance has been discussed by Lord Loughborough; it appears in the Year Books; it has got into all the text books; and in recent times has been elaborately considered by Lord Coleridge in *Bradlaugh* v. *Newdigate* (*ubi sup.*), and has been considered in other cases. It is not a question of moral right or wrong, or of natural justice or injustice. I cannot see that, apart from the specific law upon the subject, there is any harm in assisting another man's action. I can see that it may be contrary to public policy, for the courts may be inundated with actions and be blocked, and there may be much litigation commenced by persons who cannot pay the costs if they fail. The foundation of this law is, as stated by Lord Loughborough, that, upon grounds of public policy, a man must litigate upon his own bottom. The law of maintenance is really this, that if a man interferes in the suit of another in such a way as to pay the expenses, he is breaking the law against maintenance. From the earliest times some relaxation of the strictness of this rule was allowed, and some particular cases were specifically allowed in which such interference was excused, though by the strict law a man would be liable for maintenance. One exception was the case of a landlord assisting the suit of his tenant. No matter what was the reason for such exceptions, such exceptions were allowed by the law. There was also the case where assistance was given from charity, which was specifically allowed as an exception; and there may be others. All the cases were specifically allowed as exceptions from early times, and are still so allowed. If, however, a case does not come within these specific exceptions, it must be governed by the strict letter of the law. I will adopt here the rule given by Lord Coleridge, in *Bradlaugh* v. *Newdigate* (*ubi sup.*), where he says: "But in all these cases the interest spoken of is an actual valuable interest in the result of the suit itself, either present, or contingent, or future, or the interest which consanguinity or affinity to the suitor give to the man who aids him, or the interest arising from the connection of the parties, *e.g.*, as master and servant, or that which charity and compassion give a man in behalf of a poor man who, but for the aid of his rich helper, could not assert his rights, or would be oppressed and overborne in his endeavour to maintain them." The case of a person being "overborne" is that which was put by Lord Abinger, in *Findon* v. *Parker* (11 M. & W. 675), as an illustration; but I think that it has never occurred, and probably never will occur. Admitting, therefore, that the only recognised exceptions are those which are stated by Lord Coleridge, and being determined not to increase those exceptions, we must hold that this case is not within the exceptions. This, then, is as bad a case of maintenance as can well be. Because of some fancied interest in the matter Harness instigated the action, and the action was really his action. Although I have adopted the words of Lord Coleridge, yet I think that the rule may be equally well expressed by saying that the person must have "an interest recognised by law" in the suit which he assists. This appeal must be dismissed.

LOPES, L.J.—I entirely agree with the judgment of Hawkins, J., in this case. The defendant was guilty of maintenance of the worst kind beyond all question. It is said that this maintenance was justifiable. I think that maintenance

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has been well defined by Lord Abinger, in *Prosser* v. *Edmonds* (1 Y. & C. 481), where he says: "No encouragement should be given to litigation by the introduction of parties to enforce those rights which others are not disposed to enforce." In this case it is sought to justify the maintenance upon the ground that Harness had a common interest with Tibbits in the action. In my opinion he had no such common interest as would justify his interference. In my judgment, in order to justify such interference, a man must have some interest which is recognised by law, in "the thing which is in variance," by which I understand an interest in the subject matter of the action then in issue between the parties; and, in my opinion, it must be a legal, and not merely a sentimental, interest in the result of the action which is in issue between the parties. Can Harness make out that he had any such common interest in this action? In my opinion he had not any such interest. There was no question between Harness and the defendants in that action, and no issue which affected him. If the law of maintenance is based upon grounds of public policy, it is impossible to say that it is not contrary to public policy for a man who cannot be liable for costs, to be permitted to come in and assist another in an action like this. I can imagine nothing more contrary to public policy. I only wish to add that there are other exceptions recognised by law, such as cases of consanguinity, oppression, charity, and master and servant. These exceptions have been introduced and are well recognised, but I should be sorry to see other exceptions engrafted upon the rule. I agree that the appeal must be dismissed.

RIGBY, L.J.—An action was brought by Tibbits to recover damages for a libel, and that action was brought at the instigation of Harness. It has been argued that questions might arise in that action which would affect Harness, and that it would be hard if he could not protect himself in that action. I will not attempt to give any definition of maintenance, because the general rule has been stated over and over again in the authorities. This case is clearly within the general rule. The difficulty arises because of the various exceptions which have been allowed by judicial decisions as defences when the general rule has been violated. These exceptions cannot be reduced into any general rule. The appellant, however, contends that there is a general rule that there must be a *mens rea* in every case, that is, that it must be shown that the defendant in each case did what he thought to be wrong; and that he has a good defence if he believed that he was not doing wrong. I adopt the passages which have been read from the judgment of Lord Coleridge, merely introducing what I think he meant, viz., that the defendant must bring the case within the general rule as to having a common interest, or within one of the decided exceptions. This is a clear and aggravated case of maintenance, and not within any of the exceptions. I doubt whether, in any case, the man who is himself the author of the litigation, can claim the benefit of any of the exceptions, when his only excuse is that a question may arise which will affect him.

Appeal dismissed.

Solicitor for the appellant, *Richard Furber.*
Solicitors for the respondents, *Lewis* and *Lewis.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Oct. 25, 26, 27, 30, *Nov.* 1 *and* 6, 1894.

(Before NORTH, J.)

Re PIERCY; WHITWHAM *v.* PIERCY. (*a*)

Conflict of laws—Will—Testator domiciled in England—Land abroad—Trust for sale—Law governing disposition of proceeds.

P., who died in 1888, *by his will devised and bequeathed all his real and personal estate to trustees upon trust to sell and to invest the proceeds in English securities and pay the income thereof, one-fifth to his wife during widowhood, and the remainder equally among his children and his brother and sister, and from and after the death or second marriage of his wife upon trust for all his children and his said brother and sister in equal shares; but the testator directed half of each child's share to be held on trust for such child for life, with remainder to his or her children at twenty-one, with gifts over in case of the death of any child without issue, and the whole of his brother's share to be held on similar trusts for him and his children. And the testator empowered his trustees to postpone the sale and conversion of his real and personal estate, and to manage the same until sale. The trustees were appointed executors. The testator was at the time of his death entitled to lands of considerable value in Sardinia. The trustees had proved the will in Italy, and had sold and mortgaged some of the testator's Sardinian land without the purchasers or mortgagees making any objection to their power to do so. An action had been brought for the administration of the testator's estate, and an inquiry ordered (among others) whether the testator's interest in lands situate elsewhere than in England passed by his will, and were validly devised on the trusts thereof, and if not who were entitled thereto. This inquiry was referred to the judge. A number of conflicting opinions of Italian advocates were produced as to the effect of the dispositions in the will according to Italian law.*

Held, on the evidence, that the trustees had, according to Italian law, a valid power to sell the land and receive the purchase money; that this being established, the distribution of the proceeds of sale was governed by English and not by Italian law, and such proceeds must be held upon the trusts of the will; but that the distribution of the rents and profits of the land until sale was governed by Italian law.

Held, also, on the evidence, that by Italian law the gifts to the widow and children were good, but the gifts over were bad, and therefore the children and the brother took their shares in the income of the land until sale absolutely. The children, however (except the heir-at-law), elected to take this income also according to the trusts of the will.

BENJAMIN PIERCY, by his will dated the 5th Dec. 1883, devised and bequeathed all his real and personal estate, whatsoever and wheresoever, to three trustees upon trust to sell and convert, and to hold the moneys to arise from such sale and conversion upon trust, after payment of expenses.

(*a*) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

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to apply one-tenth of all his estate over 110,000*l.* to charitable purposes at the discretion of the trustees as therein mentioned, and to stand possessed of his residuary real estate until conversion, and the surplus of the said moneys and all his estate after conversion upon trust to pay the income thereof: One-fifth to his wife, Sarah Piercy, during her life or widowhood, and the remainder equally among all his children and his brother, Robert Piercy, and his sister, Jane Piercy, in equal shares, and after the death or second marriage of his wife in trust for all his children and his said brother and sister in equal shares upon the trusts following; that was to say, to pay the income of the moiety of the share to which any child might be entitled to such child for life, and after his or her death for all his or her children who should attain twenty-one, and if any child should die without issue, the moiety to which he or she was entitled should be divided equally amongst the testator's other children, and the testator declared that the share to which his brother, Robert Piercy, was entitled should be held upon trust for him for life, and after his death for his children, and he declared that the share to which any child of his should be entitled should absolutely vest in such child at the testator's death, and that the share of any daughter should be for her separate use, and be settled on her marriage, and he gave his trustees power, at their discretion, to postpone the sale and conversion of any part of his estate, and to manage his real estate until sale or conversion, with a special power to complete unfinished contracts, and he directed that all moneys to be invested under his will should be invested in any stocks, funds, or securities of or guaranteed by the Government of the United Kingdom, or any British dependency, or Bank of England stock or debenture, guaranteed or preference stock of any railway in England or India of a specified kind, or on real or leasehold security in England or Wales.

The testator died on the 24th March 1888, leaving his wife, the brother and sister mentioned in his will, and nine children him surviving, of whom three were infants at the date of his death, but two of these had attained twenty-one before the hearing.

The testator was an Englishman, domiciled in England, but he had contracted for and constructed certain railways in Sardinia, and in connection with these railways and otherwise had made extensive purchases of land in Sardinia, and was at the time of his death entitled, as absolute owner, to about 23,000 acres of land there.

An originating summons for the administration of the testator's estate was taken out by the trustees, and on the 21st Jan. 1889 an order was made for the usual accounts and inquiries, including a special inquiry:

10. What was the testator's estate and interest in lands situate elsewhere than in England, and whether such lands passed by the testator's will and were validly devised on the trusts thereof, and if not, who were entitled to such lands and for what estates and interests.

The trustees, who were also executors, had proved the will in Italy, had been registered as owners in the local land registry, and had, with the sanction of the English court, sold portions of the land and borrowed from the Banca Nazionale a sum of 50,000 lire (20,000*l.*) on the security of part of the land for the purpose of paying the debts of the testator. These transactions had all been carried through without any objections being raised to the title.

In 1892 the eldest son of the testator raised the question whether the will was good in Italian law, and claimed the land in Sardinia.

The summons to proceed on inquiry No. 10 was adjourned into court, and now came on to be heard upon evidence as to Italian law.

The testator's brother and sister had both died since his death.

Seventeen opinions of Italian advocates, obtained by the parties, were produced, and were very conflicting.

The sections of the Italian Code which were referred to in the opinions of the different advocates, and by the judge were to the following effect: — Preliminary Code, Art. 7. Movable property is subject to the law of the nation of the proprietor, saving any disposition thereof contrary to the law of the country where it is situated. Immovable property is subject to the laws of the place where it is situated. Art. 8. Successions, whether at law or testamentary, both as regards the order of succession and the rights of the successors, and the intrinsic validity of the dispositions, are regulated by the national law of the person from whom the inheritance comes, of whatever nature be the property and wherever it is situated. Art. 12. Notwithstanding the preceding articles, the laws, acts, and decisions of a foreign country cannot in any case, any more than private dispositions or agreements, transgress the prohibitive laws of this kingdom concerning persons, property, or contracts, nor the laws which relate in any manner to public order and good morals (*il buon costume*).

Code Civil 899. Every disposition by which the heir or legatee is bound by any form of expression to preserve (the property) and hand it over to a third person, is a trust substitution. Such substitution is forbidden.

900. The nullity of the trust substitution does not prejudice the validity of the institution of the heir or of the legacy; but all substitutions, even in the first degree, are void.

Cozens-Hardy, Q.C. and *F. Thompson* for the trustees.

Swinfen Eady, Q.C. and *Badcock* for the testator's younger children.—We do not raise any objection to the jurisdiction, but the court will consider whether it will entertain the question at all. The title to foreign land is directly in dispute.

Cozens-Hardy, Q.C. and *Badcock*.—The court has jurisdiction: (*Nelson* v. *Bridport*, 8 Beav. 547.) [NORTH, J. referred to *Batthyany* v. *Walford*, 55 L. T. Rep. 509; 57 L. T. Rep. 206; 33 Ch. Div. 624; 36 Ch. Div. 269.] At any rate the court is bound to decide the question in order to deal with the money in court arising from the sales.

NORTH, J.—I cannot refuse to hear the case.

Cozens-Hardy, Q.C. and *F. Thompson* then stated the facts,

S. Hall, Q.C. and *St. John Clerke* for the heir-at-law.—We contend that there is an absolute intestacy. Two advocates have given a clear opinion that all trusts are invalid by Italian law. The court will rely on that opinion, and will not

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itself construe the article in the Code forbidding trust substitutions, or assume that that is the only article forbidding trusts. If there is an intestacy we submit that the heir, according to English law, takes.

Swinfen Eady, Q.C. and *Badcock* for the testator's younger children, and for the legal personal representatives of his brother and sister.—The evidence of the greater number of the advocates is that it is not all trusts which are forbidden by Italian law, but trust substitutions; that is, where one person is instituted heir, subject to an obligation to hand the property over at some time to some other person. In such a case all are agreed that the original gift is good and only the gift over bad. The only question is, who in this case are the instituted heirs. The great majority of the advocates agree that the beneficiaries and not the trustees are the instituted heirs. The result is that the gifts to the children are good, but the gifts over of half their shares to grandchildren and the direction to settle the daughter's shares are bad. As against the grandchildren we do not deny that the children are bound to elect, and they elect to take according to the will, and that the trusts for the grandchildren should be carried out.

Sir *A. Watson*, Q.C. and *Rolt* for the grandchildren.—We contend that the trusts are good throughout. The trust for sale is admitted to be good, and when once the property is sold the proceeds are personalty, and their disposition is governed by English law. Italian law has nothing more to do with them.

P. M. Walters for the testator's widow.

S. Hall, Q.C. in reply.

Cur. adv. vult.

Nov. 6.—NORTH, J.—The question to be considered now is as to the operation of the will of the testator, Mr. Benjamin Piercy, upon certain lands in Sardinia, which are subject to Italian law. He was a contractor in a large way of business, and he had carried out the construction of railways in the island of Sardinia, and had acquired, more or less in connection with his works there, considerable landed property in Sardinia. He was a domiciled Englishman, and made an English will, which is shortly to the following effect: He devised all his real and personal estate, whatsoever and wheresoever, to which he should be beneficially entitled at the time of his death. It is clear that, according to English and Italian law, those words of description are sufficient to include land in Sardinia, assuming that the will proceeds to deal with it validly in other respects. He gives it to three trustees, whom he appoints executors, upon trust to sell and to stand possessed of the proceeds upon trust. [His Lordship stated fully the trusts of the will, and proceeded:] Now, no question of difficulty has been raised, or can be raised, as to carrying that out entirely with respect to his English property, and whatever property is to be dealt with according to the law of England. [His Lordship then stated the order which had been made, and the inquiry which had been referred to him, and proceeded:] There is no estate out of England, except this in Sardinia, and it is clear that the estate in Sardinia was the testator's own absolutely, as we should say, in fee simple, and he had power to deal with it in any way he pleased. According to Italian law he could make a will of it, and he has made a will of it, and the question is to what extent it is valid. [His Lordship stated that he was in some difficulty, because of the conflict of the opinions of advocates laid before him, but that, as he was asked by all parties to avoid if he could obtaining any further information, he was prepared to deal with the matter on the evidence before him, and proceeded:] Now, to do that we must look at the opinions of these various Italian advocates, and also at the Italian law—I mean the written law, the Code, so far as it is incorporated in their opinions. But the question is one of fact, what the Italian law is on the subject, and I must deal with it as a matter of fact, obtaining any information I can from the opinions of those competent to advise me, coupled with an examination of the particular clauses of the Code upon which they rely, and which they state as part of the grounds of the opinions which they give with respect to the law. Now, first of all, the question is whether the will is wholly bad, and the property goes as in the case of an intestacy? If it is not wholly bad, then the question is how far it is good, and how far effect can be given to it here? [His Lordship then read the sections of the Italian Code relating to the question, set out above, and examined at length the opinions of the advocates, and proceeded:] Then the question is, what is the position of the matters as regards the real estate in Sardinia? The conclusion I come to is this: It is not necessary for me to decide the question whether the trustees take as heirs or whether they do not take as heirs, and the children, brother and sister, do, because *quâcunque viâ* the will is good. If the trustees take as heirs then everything behind is trust substitution, which would not be good according to Italian law, but the gift to the heirs would remain. If, on the other hand, the trustees are not heirs, but the persons named, the children and the brother and sister are heirs; then, in my judgment, according to the preponderating weight of opinion, coupled with the evidence derived from the acts that have actually taken place, the trustees have, according to Italian law, a clear power to sell the testator's real estate in Italy without any interference on the part of the persons beneficially interested in the estate. Therefore, the direction by the will to the trustees to sell the estate is perfectly good according to the Italian law. Then the next question is as to the application of the proceeds. With respect to that, in my opinion the will is perfectly good, because the application of the proceeds is not in any way inconsistent with the Italian law. The Italian law relates to the land. The Italian law settles how the land is to go, and regulates the rights of the various persons interested in the land; but when an absolute sale has taken place, the Italian law still applies to the land in the hands of the then owner or owners, and it has nothing whatever to do with the proceeds of sale after the land has been placed outside the scope of the will by a disposition, made by the trustees, which is valid according to Italian law. Then, as regards the proceeds of sale, is there anything in Italian law which renders it illegal for the testator to do what he has done? The land is no longer the subject of his disposition, because the land has become the

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property of somebody else. As regards the dispositions made by the will, what the testator has done is to direct that the proceeds of the land, which is money to be obtained by the English trustees, is to be received by them, is to be invested upon English securities, and is then to be held upon the trusts declared by an English instrument in favour of English beneficiaries. No person says that there is anything in the Italian law in any way forbidding that. There is one observation made by one of the Italian advocates which, it was suggested, applies to this; he says that the land is the patrimony, and that when the land is sold the money, that is the proceeds of it, is still the patrimony. What is the law as to that? That depends altogether upon who the person is to whom this money belongs. No doubt, if that money belongs to an owner who is subject to Italian law, whatever the Italian law says is forbidden about trusts must be observed, and if a person owning this property is subject to Italian law, and attempts to create a trust which the Italian law forbids, then, according to Italian law, that trust would be void. But where there is an English owner of money arising from land which belongs to other persons and is in their hands subject to Italian law, there is nothing in Italian law to make that money itself subject to Italian law. Therefore, in my opinion, the proceeds of sale received by the trustees in pursuance of the valid exercise of the power of sale, which they have according to the Italian law, pass entirely by the will of Mr. Piercy, because it is a disposition which is good according to English law, and does not contain anything at variance, not merely with the Italian law as expressed in the Italian Code, but anything contrary to "good custom," whatever that may mean, because Italian law does not profess to regulate the dealing with English money belonging to an English owner and going to English legatees. In my opinion, therefore, the trust for sale is perfectly good, and the application of the proceeds of sale by the will is good also. Then the only question remaining is this: the trust has not yet been entirely executed, and at the present moment a part of the testator's Italian land remains unsold, and is, therefore, subject to the law of Italy. The enjoyment of that land in the meantime, until it is sold, is not in any way affected by the valid trust for sale, which has not yet been executed. We must look, therefore, to the Italian law to see what the position of matters is as regards the right to enjoy the land in the meantime before the sale has actually taken place. I will take first the case of the widow. It seems to me quite clear that, according to Italian law, she is a usufructuary in the sense that a disposition to her for life is perfectly good, and that a gift of the property to the children and brother and sister, subject to that usufruct, is a good disposition. Then we come to the question of the "trust substitution." As to that, I come to the conclusion that the property is unconverted during that limited period. The Italian law therefore applies, and there can be no "trust substitution"; that being so, the attempt to settle the shares of the children and the brother is not valid. As regards the sister there is no question, because she takes absolutely in any case. As regards the children to the extent of one moiety of their shares, and the brother to the extent of the whole of his share, there is an attempt to settle. Leaving the heir-at-law (Robert Charles Piercy) out of the case, none of the children of the testator raise any question. According to the Italian law, they take absolutely, and the trusts over are ineffective, but all those persons come here and say, "We wish to give effect to the testator's will in this respect; we are desirous that the income of the property until conversion shall, so far as our interests go, be applied in the same way as our shares of the income of the proceeds of conversion directed by the will would go if the conversion had taken place." There is nothing whatever, in my view, in Italian law to incapacitate these persons from saying, as they do, that they wish their absolute shares to be held on the same trusts as they would be held if they were income arising from the proceeds of sale after conversion had taken place. The heir-at-law, however, does not elect or waive any right he may have, and all I can say with respect to his share is, that it is unnecessary for me to decide the question at present. During the time he is alive, of course, he will be entitled to take the income whether the trusts in favour of his children are good or bad, and no question between him and his children or any other person can possibly arise. It may be that all the land will be sold during his lifetime, and the question will never arise as between him and his children; but, inasmuch as it is possible that he may die while part of the land remains unsold, and the question may arise between him and his children, I must say that any directions I give now are to be without prejudice to any question between the heir-at-law and any person who may claim upon his death to be entitled to one-eleventh of the income to arise from the Italian property before any conversion of it. The question as to the brother's share of the income of the unsold land must be left open in the same way.

Solicitors: *Field, Roscoe*, and *Co.*, agents for *Evan Morris*, Wrexham; *Crowders* and *Vizard*; *Godden, Son*, and *Holmes*.

Thursday, Nov. 22, 1894.

(Before NORTH, J.)

Re HULBERT AND CROWE (Solicitors). (a)

Practice — Taxation — Costs — Delivery of bill — Common order — Bill sent for other purpose — Draft bill of plaintiff's costs sent to defendant's solicitor to enable him to agree costs as part of compromise of action.

On the 3rd Aug. 1894 R. P. commenced an action against W. P., his son and partner, for dissolution of partnership. Notice of motion for a receiver was given, but stood over pending negotiations for a settlement until the 22nd Aug. A draft agreement for settlement was sent on the 15th Aug. by the plaintiff's solicitors to the defendant's solicitors, containing among other clauses the following: "The cost of the action and of this agreement and of the notice of dissolution for the London Gazette, *shall be paid by W. P. On the 17th the plaintiff's solicitors sent to the defendant's solicitors a draft bill of costs for 48l. 19s., with an explanatory letter saying that they were sent in order that*

(a) Reported by J. R. BROOKE, Esq., Barrister-at-Law.

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the defendant's solicitors might peruse them before completion, and the amount agreed upon might be inserted in the agreement. On the 21st Aug. the parties and their solicitors met, and the agreement was signed by the plaintiff and defendant with the words "Such costs being agreed at 45l." added at the end of the draft clause set out above. The action was abandoned according to the agreement, and on the 27th Aug. W. P. obtained the common order to tax the bill so delivered. The plaintiff's solicitors moved to discharge this order. It was alleged at the hearing of the motion that the amount was agreed under pressure.

Held, that the sending the bill under the circumstances stated was not a delivery of a bill within the meaning of the Attorneys and Solicitors Acts, and that, whatever might have been W. P.'s rights to have a bill delivered and taxed on a special application, he was not entitled to the common order to tax, and this order must be discharged with costs.

ON the 3rd Aug. 1894 an action was commenced by Robert Page against his son and partner William Page for dissolution of partnership. On the 9th Aug. an order was made for substituted service on the defendant, and leave given to move for a receiver before the Vacation Judge on Aug. 15. On that day the motion by consent stood over till the 22nd pending negotiations for a settlement. The terms of settlement were practically arranged on the 14th Aug., and one of the terms was that the defendant should pay the plaintiff's costs to his solicitors Messrs. Hulbert and Crowe. On the 15th Aug. a draft agreement for settlement was sent by Messrs. Hulbert and Crowe to the defendant's solicitors, and on the 17th Messrs. Hulbert and Crowe sent also a draft bill of costs amounting to 48*l.* 19*s.*, accompanied by a letter containing the following passage:

> As regards the agreement we have had our costs made out and send them to you herewith so that you may peruse them prior to the completion here at 12. We must have the amount agreed upon inserted in the agreement, as no provision is made for taxation if the parties differ. We have inserted in our part at the end of clause 6 the words: "Such costs being agreed at *l.*"

The bill included costs relating to a mortgage and assignment which formed part of the terms of settlement. The defendant's solicitors wrote objecting to some items in the bill, and the plaintiff answered defending them and offering to take 45*l.*

On the 21st Aug. the parties and their solicitors met, and an agreement was signed by the plaintiff and defendant for the settlement of the action which contained the following clause:

> The costs of the said action and of this agreement, and of the notice of dissolution for the *London Gazette* shall be paid by the said W. Page. The said action shall, on the signing hereof, be stayed, and the motion pending therein shall be withdrawn. All the said costs to be paid one-half in the fortnight from the date when the same shall be delivered to him or his solicitors, and one-half in a month from that time, such costs being agreed at 45*l.*

On the 27th Aug. William Page obtained the common order to tax the bill above mentioned which the petition stated had been delivered on or about the 10th day Aug. 1894. The petition also stated that the petitioner had agreed to pay the costs of the said Robert Page.

Messrs. Hulbert and Crowe gave notice of motion to discharge this order; the motion stood over until the Michaelmas Sittings and now came on for hearing.

Pochin for the motion.—The bill in this case was not delivered for payment or taxation, but only for perusal by William Page's solicitor in order that the amount might be agreed and put into the agreement for a compromise. Moreover, William Page was not the party to be charged, and therefore has no right to taxation:

> *Re Abbott*, 4 L. T. Rep. 576.

Messrs. Hulbert and Crowe have never adopted William Page as the party to pay. Where there is an agreement to compromise and the sum to be paid for costs is inserted, there can be no taxation:

> *Vincent* v. *Venner*, 1 M. & K. 212;
> *Re Grundy, Kershaw, and Co.*, 44 L. T. Rep. 541; 17 Ch. Div. 108.

William Page is either bound by the agreement, or he is a person not liable to pay, and therefore has no right to tax. In any case the existence of this agreement was a material fact which ought to have been mentioned to the court, and it was wrong to take the common order as of course:

> *Re Holland*, 19 Beav. 314.

Loehnis for William Page.—The case falls exactly within sect. 38 of the Attorneys and Solicitors Act 1843. William Page has undertaken to pay the costs whatever they may be up to the limit of 45*l.*, so he has a right to have the bill taxed. There is no agreement binding on him as to amount. Such an agreement must be signed by both solicitor and client:

> *Re Lewis; Ex parte Munro*, 35 L. T. Rep. 857; 1 Q. B. Div. 724;
> *Re Raven; Ex parte Pitt*, 45 L. T. Rep. 742.

Re Hartley (30 Beav. 620) is an express authority that a person who agrees to pay the costs of his opponent as part of a compromise is entitled to taxation: *Vincent* v. *Venner* (*ubi sup.*) was a case where a man agreed with the solicitor of another that he would pay his costs. In *Re Newman* (17 L. T. Rep. 128, 130; L. Rep. 2 Ch. 707, 711) Sir John Rolt lays down that a man agreeing to pay another's costs has a right to have them taxed. The agreement was not a material fact, because the solicitors could not have used it to protect themselves. They were not parties to it, and if there was any agreement to take a lump sum for costs it was by parol only and wholly void:

> *Re Russell, Son, and Scott*, 52 L. T. Rep. 794; 30 Ch. Div. 114.

The bill was delivered to William Page through his solicitors, either as the party to pay, or as agent for R. Page, the client originally liable.

Pochin in reply.

NORTH, J.—I do not think this is a case in which the common order to tax ought to have been obtained. The common order is a very useful and convenient one, but it is clear that the order ought never to be obtained without the fullest disclosure of all the circumstances, because it is in fact obtained *ex parte*, and the other party has no opportunity of stating anything which in his view makes the order improper. In the

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present case it is impossible to say that the order of course to tax this bill was right. The applicant might perhaps have obtained on special application an order to have the bill delivered and taxed. In my opinion there has not been any delivery of the bill within the meaning of the Attorneys and Solicitors Acts. The draft bill was sent for quite another purpose, as appears from the statement in the letter sent with the bill, and also from the solicitor's affidavit. It was sent to enable the defendant to agree with the plaintiff what sum he should pay for costs as part of the terms on which the action was to be compromised. It seems to me that it was a very wise thing to send it for that purpose. I do not find any trace of a claim by the solicitors that William Page was liable to pay the bill at the time it was sent, and it is clear that they did not intend to set Robert Page free. Under those circumstances the parties met together and the amount of costs was agreed and paid to Robert Page. It was suggested that the payment was made under pressure; but the question of pressure cannot arise on this motion, for it certainly could not give the defendant a right to the common order. The order must therefore be discharged and the defendant must pay the costs.

Solicitors: *Hulbert* and *Crowe*, *G. R. Browne* and *Co.*

Oct. 26 *and Nov.* 13, 1894.

(Before KEKEWICH, J.)

Re BENDY; WALLIS *v.* BENDY. (*a*)

Marriage settlement—Covenant to settle wife's other or after-acquired property — Property excepted from settlement — Sale and purchase by wife during coverture — Accumulations of income.

By an ante-nuptial settlement it was declared that if the wife should at the time of the marriage, or at any time during the coverture, become entitled to any property (other than property specifically settled), "except any property of or to which she is at the present time possessed or entitled," it should be settled upon the trusts of the settlement. At the time of the marriage, in addition to her property specifically settled, the wife possessed an undivided moiety of a leasehold house and seven shares in a limited company. During the coverture she sold the moiety and the seven shares. With the proceeds she bought certain debentures and a leasehold house. The full price of the debentures she made up out of accumulations of separate income. The full price of the leasehold house she made up out of such accumulations, and by means of a loan from her bankers. Part of this loan was subsequently repaid by the wife and her husband.

Held, upon the construction of the settlement, that the moiety of the leasehold house and the seven shares in the limited company were excluded from the operation of the covenant to settle other or after-acquired property; but

Held, that the debentures purchased with the proceeds of sale of the moiety of the leasehold house, and with accumulations of separate income, were within the covenant; and

Held, that the leasehold house was the absolute property of the wife, but subject to a charge in favour of the trustees of the settlement of the amount provided out of the sale of the seven shares, and out of accumulations of separate income, including any moneys contributed by the wife towards repayment of the banker's loan.

Lewis *v.* Madocks (8 *Ves.* 150; 17 *Ves.* 48) *discussed.*

BY an ante-nuptial settlement, dated the 24th June 1890, made upon the marriage of W. Bendy and Sarah Wallis, afterwards Bendy, property of the intended wife was settled upon trust for the intended wife for life for her separate use, and after her death for the intended husband and children as therein set out, and it was covenanted, agreed, and declared by and between the parties thereto (the intended husband, wife, and the trustees of the settlement) that, "if the said Sarah Wallis shall at the time of the said now intended marriage be, or if at any time during the said now intended coverture she shall become seised, possessed, or entitled of or to any real or personal property (other than the property hereby specifically settled), or any estate or interest whatsoever in possession, reversion, remainder, or expectancy, except any property of or to which she is at the present time possessed or entitled . . . , all of which excepted property it is hereby declared shall be and remain the absolute property of the said Sarah Wallis. . . . then and so often as the same shall happen, all such real and personal property, except as aforesaid, shall, at the cost of the trust estate, be forthwith assured or transferred to the trustees" upon the trusts of the settlement as therein set out. At the time of the marriage, in addition to her property specifically settled, Mrs. Bendy possessed an undivided moiety of a leasehold house, and seven shares in the Standard Bank of South Africa. During the coverture she sold her moiety of the leasehold house, and invested the proceeds of sale in the purchase of certain debentures of Wallis and Co. Limited, the full price of the debentures being made up out of accumulations of separate income. During the coverture Mrs. Bendy also sold the seven shares of the South African Bank, and invested the proceeds of sale in the purchase of a leasehold house, No. 18, Gloucester-road, Finsbury Park, making up the price with accumulations of separate income and by borrowing from her bankers. Some of this borrowed money was afterwards repaid to the bankers by Mrs. Bendy and her husband. Mrs. Bendy died on the 17th March 1894, and letters of administration were granted to her husband. There was one child of the marriage, an infant. This was an originating summons by the trustees of the settlement, to which the husband and child were made defendants. It asked (*inter alia*) whether the debentures of Wallis and Co. Limited and the leasehold house, No. 18, Gloucester-road, were within the operation of the coverture to settle other or after-acquired property contained in the above settlement.

Stokes for the plaintiffs, the trustees.

G. N. Trollope for the defendant, the infant child of the marriage.—As soon as the wife's separate property was invested and converted into capital it became "after-acquired" property, although it was not so before. The present case

(*a*) Reported by C. F. DUNCAN, Esq., Barrister-at-Law.

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is covered by *Lewis* v. *Madocks* (8 Ves. 150 and 17 Ves. 48). He also cited

Re Turcan, 40 Ch. Div. 5.

Warmington, Q.C. and *T. D. Munns* for the defendant, the husband.—In *Lewis* v. *Madocks*, income was held not to be bound, not as distinguished from capital, but on the ground of expediency. It is contrary to the principles of equity to say the wife could not deal with her own property, and that by so doing she must be held to have cut down her own right to the property, which is to "be and remain her absolute property."

Cur. adv. vult.

Nov. 13.—KEKEWICH, J.—On the conclusion of the argument I expressed the opinion that the exception from the covenant to settle property of the wife other than that specified must be construed to comprise, that is to exclude from the operation of the covenant, property to which the wife was entitled at the date of the settlement. There is obviously some blunder, and the result may or may not be what was intended, but I can put no other construction on the words. Therefore, what belonged to the wife at the date of the marriage, not being specifically comprised in the settlement, remained here unaffected by the covenant. During the coverture she received income for her separate use, and whatever was so received remained separate estate, that is to say, the property of the wife independent of marital control, in whatever form it might from time to time be found. This proposition was not impugned in argument, and therefore no authority was cited for it, but authorities could be forthcoming if required. The question which I have to decide is, whether the property thus excepted from the covenant and the savings of separate estate have to any and what extent been made subject to the covenant by subsequent dealings therewith on the part of the lady. It is one of novelty and difficulty. It may fairly be said to be one of novelty, notwithstanding the case of *Lewis* v. *Madocks* (*ubi sup.*), for, although that case states and proceeds on a principle with which I will deal presently, it is in many respects different from this. The essential difference consists in the fact that in *Lewis* v. *Madocks* (*ubi sup.*) there was a covenant by a man to settle all his property at any time coming to him, which would include his means of supporting his wife, so as from one point of view to amount to an absurdity, whereas here the covenant binds only the property of a married woman, the settlement of which is not open to a similar objection, and which has always been regarded as the appropriate subject of a covenant of this character. Notwithstanding my trust in the industry of counsel, I hoped that further research would disclose some case giving instruction by comment or otherwise respecting *Lewis* v. *Madocks* (*ubi sup.*). I have found many in which it was cited, including *Re Turcan* (*ubi sup.*), to which reference was made in argument, but in none is there any comment on the principle of *Lewis* v. *Madocks* (*ubi sup.*) which I am asked to apply here, and I am equally without any expression of assent to or dissent from it. The principle of *Lewis* v. *Madocks* (*ubi sup.*), so far as it is necessary to consider it for the present purpose, seems to be this, that although a covenant to settle other or after-acquired property (I use a somewhat vague phrase, but one which will readily be understood by lawyers) must be reasonably construed, and, therefore, will not be held to include such property as cannot be included without defeating the paramount object of the settlement, such as income required for household or other expenses, or, as in this case, money which was obviously intended to be retained or expended at pleasure, yet if it is once so invested as to indicate permanent intention on the part of the owner to convert it into capital, that is to say, to change it from property which is income into property which yields income, then it may reasonably and properly be held to be subject to the covenant, provided, of course, that the words of the covenant are sufficiently large to cover it. It would be impertinent of me to criticise the decision of the Lord Chancellor in *Lewis* v. *Madocks* (*ubi sup.*), but I may venture to say that this has the double advantage of giving an intelligent meaning to a covenant, which might otherwise have no legal meaning at all, and of being also consistent with the ordinary habits of prudent men and women. Whatever questions may arise on matters of detail, there is no great difficulty in applying this principle to the covenant under consideration, relating, as it does, to the property of Mrs. Bendy other than that specifically comprised in the marriage settlement. It was not intended that such property should be subject as it then stood to the covenant. It was intended that Mrs. Bendy or her husband in her right should be at liberty to deal with it as property unaffected by settlement. This property, consisting of two items—first, an undivided moiety of a leasehold house; and secondly, seven shares in the Standard Bank of South Africa—was sold by Mrs. Bendy, and the proceeds of sale were received by her. She has invested these proceeds of sale together with other money in the purchase of certain debentures of Wallis and Co. Limited and a leasehold house, No. 18, Gloucester-road. As regards the debentures, the price appears to have been provided to a large extent by the proceeds of sale of the leasehold house belonging to her at the date of the settlement, and the balance came out of accumulations of separate income. If I correctly understand the principles of *Lewis* v. *Madocks* (*ubi sup.*) this was such an acquisition of property as to bring the property so acquired within the covenant in the marriage settlement, and it thereupon became subject to the trusts of that settlement. The position of the second property is not quite so simple. The lady provided a considerable portion of the purchase money of 18, Gloucester-road, out of the proceeds of sale of the shares in the Standard Bank of South Africa, and some more from accumulations of separate estate. To that extent what I have just said respecting the debentures is directly applicable, but these sources were not sufficient to provide the entire purchase money, and it seems that the balance was borrowed by the lady from her bankers. The circumstances in *Lewis* v. *Madocks* (*ubi sup.*) were sufficiently similar to enable me to take that case as a guide here also. I think that the house must be regarded as belonging to the lady, that is, as now forming part of her estate, but subject to a charge in favour of the trustees of the settlement for the amount which I hold to have been devoted by her act to the settlement. It seems that the borrowed money was afterwards repaid, but, as at present

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advised, I am not sure to what extent it was repaid by her, and to what extent by her husband; and, if this cannot be cleared up by affidavit (which probably it can be), there must be an inquiry to ascertain the amount for which the trustees of the settlement are entitled to a charge. I hold that charge to include any moneys contributed by the lady towards payment of the loan, but not moneys contributed by the husband. All the difficulties have been occasioned by the frame of the settlement, on which I will make no further comment, and the summons is naturally enough that of the trustees, who require the assistance of the court. In these circumstances, I think that all the costs as between solicitor and client ought to be paid out of the money which comes to the trustees of the settlement.

Solicitors for the plaintiffs, *Dod, Longstaffe, Son*, and *Fenwick*.

Solicitors for the defendants, *Munns* and *Longden*.

Dec. 1 *and* 3, 1894.

(Before ROMER, J.)

BOLTON *v.* CURRE. (*a*)

Trustee—Breach of trust—Equitable mortgage—Consent of tenants for life—Married woman restrained from anticipating—Assignee of life interest—Replacement of trust funds—Impounding life interests of beneficiaries—Equities—Trustee Act 1888 (51 & 52 *Vict. c.* 59), *s.* 6—*Trustee Act* 1893 (56 & 57 *Vict. c.* 53), *s.* 45.

The effect of the Trustee Act 1888 *is not to curtail the previously existing rights and remedies of trustees, but to enlarge the power of the court. The equity, therefore, of trustees to impound the life interest of a beneficiary who has instigated a breach of trust exists as much since the Trustee Act* 1888 *as before, and will, in a proper case, be enforced by the court as against the assignee for value of the life interest of such beneficiary. But where a married woman, entitled for her separate use for life, with a restraint on anticipation, has, at the instigation of her husband, consented in writing to what she believed to be a mere change of investment, but which was, in fact, a breach of trust, the Court will not, in the exercise of its judicial discretion, order the removal of the restraint on anticipation, in order that the trustees may impound her life interest to indemnify themselves for replacing the trust funds.*

Ricketts *v.* Ricketts (64 *L. T. Rep.* 263) *explained.*

ACTION brought to compel the replacement of a sum of 4000*l.* Great Western Railway Five per Cent. Rentcharge Stock, which had been sold in breach of trust by the trustees of the marriage settlement of Neptune William Blood and Constance Rebecca Blood, and advanced to N. W. Blood; and also to have the moneys expended in so replacing the stock recouped by impounding the life estates of Mr. and Mrs. Blood. The plaintiff was Richard George Ireland Bolton, the legal personal representative of George Thomas Lyndon Bolton, one of the trustees of the marriage settlement of Mr. and Mrs. Blood. The defendants were William Edward Carne Curre and Hugh Rosindell Peake (the surviving trustees of Mr. and Mrs. Blood's settlement), the said Neptune William Blood and Constance Rebecca Blood, Catherine Jane Studdert (an assignee of Mr. Blood's life interest), and Edmund Maglin Blood, an infant. By the marriage settlement of Mr. and Mrs. Blood, dated the 25th July 1877, a sum of 5000*l.*, carrying interest at 5 per cent., was brought into settlement by Mr. Blood. This 5000*l.* was secured to the trustees of the settlement by a mortgage dated the 25th July 1877, by which Mr. Blood mortgaged to them certain real property in Ireland. He retained the life interest in this sum. Mrs. Blood brought into settlement a legacy of 5000*l.*, payable under her father's will, and certain other reversionary shares and interests under the will of one John King. Under the trusts of this settlement the income of the husband's fortune was to be paid to him during his life, and, after his death, to his wife during her life. The income of the wife's fortune was to be paid to her during her life, for her separate use, without power of anticipation, and after her death to her husband during his life, or until forfeiture of his interest by alienation or otherwise, as therein mentioned; and there were the usual trusts, after the death of the survivor of the husband and wife. The investment clause in the settlement contained (*inter alia*) power to invest upon mortgage of real property in Ireland, but there was no power to invest on equitable or second mortgages. The legacy of 5000*l.*, brought into settlement by Mrs. Blood, was transferred to the trustees in the equivalent sum in consols, which consols were afterwards sold by the trustees, and the proceeds laid out in the purchase in their names of 4000*l.* Great Western Railway Five per Cent. Rentcharge Stock. In 1885 Mr. Blood was in pecuniary difficulties, and requested the trustees to sell the said 4000*l.* stock, and advance the proceeds to him upon the security of an equitable mortgage of his said estates in Ireland. These estates were already subject to a jointure rentcharge of 200*l.* a year, and four other mortgages amounting to about 10,000*l.* The trustees accordingly sold the 4000*l.* stock, and advanced the proceeds, amounting to 5372*l.* 17*s.* 6*d.*, to Mr. Blood, on the security of a mortgage, dated the 23rd March 1885, of his Irish estates. No charge on Mr. Blood's life estate in the 5000*l.* was taken by the trustees, although Mr. Blood offered at the time to give them that additional security. It was alleged in the statement of claim that this advance to Mr. Blood was made at the request of Mr. and Mrs. Blood, and that both of them knew that it was a breach of trust. But in her examination in the box Mrs. Blood stated that she merely gave her written consent to what she understood was to be a change of investment, and that she was never told that it was a breach of trust. Mrs. Blood joined in the mortgage of the 23rd March 1885 for the purpose of releasing, so far as she could, her life interest under a voluntary settlement of the 12th Sept. 1883, made in her favour by Mr. Blood; but this voluntary settlement was void as against mortgagees. The market value of the 4000*l.* stock had gone up considerably since the sale by the trustees. By an indenture of the 12th Aug. 1893, made between the defendant, Mr. Blood, and the defendant, Catherine Jane Studdert, in consideration of 1500*l.*, Mr. Blood assigned to C. J. Studdert his

(*a*) Reported by G. MACAN, Esq., Barrister-at-Law.

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life interest under the marriage settlement in the mortgage debt of 5000*l.* brought by him into settlement. The defendant, C. J. Studdert, had notice of the mortgage of 1877 for 5000*l.* and of the mortgage of the 23rd March 1885; and on inquiries being made on behalf of Mrs. Studdert, it was stated that there were no incumbrances on Mr. Blood's life interest, except one for 500*l.* which would be paid off. Upon a motion on behalf of the plaintiff, an order was made on the 23rd June 1893 by Stirling, J. that the plaintiff and the other trustees should pay into court respectively one third of the Great Western stock, and that a receiver of the rents of the Irish estates should be appointed, with directions to keep down the interest on the mortgages created by Mr. Blood, prior to the mortgage of the 23rd March 1885, and to pay the surplus of the rents, and also interest on Mrs. Studdert's mortgage into court. The plaintiff and the other two trustees paid into court the sum of 5372*l.* 17*s.* 6*d.* in equal shares of 1790*l.* 19*s.* 2*d.*, as representing the proceeds of sale of the Great Western stock.

The plaintiff now claimed a declaration that he was entitled to a lien on the life and other interests of Mr. Blood, under the settlement, for all moneys expended in replacing the sum of 4000*l.* stock, and that such lien had priority over any claim by the defendant, C. J. Studdert, as assignee of Mr. Blood. He also claimed an order impounding the life interest of Mrs. Blood under the settlement, by way of indemnity to the trustees in respect of the sums required to replace the 4000*l.* stock; and that they were also entitled to a charge upon the mortgage of the 23rd March 1885, for the same purpose.

Neville, Q.C. and *Frank Wright* for the plaintiff.—It is a question whether the trustees should replace the same amount of stock at the price of the present day, or at the price when it was sold. But whichever it is, we claim to be recouped out of Mr. Blood's life estate and also out of that of Mrs. Blood. Both of them consented to the transaction, and executed the mortgage by which it was carried out. The right of the trustees arises under sect. 45 of the Trustee Act of 1893, which is practically identical in terms with sect. 6 of the Act of 1888. The tenants for life have benefited all this time from the increased income derived from the beach of trust, and are therefore bound to recoup the trustees:

Raby v. *Ridehalgh*, 25 L. T. Rep. O. S. 19; 7 De G. M. & G. 104;
Doering v. *Doering*, 42 Ch. Div. 203.

Mr. Blood having instigated the breach of trust, we are clearly entitled as against him to the order asked for, and his assignee can be in no better position. As to Mrs. Blood's position, she desired to help her husband in his difficulties and knew what was being done:

Re Somerset; *Somerset* v. *Earl Poulett*, 69 L. T. Rep. 744; (1894) 1 Ch. 231;
Griffith v. *Hughes*, 66 L. T. Rep. 760; (1892) 3 Ch. 105.

It is true that in the last case Kekewich, J., at p. 107, in referring to the case of *Ricketts* v. *Ricketts* (64 L. T. Rep. 263), observed that in that case "Mr. Justice Romer thought it right not to give the trustee the benefit of the indemnity, and thought so generally upon the ground that he must be taken to have been aware that he was committing a breach of trust." [ROMER, J.—It is a judicial discretion to be exercised, having regard to the circumstances of each case. Here Mrs. Blood appears to have merely consented, and not to have been the direct instigating party, as in *Griffith* v. *Hughes* (*ubi sup.*).]

J. R. Brooke, for W. E. C. Curre and H. R. Peake.—It is for the court to say whether the stock is to be replaced by the trustees at its present price. [ROMER, J.—That is a question for the representatives of the infant defendant.]

J. F. H. Bethell for the infant defendant, E. M. Blood.—It is, undoubtedly, for the benefit of the infant that the Great Western Stock should be replaced at its present price, since the stock has gone up considerably. I therefore ask for that to be done.

J. S. Butcher for Mr. and Mrs. Blood.—Mrs. Blood, having taken no active part whatever in the transaction of March 1885, beyond giving her formal consent to the change of investment, the court, in its discretion, will not order her life interest to be impounded at the instance of the trustees. They were bound to protect her, as she was restrained from anticipating, and have no equity now to recoup themselves. *Ricketts* v. *Ricketts* (64 L. T. Rep. 263) was a much stronger case than this, and yet the married woman's life interest was not impounded, although there she had been one of the instigating parties to the breach of trust. There are other cases on the subject:

Sawyer v. *Sawyer*, 52 L. T. Rep. 292; 28 Ch. Div. 595.

As to the case against Mr. Blood's life interest, it is for the assignee to resist that.

Henry Fellows for Mrs. Studdert.—This is the first action, since the passing of the Trustees Act of 1888, where trustees have sought an indemnity as against the assignee of a life interest. I submit first, that the trustees' rights of indemnity, as against beneficiaries, are now statutory only, under the Act of 1893, and not equitable as before. It follows that the pre-existing law as to the right of indemnity to trustees has been superseded since the passing of the Trustee Act 1888, s. 6, and that section has been practically re-enacted in the Trustee Act 1893, s. 45. Therefore, as no order of the court was made impounding the life interest before the assignment of it to Mrs. Studdert, she is now absolutely entitled as against any claim by the trustees. The statutory right only comes into existence when the order impounding is made. [ROMER, J.—Do you say that the whole of the old law is swept away? The section (sect. 45 of the Act of 1893) says the "court may." Does that take away all other rights?] I submit that is the effect of it. I rely upon the judgment of Lindley, L.J. in *Re Somerset*; *Somerset* v. *Earl Poulett* (69 L. T. Rep. 744; (1894) 1 Ch. 231). I also refer to the cases of

Re Knapman; *Knapman* v. *Wreford*, 45 L. T. Rep. 102; 18 Ch Div. 300;
Priddy v. *Rose*, 3 Mer. 86;
Woodyatt v. *Gresley*, 8 Sim. 180.

The assignee of this life interest takes it free from any existing equity. Secondly, I submit that Mrs. Studdert is not a beneficiary within the meaning of the section in the Trustee Act; ar

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even if she was, the court will not, in the exercise of its judicial discretion, impound this life interest. Lastly, neither under the old, nor the present law, are trustees entitled to any equity or lien such as is claimed here, where they have lent trust money to a beneficiary, and have deliberately taken from him a substantial independent security, outside the settlement altogether. The real substance of the transaction appears from the correspondence, and no right to any equity was there asserted on the part of the trustees. They were secured at the time when the 5372*l.* was advanced, and they also declined to take the additional security of his life estate offered by Mr. Blood; and they must be taken to have waived or abandoned any equity which they may have had. Thus at the time of the advance to Mr. Blood there was no right, or lien, or equity which the trustees could enforce. [ROMER, J. —If the beneficiaries had brought an action, you would have had no answer to it.] That may be so, but Mrs. Studdert was not fully informed of the facts by the trustees, or their solicitor, as appears from the correspondence.

Neville, Q.C. in reply.

ROMER, J.—I will first deal with the claim against the life interest of Mr. Blood, now assigned to Mrs. Studdert. Mr. Blood instigated the breach of trust in question, and he received the money advanced in pursuance of it, and became debtor to the estate in respect of that money. The trustees' right to have his life estate impounded under these circumstances would be clear if he had still retained that interest. It is also, I think, clear, and indeed this has not been challenged, that as the law stood prior to the passing of the Trustee Act of 1888 the equity of the trustees and of the other beneficiaries, against Mr. Blood's life interest would affect that interest in the hands of Mrs. Studdert, as she purchased it subsequently to the breach of trust and the borrowing of the money. I am saying this apart from a special contention made on the part of Mrs. Studdert, which I will allude to in a moment. But it is now stated, on her behalf that sect. 6 of the Trustee Act of 1888, which was substantially repeated by sect. 45 of the Trustee Act 1893, has altered the law. It is contended that now the whole of the law as to the impounding of interests to indemnify trustees is contained in those sections, and that the formerly existing law upon the subject was put an end to by the Act of 1888, unless it was re-enacted by sect. 6. And it is further stated that by that section, and the corresponding section of the Act of 1893, the impounding is put absolutely in the discretion of the court, and that the interest of a beneficiary is not affected by any equity in favour of the trustees until the court orders the impounding, and that therefore Mrs. Studdert is entitled to hold her purchased interest free from any claim of the trustees, as she bought the interest before any order of the court was obtained. I think this contention cannot be sustained. In my opinion, sect. 6 of the Act of 1888 was intended to enlarge the power of the court as to the indemnifying of trustees, and to give greater relief to trustees, and was not intended, and did not operate, to curtail the previously existing rights and remedies of trustees, or to alter the law except by giving greater power to the court. The discretion given to the court by sect. 6 as to whether it will impound or not is a judicial discretion, and if, prior to the passing of that Act, the court would in a proper case enforce the equity of the trustee and impound the interest of a beneficiary in the hands of an assignee, then the court would be bound to do the same in a similar case after the Act. The equity of the trustees existed as much since the Act as before, and if the court thought fit in a proper case to enforce that equity by impounding, it will equally, since the Act "think fit" (following the words of the section), to enforce the equity in a similar case and impound. This deals with the main contention raised on Mrs. Studdert's behalf. But then there is a special defence also raised for her that in some way the equity against Mr. Blood's interest that I have mentioned was waived or lost, because the trustees did not take, as an additional security for the loan to him, an express charge on his life estate, and offered originally on Mr. Blood's behalf. I do not follow that. I do not think that the not taking of the express charge amounted, or could be treated as amounting, to an abandonment of the right to enforce the equity. Why the express charge was not given was probably because it was not thought right that the life interest should be at once hampered, and payments to Mr. Blood stopped, as might have happened if the express charge had been given. And because I think that at the time of the advance it was not understood, though it ought to have been understood by the parties to the transaction, that a breach of trust was being committed, I hold that there was no intention to abandon, and no abandoning of the equity I have referred to. Nor do I see that the plaintiff, or the other trustees, have lost their rights because of any answers to the applications by Mrs. Studdert's solicitor when she was contemplating her purchase. No untrue statement or unfair conduct on the part of the trustees is proved. And I do not think that the trustees are estopped by that correspondence from now raising their present claim. The trustees would have had the right to impound Mr. Blood's life interest to make good his debt, and I do not think that they have lost their rights because they have acted properly, and first replaced the money which, it turns out, ought not to have been advanced. Besides, Mrs. Studdert is in this position, that, when she bought this life interest, she knew of the mortgage which had been made by Mr. Blood, and that he was a debtor in respect of the money which he had borrowed, and in law she was bound to have had knowledge of the equities which arose under those circumstances, although I have no doubt that, as a matter of fact, it did not occur, either to her or to her advisers, to consider that any such equity would, or was likely to arise. For these reasons I hold that the trustees' right to have the interest of Mr. Blood impounded is established, and that life interest must be impounded accordingly. I have next to consider the life interest of Mrs. Blood, which she is restrained from anticipating. Now, that lady has done nothing in the matter of the breach of trust but consent in writing to the change of investment. She did not instigate the change, or, in fact, know that the new investment was a breach of trust; and the trustees had no direct communication with her on the subject,

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and certainly they did not explain to her that the proposed new investment was a breach of trust, or was improper in any way. Under these circumstances, in the exercise of my judicial discretion, I shall not order the removal of the restraint on anticipation in order that the trustees may impound her life interest. I desire to say a word about my decision in the case of *Ricketts* v. *Ricketts* (64 L. T. Rep. 263), which appears to have been misunderstood. I did not intend to lay down, and I did not in fact lay down in that case, any general rule that a trustee who knowingly committed a breach of trust could never have his beneficiary's interest impounded. What I considered in that case was, that one of the facts to be borne in mind by the court, when asked to exercise its discretion, is whether the breach of trust was committed by the trustee knowingly, and in that case, seeing that the trustee acted knowingly, and having regard to the other circumstances of the case, I refused to remove the restriction on anticipation on the married woman's interest in order to give a security to the trustee. And I repeat what I said then: It is the duty of a trustee to protect a married woman against herself when she, as a beneficiary restrained from anticipating, asks him to commit a breach of trust. And I do not think a trustee ought to be allowed to deliberately commit a breach of trust at the request, or with the consent of such a beneficiary, in the hope and expectation that the court will afterwards assist him by removing the restraint on anticipation, and so give him a security for his breach of trust, which at the time he had no right to look to. The restraint on anticipation would be practically rendered inoperative if the trustee could be certain that, when he disregarded it and committed a breach of trust, he could be put by the court in the same position as though the restraint had never existed. For these reasons I dismiss the application of the trustee to impound Mrs. Blood's life interest, and I think that so far as Mrs. Blood's costs have been increased by the claim to impound her life interest they must be paid by the plaintiff. I will make no order as to Mrs. Studdert's costs, as it is a very hard case. Mr. Blood must pay the plaintiff's costs so far as relief is sought against him personally. When the fund is impounded I shall not allow the two other trustees to take out their shares unless they also consent to bear their share of the costs. I think the order should take this form: Declare that the trustees, having made good the Great Western Stock, are entitled to retain the mortgage securities to recoup them so far as they will extend; then declare the right to impound Mr. Blood's life interest to make good the deficiency, such deficiency not exceeding, as it clearly will not exceed, the 5372*l.* which Mr. Blood received. In that way the trustees will be fully recouped. There will be liberty to apply to the court by any party to have the securities realised.

Solicitors for the plaintiff, *Patersons, Snow, Bloxam*, and *Kinder*, for *Wilson, Wright*, and *Wilsons*, Preston.

Solicitors for the defendants, *Booty* and *Baylifes*; *Lattey* and *Hart*; *Hugh Wharton*.

Nov. 7, 8, and 9, 1894,

(Before ROMER, J.)

KIBBLE v. FAIRTHORNE. (a)

Statutes of Limitation — Mortgage to building society — Subsequent equitable mortgages — Priority—First mortgage paid off and mortgage deed given up to mortgagor with statutory receipt indorsed—No principal or interest ever paid or acknowledgment given to second mortgagee—Right to land extinguished—Action by third mortgagee to enforce his security—3 & 4 Will. 4, c. 27, s. 34—37 & 38 Vict. c. 57, s. 8.

The first defendant, who had mortgaged certain hereditaments to a building society, subsequently in Sept. 1874 *gave a mortgage in the form of a first mortgage of the same property to P. to secure a sum of money advanced out of funds belonging to P. as a trustee for the other defendants, who were the wife and children of the first defendant.*

In 1877 *the mortgagor gave an equitable mortgage on the same property to a bank. The principal and interest secured by the first mortgage to the building society having all been paid off, the society in May* 1886 *gave up the mortgage deed to the mortgagor with the statutory receipt indorsed on it. In* 1890 *the plaintiff, having paid off to the bank the sum owing them on their equitable mortgage, received from them the title deeds they had held, and from the mortgagor a deed purporting to be a first mortgage on the same property. P. died in* 1890, *and in June* 1893 *his executor executed to the defendants, P.'s three* cestuis que trust, *a conveyance of the same property under the mortgage of* 1874; *but it appeared by the recitals that no principal or interest had ever been paid under that mortgage, and it appeared at the trial that no acknowledgment of the mortgagee's title had ever been given until after the expiration of the statutory period. The mortgagor had been in possession throughout.*

The plaintiff brought an action to enforce his mortgage against the land and the mortgagor, and also against the three other defendants who claimed, under the mortgage to P. in 1874, *to be entitled to a charge on the land in priority to the plaintiff.*

Held, that, the mortgagor having been in possession of the property throughout, P. (or those claiming under him) could at any time before the completion of the statutory period, notwithstanding the existence, during the earlier part of such period of a prior legal mortgage, have brought a foreclosure action, and such an action being an action to recover land within the meaning of the earlier provisions of the Act of 3 & 4 *Will.* 4, *c.* 27, *the case consequently fell within the scope of sect.* 34 *of that Act;*

And Held accordingly, that (under that section) the statutory period having expired without any payment of principal or interest having been made, or any acknowledgment of the mortgagee's title given, not only was the mortgagee's remedy against the land barred; but his interest in it was extinguished (and could not therefore be revived by a subsequent acknowledgment by the mortgagor), and that upon such extinguishment the legal estate vested in the mort-

(a) Reported by R. H. DEANE, Esq., Barrister-at-Law.

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gagor, and from him passed to the plaintiff under the subsequent deeds.

THIS action was brought by Thomas Kibble against Edward Falkener Fairthorne, Caroline Fairthorne (his wife), and Edward Fairthorne, and Frederick Fairthorne (their sons), principally with the object of determining the priorities between different mortgagees in respect of certain hereditaments in the parish of St. James, Brackley, in the county of Northampton.

On the 4th April 1862 the said hereditaments were conveyed to the defendant E. F. Fairthorne in fee simple, and he remained in possession of them from that time down to the date of the trial.

On the 4th Nov. 1864 the said E. F. Fairthorne mortgaged the premises to the trustees of the Oxford and Abingdon Permanent Benefit Building Society to secure an advance of 1000*l.* made by them to him out of the funds of the society in respect of his ten shares therein according to the rules of such society, whereby the said defendant had to make, in fourteen years, 168 equal monthly payments of 9*l.* 12*s.* 4*d.* each, and it was provided that, when all the said instalments had been paid, a receipt or acknowledgment should be indorsed on the deed.

On the 3rd Sept. 1874 the defendant E. F. Fairthorne conveyed the mortgaged premises to the use of Thomas Pain in fee simple, to secure repayment of 700*l.* and interest at 4½ per cent. per annum, which sum of 700*l.* formed part of the personal estate bequeathed by Eliza Pain (who died in 1869) in certain proportions for the separate use of the defendant Caroline Fairthorne, and for the benefit of the defendants Edward Fairthorne and Frederick Fairthorne.

In 1877 the defendant E. F. Fairthorne, who was a customer of the Bucks and Oxon Union Bank at Banbury, and indebted to them, gave them an equitable mortgage on the same premises as security for his overdraft; and (according to the plaintiff's statement) the said defendant then deposited the title deeds with the said bank; but this was disputed.

The last of the instalments payable under the mortgage deed of the 4th Nov 1864 was not paid till 1886, and the trustees of the building society then indorsed upon their mortgage deed the usual statutory receipt for the mortgage money, and delivered it up with any title deeds held by them in respect of the said mortgage to the said defendant.

On the 19th May 1881 the mortgage deed of the 3rd Sept. 1874 was handed over by the trustee in bankruptcy of Thomas Pain, either (as the plaintiff alleged) to the defendant E. F. Fairthorne, or (as that defendant alleged) to the other defendants Caroline Fairthorne, Edward Fairthorne, and Frederick Fairthorne, who were the parties beneficially entitled to the money secured by such mortgage.

Thomas Pain died in 1890.

In the same year the plaintiff paid to the said bank the sum of 1200*l.* (being the amount of the defendant E. F. Fairthorne's overdraft with them), and received from them the title deeds which the last-named defendant had at some time deposited with them as security for his overdraft, and of which deeds the plaintiff had ever since retained possession.

On the 12th May 1892 the same defendant gave the plaintiff what purported to be a legal mortgage of the premises.

The interest having been irregularly paid, the plaintiff on the 18th Jan. 1893 served notice on E. F. Fairthorne calling in the principal money, but it had never been paid, although in July 1893 the plaintiff recovered judgment for it, together with an arrear of interest, against the same defendant.

Thomas Pain's sole proving executor was John Weldon Symington, and on the 3rd June 1893 he transferred the mortgage debt and interest under the mortgage of the 3rd Sept. 1874 and conveyed the mortgaged premises to the defendants Caroline Fairthorne, Edward Fairthorne, and Frederick Fairthorne in fee simple, but it appeared by the recitals in the conveyance that no interest had ever been paid under Thomas Pain's mortgage down to the time of the trial, and that no part of the principal had been paid off.

On the 1st Aug. 1893 the plaintiff issued an originating summons against the defendant E. F. Fairthorne for the usual mortgage accounts, appointment of a receiver, foreclosure or sale, and possession of the premises included in the mortgage security of the 12th May 1892, whereupon the defendant Edward Fairthorne filed an affidavit in opposition to the said summons, claiming that he, his mother the defendant Caroline Fairthorne, and his brother the defendant Frederick Fairthorne, held a mortgage of the mortgaged premises for 700*l.* and interest, in priority to the plaintiff's mortgage.

The plaintiff, in view of these questions of priority having arisen, subsequently discontinued the originating summons.

On the 5th Jan. 1894 the plaintiff took a conveyance from the said bank of the legal estate in the mortgaged premises, on the assumption that it had vested in the bank by virtue of the statutory receipt indorsed on the original mortgage to the building society.

On the 27th Nov. 1893 the plaintiff commenced this action, contending (*inter alia*) that, by the negligence of the said Thomas Pain under whom they claimed and of themselves, in allowing the title deeds of the mortgaged premises to remain (as he alleged they had done) in the possession of the defendant E. F. Fairthorne, the defendants C. Fairthorne, E. Fairthorne, and F. Fairthorne had lost any priority they might otherwise have had over the plaintiff's security, and must accordingly be postponed thereto.

He claimed (1) a declaration that he was entitled to a first charge on the mortgaged premises comprised in the mortgage of the 12th May 1892, for the sum of 1200*l.* and interest, in priority to the mortgage or charge, if any, of the defendants C. Fairthorne, E. Fairthorne, and F. Fairthorne; (2) a declaration that the legal estate in the mortgaged premises was vested in him, or (in the alternative) a direction to the defendants to convey it to him; (3) recovery of the title deeds in the possession of the defendants; (4) an account of what was due to him as mortgagee for principal, interest, and costs, and foreclosure or sale; (5) a receiver; and (6) possession.

By his defence the defendant E. F. Fairthorne denied that either in 1877, or at any time during the currency of the mortgage to the building

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society, had he deposited with the said Bucks and Oxon Union Bank any of the title deeds of the mortgaged property, and alleged that he only deposited such title deeds with the said bank after the trustees of the building society had given them up to him in 1886, upon payment of the last instalment due to them under their mortgage.

The other defendants denied that either the said Thos. Pain, or they themselves, had been negligent in allowing the title deeds of the mortgaged premises to remain in the possession of the defendant E. F. Fairthorne, and alleged that the said T. Pain believed the said deeds were in the possession of the building society.

The defendant E. F. Fairthorne was a solicitor, and had sometimes acted as such for the plaintiff.

The defendants C. Fairthorne, E. Fairthorne, and F. Fairthorne had at the time of the trial resided for more than twenty years with the defendant E. F. Fairthorne, upon the mortgaged premises. No acknowledgment by the mortgagor had ever been given of the title of the mortgagee under Pain's mortgage, until 1893, which was after the expiration of the statutory period.

The action was heard before Romer, J., on the 7th, 8th, and 9th Nov. 1894.

During the trial it was agreed that the judgment of the learned judge should be accepted without appeal.

Oswald, Q.C. and *John Henderson* for the plaintiff.—No interest and no part of the principal was ever paid under the mortgage to Pain, and no acknowledgment ever given, and therefore, under the Statutes of Limitation, all the mortgagee's rights had ceased to exist before the date of the transfer by Pain's executors to the defendants C. Fairthorne, E. Fairthorne, and F. Fairthorne:

Dawkins v. *Lord Penrhyn*, 36 L. T. Rep. 680; 37 L. T. Rep. 80; 39 L. T. Rep. 583; 6 Ch. Div. 318; 4 App. Cas. 51.

Those defendants can be in no better position than their transferor, or than Pain himself. Sect. 8 of 37 & 38 Vict. c. 57, which is to be read with 3 & 4 Will. 4, c. 27, s. 34, extinguishes the right to the money secured by the mortgage after the lapse of twelve years from the date when the right to payment accrued, or when the last payment of principal or interest was made, or an acknowledgment given in writing, and does not merely bar the remedy. That applies to a mortgage just as much as to any other right in land. There was no acknowledgment till 1893, which was too late. An acknowledgment after the lapse of the statutory period cannot reinstate the title which has been extinguished:

Re Alison; *Johnson* v. *Mounsey*, 40 L. T. Rep. 234-5; 11 Ch. Div. 285, at p. 295;
Sanders v. *Sanders*, 45 L. T. Rep. 637; 19 Ch. Div. 373, 379.

The statutory period expired in 1887. The mortgagees' title being barred, the legal estate became vested in the mortgagor:

Sands to Thompson, 48 L. T. Rep. 210; 22 Ch. Div. 614.

It follows that, as soon as the statutory period had expired, not only did Pain lose his right to the money, but his title as mortgagee, or that of those claiming under him as mortgagees, was extinguished, and the legal estate became vested in the mortgagor, and is therefore now in the plaintiff. If a trustee is guilty of negligence his *cestui que trust* is in no better position:

Lloyd's Banking Company v. *Jones*, 52 L. T. Rep. 469; 29 Ch. Div. 221.

This is an issue between two equitable mortgagees, and the plaintiff has the best right to call for the legal estate:

Layard v. *Maud*, 16 L. T. Rep. 618; L. Rep. 4 Eq. 397;
National Provincial Bank of England v. *Jackson*, 55 L. T. Rep. 458; 33 Ch. Div. 1;
Union Bank of London v. *Kent*, 59 L. T. Rep. 714, 717; 39 Ch. Div. 238, at p. 245;
Farrand v. *Yorkshire Banking Company*, 60 L. T. Rep. 669; 40 Ch. Div. 182.

E. Manley Smith for the defendant E. F. Fairthorne.

Neville, Q.C. and *S. Dickinson* for the other defendants. — The deeds remained with the building society, and were not deposited with the bank till 1886. The effect of the statutory receipt on the building society's mortgage was to vest the legal estate in those claiming under Pain, and those defendants, therefore, have priority over the plaintiff:

Hosking v. *Smith*, 59 L. T. Rep. 565; 13 App. Cas. 582.

Even supposing that (contrary to the evidence) there was a mortgage given to the bank, it was not given till 1877, while ours was in 1874. Therefore we have the better equity, if there was nothing else to displace it. The plaintiff says it is displaced by our negligence in not making inquiries as to where the deeds were, and that, consequently, we must be taken to have known where they were. But a second mortgagee ought not to be treated as negligent for not inquiring as to the whereabouts of deeds, which ought to have been in the hands of the first mortgagee. Therefore Pain was not negligent. Such an omission is not, at any rate, negligence sufficient to forfeit priority:

Northern Counties of England Fire Insurance Company v. *Whipp*, 51 L. T. Rep. 806; 26 Ch. Div. 482.

Lloyd's Banking Company v. *Jones* (*ubi sup.*) is an entirely different case. There the trustee made no inquiry at all. When a man gets a possessory title under the earlier sections of the statute 3 & 4 Will. 4, it is as good as a conveyance to him. A subsequent acknowledgment will not re-vest the estate. But the present case comes under a different section—that is, under sect. 40, which provides that a mortgage debt charged on land shall not be recovered but within twenty years, unless, in the meantime, part of the principal money, or some interest, has been paid, or some acknowledgment of the right thereto given in writing. That has never been held to give the mortgagor any right he does not otherwise possess. Sect. 8 is the corresponding section of the Act of 1874. The cases cited for the plaintiff are under different sections of these two Acts, which sections do not touch the present question. Sect. 42 of the former Act has been held to bar only the remedy, and prevent the recovery of the money, but not to extinguish the right to the land, and in terms the form of bar in sect. 40 is the same as that in sect. 42. That being so, a subsequent acknowledgment gets rid of the bar altogether, and revives

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the rights of the mortgagee. [*Oswald*, Q.C. referred to *Harlock* v. *Ashberry* (46 L. T. Rep. 356; 19 Ch. Div. 539). ROMER, J.—That case shows that a foreclosure action is an action for the recovery of land, and accordingly falls under sects. 2 and 24 of 3 & 4 Will. 4, c. 27, and under the supplementary Act of 7 Will. 4 & 1 Vict. c. 28, and not within sect. 40 of the former Act. A foreclosure action would in this case have been the appropriate remedy of the mortgagee under the mortgage of 1874. That being so, both the remedy against the money and the right against the land are gone after twelve years, under sect. 8 of the Act of 1874: *Sutton* v. *Sutton*, 43 L. T. Rep. 95; 22 Ch. Div. 511.] But time did not begin to run here against the mortgagee till the building society was paid off in 1886. [ROMER, J.—He might have brought a foreclosure action any time after the day fixed for redemption had gone by.] The plaintiff was not in possession, and cannot, therefore, set up the statutes.

ROMER, J.—On this point I cannot say I feel any doubt. A mortgagee has two remedies: one against the land charged; and the other, the personal claim, against the mortgagor in respect of moneys borrowed. Now, with regard to these two remedies, there are in the Statutes of Limitation two distinct sets of provisions. Taking the Act of 3 & 4 Will. 4, c. 27, it will be seen that there are two sets of provisions, one of which deals with the rights against the land, and the other with the personal rights against the mortgagor in respect of the debt. Now these two sets of provisions stand on an entirely different footing. With regard to the rights against the land, which are dealt with by the earlier provisions of the statute, it is provided that, when the statutory period of limitation has expired, not only is the remedy against the land barred, but the mortgagee's interest in the land is extinguished. The second set of provisions, which deal with the rights against the mortgagor personally in respect of the mortgage debt, stand on a different footing. In the latter case, only the remedy is barred when the statutory time has expired; the debt itself is not extinguished. Now in the present case it is admitted, and it is established before me, that the mortgagee had for more than the statutory period received no interest in respect of the mortgage debt, that no part payment in respect of the principal had been made, and that no acknowledgment under the statute had been given. That being so, not only was the remedy of the mortgagee against the land gone, but the charge itself on the land was extinguished. It follows that, so far as the plaintiff is concerned, this mortgagee has no claim to the land, and certainly cannot set up that he has a charge on the land in priority to the plaintiff. A suggestion was put forward on behalf of the defendants to the effect that, in this case, that state of things did not come into operation, because there was a prior outstanding legal mortgage in existence till some time in 1886. But the legal mortgagees under that mortgage were never in possession of the land. The mortgagor was in possession of the mortgaged property throughout, and the equitable mortgagee represented by these defendants was in a position to have taken proceedings against the land at any time during the statutory period. For example, he could have brought an action for foreclosure, and a foreclosure action has been decided in many cases to be not a personal action, but to be an action against the land within the meaning of the earlier provisions as to remedies against the land which I have mentioned as existing in the statute 3 & 4 Will. 4, c. 27. Consequently, as between the mortgagor and the mortgagee claiming under the mortgage of 1874, the statutory period had begun to run against the mortgagee from the last payment of interest, which in this case was from the date fixed by that deed for the redemption of the mortgaged property; and the mortgagee, who could have taken proceedings, and who had a right to take proceedings against this mortgagor during the whole of that period, for the reasons I have indicated, barred his remedy against the land, and not only that, but his charge as well. For these reasons, I hold that the defendants' charge no longer exists, and that the plaintiff is entitled to the relief he claims as against these defendants. I am satisfied also, by what I have heard, that the legal estate is vested in the plaintiff under his mortgage, and there must therefore be a declaration to that effect.

Solicitor for the plaintiff, *T. A. Jones*, for *Stockton* and *Sons*, Banbury.

Solicitors for the defendants, *Hickin, Smith*, and *Capel-Cure*, for *E. F. Fairthorne*, Brackley.

QUEEN'S BENCH DIVISION.

Thursday, Nov. 22, 1894.

(Before WRIGHT and COLLINS, JJ.)

MORANT (Surveyor of Taxes) (app.) *v.* THE WHEAL GRENVILLE MINING COMPANY (resps.). (a)

Income tax — "Cost-book" mines — Capital — Capital expenditure — Whether there can be capital in such mines — Cost of sinking new shaft—Right to deduct cost—Income Tax Act 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *sched. D., r.* 3.

Commissioners of Inland Revenue having decided that in the case of cost-book mines, and under the Stannaries Acts, there was no such thing as capital, and that there could be no profit in working such a mine until every expenditure had been met, and that therefore the cost of sinking a new shaft was not capital expenditure, but working expenditure, and could be deducted in assessing the annual profits for income tax purposes:

Held, that the Commissioners were wrong in their finding that in such mines there could be no capital; that in this respect there was no difference between a cost-book mine and any other mine, and that the question whether the cost of sinking the shaft was capital expenditure or working expenditure, or partly the one and partly the other, was a question of fact to be decided on the circumstances of the case.

APPEAL by Income Tax Commissioners acting for the division of East Penrith in the County of Cornwall. The Wheal Grenville Mining Company appealed to the commissioners against an assessment of 10,153*l.* to income tax under schedule D., and they claimed a deduction of 1614*l.* for the year ended the 5th April 1890, and 9235*l.* for the year 1890-91 in respect of sums expended in sinking a new shaft, and in providing the neces-

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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sary machinery and in erecting the necessary buildings in connection therewith.

Wheal Grenville is a tin mine within the Stannaries of Cornwall, and is worked by a company of shareholders, or, as they are called in Cornwall, "adventurers," under the cost-book principle, and is divided into 6000 shares. A cost-book company is practically a common law partnership, the shareholders as between themselves participating in profits and losses according to the number of shares held by them respectively, but, as regards creditors of the company, each shareholder is liable for the whole debts of the concern. There is no capital as such, and no capital account is kept. If the expenditure exceeds the receipts, that is, if there is a loss on the working, a call of so much per share as may be necessary to meet it is made to cover it; if, on the other hand the current receipts exceed the expenses, that is, if there is a profit, it is divided *pro ratâ* by the declaration of a dividend of so much a share. Such profits are never applied as a percentage dividend upon any stated capital.

Cost-book mines have hitherto been assessed on a five years' average of ascertained profits, unless a reduction is claimed under sect. 133 of the Income Tax Act 1842.

The shareholders in the Wheal Grenville mine, in order to its better development, resolved to erect an additional engine and to sink a new shaft. In the ordinary course in a cost-book mine dividends would have been suspended, and calls would have been made from time to time to meet the cost until the work was completed. Instead of this the shareholders obtained an estimate of the amount likely to be required (15,000*l.*) and made a call at once to meet it—the old part of the mine being worked as before and the profit divided as it accrued.

It was now sought by the company to bring so much of the amount raised by the call as has been expended into the five years' average. In the assessment of this and other mines conducted on the cost-book principle no claim or allowance has been allowed for depreciation of machinery, &c., but these mines have been assessed on the basis of ascertained profits and loss, and the commissioners could not see how a fair and proper division as between capital and revenue could be arrived at, or on what principle claims for depreciation could be dealt with.

The company maintained that the outlay was a necessary expenditure incurred in working the mine; that, if this expenditure were not incurred, the mine would fail, and that this outlay did not differ in character from the necessary costs incurred in working the other portions of the mine; that the sinking of a new shaft was not a rare occurrence in working Cornish mines; that, as a rule, such expenditure was included in the accounts along with the other expenditure, and that if this mine had done so the outlay would probably have been allowed; that because, for certain purposes, the mine was showing the expenditure separately, that was no reason why it should not be treated as part of the ordinary working expenses; and, further, that the fact of one large call being made, instead of several small ones, does not alter the case. The company also stated that a considerable amount out of the moneys raised by the call has been expended in ordinary working expenses, and that from these workings tin has been extracted, the price of which has gone into profit and loss account, so that it would be very difficult, if not impossible, to separate the capital from the other accounts.

The surveyor contended that this expenditure was mainly an expenditure of capital, and as such could not be deducted from the profits (5 & 6 Vict. c. 35, s. 100, sched. D., r. 3), and he cited the case of the *Coltness Iron Company* v. *Black* (45 L. T. Rep. 145; 6 App. Cas. 315) in support of his contention. He further stated that, although no capital account was kept in cost-book mines, still that did not make capital non-existent, and the peculiar method of keeping the accounts could not override the Act of Parliament, which forbade the deduction of any sums employed as capital.

The commissioners allowed the appeal, being of opinion that, in the case of cost-book mines, and under the Stannaries Acts, there was no such thing as capital, and that there could be no profit in working a cost-book mine until every expenditure had been met.

The assessment was accordingly reduced to 7983*l.*, and the surveyor appealed.

Lockwood, Q.C. (S.-G.) and *Danckwerts* for the surveyor of taxes.

Pollard for the company.

The arguments were similar to those used before the commissioners, and the cases of the *Coltness Iron Company* v. *Black* (45 L. T. Rep. 145; 6 App. Cas. 315) and *Addie and Sons* v. *Solicitor of Inland Revenue* (12 Scot. L. Rep. 274; 1 Tax. Cas. 1) were referred to.

Wright, J.—In this case the commissioners have found that in the case of cost-book mines and under the Stannaries Acts there was no such thing as capital, and that there could be no profit in working a cost-book mine until every expenditure had first been met. It seems to me that they are clearly wrong in that finding. There is no difference between a cost-book mine and any other mine. Under the Income Tax Act 1842, s. 60, sched. A., r. 3 (2), mines are to be assessed for the purposes of this taxation on the average profits of the five preceding years, and sect. 159 says that no deductions are to be allowed except such as are specified in the Act, and sect. 100 (sched. D., r. 3) says that no sum shall be deducted or set against profits or gains for (amongst other things) "repairs," "nor for any sum employed or intended to be employed as capital in such trade, manufacture, adventure, or concern, nor for any capital employed in improvement of premises occupied for the purposes of such trade, manufacture, adventure, or concern." Even without that rule of sched. D. it seems to me that whatever is really capital cannot be deducted before arriving at the amount that is to be treated as profit. Then the *Coltness* case (*ubi sup.*) clearly establishes that the mine owner cannot deduct for expenditure in the nature of capital expenditure incurred in former years, although the value of that expenditure may have been exhausted in the process of making the profits within the period of assessment. Then in *Addie's* case (*ubi sup.*) the court, in giving their judgment, appear to me to lay it down that the same rule applies to capital expended within the year of assessment, and the real question is: Is the expenditure in respect of which a deduction is sought to be made capital or not? That must, or may to a great extent, be a

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question of fact. One can very well imagine cases of mines where the minerals lay at shallow depths and where it was necessary to open them out frequently by shallow shafts, and, in such cases, it well might be that the sinking of shafts would be properly treated as part of the ordinary working expenditure. On the other hand, there might be cases, such as I suppose the present is, where a large area of ground has been worked from one shaft, and it is apprehended that it will soon become impossible to work any further from that shaft, and a new mine, so to speak, must be opened by a new shaft altogether. That, I apprehend, is this case; but Mr. Pollard says it is not, and that he is prepared with an affidavit to prove that it is not. As I understand, he is prepared to show that the works for which this expenditure was incurred were in theory, at any rate, works which conduced to the making of the profit in the period of assessment; and, if so, I think he ought to be allowed to raise that point as a question of the quantum of assessment. The case may go back for that purpose, as also on the question of whether in point of fact in this particular mine the sinking of a new shaft, such as this is, would be so frequently and ordinarily necessary as to be part of the ordinary working expenditure, and whether, but for such expenditure, the mine would have been shut down within the period of assessment.

Collins, J.—I am of the same opinion. I think the special way in which cost-book mines keep their books and raise their money, which they spend for the purposes of their adventure, can make no difference whatever in the question of what is the real nature of expenditure in a given case. Is it capital expenditure, or is it working expenses? That is the point which the commissioners appear to have decided in this case, and that is the point that they appear to have raised for our opinion. I have no hesitation in saying that I think that their view on that part of the case was wrong. As to the facts of the case, I think, having regard to the reservation of opinion of Lord Cairns and Lord Blackburn in the *Coltness* case (*ubi sup.*), it is desirable that the case should go back, in order that the facts as to what was accomplished by the sinking of this shaft, and what was intended to be accomplished by it, should be more specifically found. It seems to me that, on the authority of *Addie's* case (*ubi sup.*), *primâ facie*, expenditure in sinking a shaft would be capital expenditure, and one therefore which could not form the subject-matter of deduction in assessing the annual value; but I agree with what my learned brother has said, that it is possible to conceive cases in which the making of a shaft, having regard to the lie of the minerals and the very small length of the shaft, might be described as working expenditure. It must be a question of fact whether that is so in a given case. I think, therefore, that this case ought to go back in order that these facts may be ascertained.

Appeal allowed with costs; case to go back to the Commissioners to find the actual facts as to the expenditure.

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Solicitors for the respondents, *Robbins, Billing,* and *Co.*, for *Daniell* and *Thomas*, Camborne.

Thursday, Nov. 22, 1894.

(Before Wright and Collins, JJ.)

Lord Mostyn (app.) v. London (Surveyor of Taxes) (resp.). (a)

Income tax — Fines for renewals of leases — Temporary deposit in bank producing interest — "Productive capital" — Exemption of such temporary deposits from assessment — Income Tax Act 1842 (5 & 6 *Vict. c.* 35), *s.* 60, *sched. A., r.* 2, *head* 5.

The Income Tax Act 1842 (*s.* 60, *sched. A., r.* 2 (5) *renders chargeable fines received in consideration of any demise of lands, subject to the proviso that, in case the party chargeable shall prove to the satisfaction of the commissioners that such fines have been applied as productive capital on which a profit has arisen, otherwise chargeable under the Act for the year of assessment, the commissioners may discharge the amount so applied from the profits liable to assessment.*

Held, that a temporary deposit in a bank of fines received for renewals of leases, producing interest for the year of assessment, is not an application of such fines as "productive capital on which a profit has arisen" within the meaning of the proviso, and that such temporary deposits are therefore not exempt from assessment.

Case stated by Income Tax Commissioners for the division of Conway in the county of Carnarvon. The appellant appealed against an assessment under schedule A. in respect of fines made according to the provisions of the Income Tax Act 1842 (5 & 6 Vict. c. 35), s. 60, sched. A., r. 2, head 5.

The section provides that amongst the matters made chargeable thereby shall be included:

All fines received in consideration of any demise of lands or tenements (not being parcel of a manor or royalty demisable by the custom thereof) on the amount so received within the year preceding by, or on account of, the party; provided that in case the party chargeable shall prove to the satisfaction of the commissioners that such fines or any part thereof have been applied as productive capital on which a profit has arisen or will arise otherwise chargeable under this Act, for the year in which the assessment shall be made, it shall be lawful for the said commissioners to discharge the amount so applied from the profits liable to assessment under this rule.

During the year 1890-1891, the appellant, Lord Mostyn, who is tenant for life under the will of his late father of certain freehold property which is let upon leases which are renewable upon payment by the lessees of certain prescribed fines, as such tenant for life granted renewals of certain leases, and upon such renewals received, as agent for the trustees of the will, fines amounting to 1795*l.* from the lessees, of which a portion amounting to 906*l.* was placed upon deposit at the London and Westminster Bank in the names of the trustees, and remained on such deposit until the end of the financial year ending in April 1892.

Interest on some of such deposits, together with other deposits, was paid to the trustees by the bank up to April 1891, amounting to 44*l.*, upon which Lord Mostyn agreed to pay income tax; but he contended that, as the fines in question, amounting to 906*l.*, had been so placed on deposit,

(a) Reported by W. W. Orr, Esq., Barrister-at-Law.

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producing (the said amount of) interest for the year of assessment, the said fines had been applied as productive capital, on which a profit had arisen otherwise chargeable under the Income Tax Acts within the operation and effect of the proviso to the above section of the Act of 1842, and that the commissioners should, in accordance with such proviso, discharge the amount so applied from the profits liable to assessment.

The appellant stated at the hearing that, under the will, all fines on renewals of leases should, after payment of debts and reduction of mortgages, be invested or expended in the purchase of freehold, copyhold, or leasehold property, and that the tenant for life therefore received and must apply such fines as capital, and had no power to appropriate them to his own use, or in any way utilise them as income.

The fines are placed in the bank temporarily on deposit as received, and remain there until required for permanent investment.

It was contended by the surveyor of taxes that the placing of money in a bank on deposit was not an application as productive capital within the meaning of the Act, the appellant having admitted that the money was only placed in the bank temporarily until such time as it was required for permanent investment.

The commissioners were of opinion that the assessment should be confirmed, and they confirmed the same accordingly.

The question for the opinion of the court is, whether the respective amounts placed on deposit as stated have been applied as productive capital on which a profit has arisen otherwise chargeable under the Income Tax Acts, within the meaning of the proviso.

Pollard for the appellant.—The fines received here are not received by the appellant in such a manner as to make him chargeable. The 5th sub-section applies to fines received "by or on account of the party;" but the case states that these fines are not received by the appellant for his own use, but are received by him for the trustees, and are lodged in the bank not in his own name, but in the name of the trustees, and, therefore, they are not fines received "by or on account of the party." The first point, therefore, is that the appellant is not chargeable at all, and this is further shown by the words used afterwards, "by the party chargeable." It is the trustees who are assessable here, if any persons are assessable, as they are the persons on whose account the fines are received. But even if the appellant is assessable in respect of fines under the earlier part of the section, with regard to these fines he clearly comes within the exemption in the proviso. The proviso itself defines what is an application as productive capital, and it defines it as an application as productive capital on which a profit has arisen chargeable under this Act. The placing of this 906*l.* in the bank is an application of the sum as productive capital, because on that application of the money a profit, namely the 44*l.* interest, has arisen, on which the appellant has already paid income tax under the Act. We therefore come within the very words of the proviso, otherwise we should be taxed twice within the same year of assessment, as the Crown asks us to pay not only on the 906*l.* placed in the bank, but also on the interest which this sum has produced. If this is capital it has been applied in such a way as to make it productive capital within the meaning of the proviso, and it is therefore exempt.

Lockwood, Q.C. (S-G.) (*Danckwerts* with him) for the Crown.—The only question for consideration here is, whether this sum has been applied as productive capital within the proviso. If the contention for the appellant is correct, then it would follow that sums received in this manner have only to be lent—and this is nothing more than a loan—to some other person, it may be for a single day only, and then the person so lending it would thereby exempt it from the operation of the statute. That would be an absurd proposition, but it is the logical result of the appellant's contention. There is no decision on the point, and there is no similar statute to help us in construing the present one. I submit that the meaning of the proviso is that there must be an investment of the money in property, and that the money so invested must result in a profit. But in this case there is a mere temporary user of the money, and it is not an application of the money as productive capital when it is lent to the bank, although at interest; but if it is used (say) in the improvement of a farm, then it is productive capital. It is not open to the appellant to say that this deposit with the bank brings the transaction within the provisions of the Act because at some future time the money may be used as is prescribed in the exemption. [Wright, J.—The words of the proviso are, "it shall be lawful for the commissioners to discharge the amount;" that would seem to show that the commissioners have a discretion in the matter.] Application as productive capital is an application of capital which calls into existence or creates some additional property: something in excess of what existed before. The lending of money to A., B., or C. is not an application as productive capital, as it does not produce anything; it merely transfers the money to some other person who may apply it for productive purposes. The application contemplated is an immediate application as productive capital. The money must be applied by the person directly, and it must result in profit to the person who is called on to apply it. Any other construction would lead to an absurd result that a person has only to lend money for a day, and then the proviso would apply, and the sum be exempted from liability. That is all that has been done here, as the money was placed on deposit in the bank temporarily. It is clear that what the statute meant was, that these fines should be applied for increasing the value of the property leased.

Pollard in reply.

Wright, J.—On the question in this case I think that this appeal fails. I very much doubt whether the provision of the rule in question—sect. 60, sched. A., r. 2 (5)—does more than give the commissioners a discretionary power; discretionary on the facts and discretionary as to how far they will act on their findings. But I do not think it is necessary to decide that further than this, that in my judgment, even if the commissioners were wrong, I do not think that they are legally obliged to allow the whole of the amount which may have been applied as productive capital. The general ground upon which I think

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the case ought to be decided is this: The words of the proviso are these, "provided that in case the party chargeable shall prove to the satisfaction of the commissioners that such fines or any part have been applied as productive capital on which a profit has arisen, &c." I think those words, read fairly according to the ordinary use of language, imply something more than a mere temporary deposit at a bank. The first word of importance is the word "applied." I cannot help thinking that the section means by the word "applied" something more than a temporary deposit—a deposit found to be temporary, and therefore found to be not yet applied, but held in suspense for the purpose of future application. Then, again, I hardly think that a temporary deposit at a bank can be regarded as an application of productive capital. I think the word "capital" itself rather points to something which is to be in its application a source of income not merely by way of loan. I do not know how to express it better; the contention may be too refined, but it seems to me that we should not expect such language to be used with reference to a temporary deposit at a bank. Then, again, I think the word "productive" is not properly applied in this context and in this section to that kind of productiveness which money on deposit at a bank has. I think, on the whole, that the word "applied" appears to be the one which is most inconsistent with the appellant's construction. I think, therefore, that it is not made out that the proviso applies to this case, and that the appeal fails.

COLLINS, J.—I am of the same opinion. I must admit that I find it absolutely impossible to define what the Legislature did intend by this provision. I am, however, able to come to a pretty clear conclusion that they could not have meant to include a temporary deposit in a bank as coming under the designation of money "applied as productive capital on which a profit has arisen." I think at least there must be some element of permanence about the application, and that where money is merely held in suspense, as has been said—which indicates that the person placing it there has not himself made up his mind that he is going to invest or apply it—where it is merely held in suspense until he has made up his mind how he is going to deal with it, I do not think that can in any sense be said to be "applied as productive capital." For these reasons I agree that this appeal fails.

Appeal dismissed.

Solicitors for the appellant, *Hulberts* and *Hussey*.

Solicitor for the Crown, *The Solicitor of Inland Revenue.*

Tuesday, Dec. 4, 1894.

(Before WRIGHT, J.)

GILL AND OTHERS v. EDOUIN.(a)

Nuisance—Adjoining owners—Damage by overflow of rain-water—Ordinary user of premises—Provision for escape of water for common benefit—Liability of adjoining owner.

An uncovered area belonging to the defendant and inclosed on two sides by his premises, on another side by the plaintiff's house, and on the fourth side by another house, was covered by the defendant with a flat roof, in one corner of which was a gully or hole for the escape of rain-water from the adjoining roofs. The plaintiff had the right of discharging rain-water from his roof on to this flat roof, and thence the water escaped through the gully down another pipe into the area, and so into the defendant's drain. The defendant had not in fact attended to or cleansed the roof or gully, and no complaint of their condition had been made to him, and there was no access to the roof from his premises. In consequence of an obstruction of the mouth of the gully the rain-water accumulated on the flat roof, leaked into the plaintiff's premises, and damaged the same.

Held, that, in the absence of negligence, the defendant was not liable for the damage, on the ground that he did no more than was ordinary and reasonable in conducting his own rain-water from the roof to the gully, and also upon the ground that the provision of the gully was for the common benefit.

FURTHER consideration by Wright, J., in an action tried by him without a jury, the claim being for damages from nuisance by water from the defendant's premises overflowing on to the plaintiff's premises, and for an injunction.

The plaintiff Gill, was the proprietor of a newspaper, which he published at No. 170, Strand, and the other plaintiffs were the lessees and occupiers of the premises No. 170, Strand. The defendant was the lessee and occupier of the Strand Theatre, adjoining No. 170, Strand.

The following statement of the facts is taken from the written judgment of the learned judge:

Prior to the year 1882 there existed at the rear of the Strand Theatre a small area open to the sky, inclosed on two sides by the buildings of the theatre, on another side by the plaintiff's house, on the fourth side by the house of a Mr. Swanborough. The soil of the area belonged to the defendant's predecessor in title, but the plaintiffs and Mr. Swanborough each had the right of discharging rain-water from their adjoining roofs down gutter pipes fixed to their respective walls, into a gully in the floor of the area, and so into a drain or sewer belonging to the defendant.

In 1882 the defendant's predecessor proceeded to cover the area with a flat roof. A dispute arose with the plaintiffs, who alleged obstruction of lights, and the dispute was settled by a deed of compromise dated Nov. 1882, whereby the plaintiffs consented to the obstruction of certain of their rights, obtaining in return a right to the exclusive use of the area for a height of seven feet from its floor. The defendant's predecessor thereupon completed the covering in of the area. In so doing it does not appear that he interfered in any way with the arrangements as to rain-water, except that he provided for its escape into a gully or hole in one corner of the new roof, and so down a pipe into the same drain as before. The roof of the area at the place in question then became, so to speak, a tank of a few square feet area, and a foot or more from each of those premises, and the water so discharged escaped down the gully or hole into the accustomed drain.

There was some evidence that the gully or hole was inconveniently placed, but there was no evi-

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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dence sufficient to establish negligent or improper construction. The pipes which bring the rain-water from the roofs of those premises are of different diameters, the pipe from the defendant's roofs being smaller than either of the other pipes, but, according to the evidence and photographs, other rain-water of unknown quantity from the defendant's roofs would reach the gully without passing through any pipes. There is no access to the roof in question from either the plaintiffs' or the defendant's premises except through windows and with the help of a ladder. There is convenient access from Swanborough's premises by a door. The roof in question was in fact used by Swanborough, apparently with the defendant's acquiescence, to keep a few flower pots, &c., upon. It had not, according to the evidence, been cleansed or attended to by the defendant since 1882. It had from time to time since 1882 been cleansed by the defendant's porter at the request of and for the benefit of Swanborough, who had paid the defendant's porter for cleaning it. Shortly before the date of the occasion which gave rise to this action the defendant's porter had, at Swanborough's request, and for payment by him, gone on to the roof to remove an obstruction to the escape of rain-water, and had found an accumulation of about three gallons caused by a stoppage of the gully by some paper and a stick. The roof and any accumulation of water upon it could be seen from the plaintiffs' windows and from Swanborough's premises, but not without intentional observation from the defendant's premises.

No complaint of the condition of the roof or gully had ever been made to the defendant, or his servant, except as before mentioned.

On the night of the 17th Oct. rain fell, not in any extraordinary quantity. On the morning of the 18th water was found leaking into the plaintiffs' premises through a window, the bottom of which adjoined the roof in question, and it was found that water had accumulated on the roof, and had filled the sort of tank formed by the roof there. The accumulation was the result of an obstruction of the mouth of the gully by paper or other substances. Damage was done to the plaintiffs' goods to an extent which the learned judge assessed at 30*l.*, and the question was whether the defendant is liable to the plaintiffs for this damage.

F. R. Y. Radcliffe for the plaintiffs.

H. G. Farrant for the defendant.

Dec. 4.—Wright, J. read the following judgment:—[His Lordship stated the facts as set out and proceeded:]: I apprehend that the *primâ facie* rule governing the case is to be gathered from *Rylands* v. *Fletcher* (19 L. T. Rep. 220; L. Rep. 3 H. of L. 330), *Hurdman* v. *The North-Eastern Railway Company* (38 L. T. Rep. 339; 3 C. P. Div. 168), *Anderson* v. *Oppenheimer* (5 Q. B. Div. 602), *Broder* v. *Saillard* (2 Ch. Div. 692), *Humphreys* v. *Cousins* (36 L. T. Rep. 180; 2 C. P. Div. 239), and is, that an occupier of land has *primâ facie* an absolute proprietary right not to have his premises invaded by injurious matter coming from his neighbour's land, otherwise than in the course of nature, without reference to wilfulness or negligence. This *primâ facie* right, however, is subject to qualifications or exceptions. One of them may be, that the defendant may excuse himself by saying that the damage resulted from the act or default of some third person. A second is recognised in *Rylands* v. *Fletcher* (*ubi sup.*), and is that, where a man uses his land in the ordinary and reasonable manner of use, and damage happens to his neighbour without wilfulness or negligence, no action lies. A third is where, although the defendant has brought the injurious matter upon his land, and therefore is not within the second exception, yet the plaintiff has consented to what the defendant did. For example, if the plaintiff consented to the defendant collecting water on the defendant's land, the defendant is not liable for the consequences in the absence of negligence; and this doctrine is extended by Bramwell, B., in *Carstairs* v. *Taylor* (L. Rep. 6 Ex. 217), to the case where the collection of the water or other cause of damage was for the common benefit. A fourth exception has been made in *Ross* v. *Fedden* (26 L. T. Rep. 966; L. Rep. 7 Q. B. 661), where the plaintiff had taken a floor in a house, and it was held that he took the premises as they were, and subject to the ordinary risks arising from the use of the rest of the house as it stood, and consequently could not recover against the occupier of an upper floor for damage done by water escaping from a closet on the defendant's floor, there being no negligence on the defendant's part: (compare *Anderson* v. *Oppenheimer* (*ubi sup.*) There may be some other exceptions. In the present case I think that, in the absence of negligence, the defendant is within both the second and the third exceptions. He did no more than what was ordinary and reasonable in conducting his own water from the roof to the gully, and the provision of the gully at the place where it was was for the common benefit and impliedly, and I should also infer actually, attended to by the plaintiffs. The defendant, therefore, is not liable unless upon proof of negligence causing the damage, and I see no sufficient evidence of such negligence. The only negligence which can be suggested is the omission to examine the gutter. It did not appear that the defendant ever did examine or cleanse it. But no previous trouble had occurred to his knowledge, nor had there been anything to call the defendant's attention to the matter. I am not prepared to say as a matter of law, or as a matter of fact, in the absence of express evidence, that a periodical inspection ought to have been made, or that, if it had been made, it would have prevented this occurrence. For these reasons I think that there must be judgment for the defendant with costs.

Judgment for the defendant with costs.

Solicitors for the plaintiffs, *Powell* and *Goodale*.
Solicitor for the defendant, *R. W. Robinson*.

Nov. 22 *and* 23, 1894.

(Before Wright and Collis, JJ.)

Sweetmeat Automatic Delivery Company Limited *v.* Commissioners of Inland Revenue.

Jones *v.* Same. (*a*)

Revenue—Stamp duty—Stamp Act 1891 (54 & 55 *Vict. c.* 39)—"*Bond, covenant, or instrument of any kind whatsoever*"—"*Security*"—"*Lease or tack.*"

In the first case, the appellants entered into an

(*a*) Reported by W. H. Horsfall, Esq., Barrister-at-Law.

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agreement to pay a yearly rent of 3000l., payable quarterly, to a railway company for the right of placing a specified number of their machines in the stations of the railway company. Either the appellants or the railway company were to be at liberty to put an end to the agreement by three months' notice in writing.

In the second case, the appellant, a theatrical and musical agent, entered into an agreement by which a telephone company agreed to establish and maintain for her telephonic communication from her head office to her branch offices, and to a large number of theatres, hotels, and other places. The appellant covenanted to pay by quarterly instalments the annual sum of 11l. 5s. per line, the minimum amount to be payable being calculated on the rent of forty-five lines, being 506l. 5s. per annum. The agreement was to be in force for ten years, and thereafter from year to year determinable by either party on three months' notice.

Held, that neither of these instruments was a lease or tack, but that they were securities for the payment of sums of money at stated periods for an indefinite period, and were therefore chargeable with stamp duty at the rate of 2s. 6d. for every 5l. payable by the appellants in each case.

These were two cases stated by the Commissioner of Inland Revenue, pursuant to sect. 13 of the Stamp Act 1891 (54 & 55 Vict. c. 39).

The Stamp Act 1891 provides:

Sect. 1. From and after the commencement of this Act the stamp duties to be charged for the use of Her Majesty upon the several instruments specified in the First Schedule to this Act shall be the several duties in the said schedule specified.

First Schedule.—Stamp duties on instruments.

Bond, covenant, or instrument of any kind whatsoever, (1) Being the only, or principal, or primary security for any annuity [except upon the original creation thereof by way of sale or security, and except a superannuation annuity], or for any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack:

For a definite and certain period, so that the total amount to be ultimately payable can be ascertained, the same *ad valorem* duty as a bond or covenant for such total amount.

For the term of life or any other indefinite period—for every 5l. and also for any fractional part of 5l. of the annuity or sum periodically payable, 2s. 6d.

The Sweetmeat Automatic Delivery Company Limited v. The Commissioners of Inland Revenue.

1. On the 30th May 1894 an instrument was presented on behalf of the Sweetmeat Automatic Delivery Company Limited (hereinafter called the appellants) to the Commissioners of Inland Revenue under the provisions of sect. 12 of the Stamp Act 1891 (54 & 55 Vict. c. 39) for the opinion of the commisssioners as to the stamp duty with which the instrument was chargeable.

2. The instrument is dated the 28th May 1894, and is an agreement under seal made and entered into between the Great Western Railway Company (hereinafter called "the company") of the one part and the appellants of the other part.

3. By clause 1 of the agreement the company agreed during the continuance of the agreement to permit the appellants to place and maintain: first, at stations (not in any case exceeding 300 stations) on the Great Western Railway from time to time agreed upon between the company and the appellants a sweetmeat automatic delivery machine, or sweetmeat automatic delivery machines with columns for cigarettes and matches at such stations only as have not for the time being any accommodation provided for refreshments; and secondly, at stations (not exceeding in any case 150 stations) on the Great Western Railway from time to time agreed upon between the company and the appellants, an automatic weighing machine or automatic weighing machines (not in any case exceeding the total number of 175 machines).

4. By clause 2 of the agreement the appellants undertook to pay to the company in respect of the privileges thereby granted the clear yearly rent of 3000l., to be paid in advance by equal quarterly payments on the four usual quarter-days, the first of which quarterly payments was to be made on the 25th March 1894, upon which day the agreement should come into force.

5. Clause 12 of the agreement contained a provision enabling either the company or the appellants to determine the agreement by giving to the other three calendar months' notice in writing expiring at any time.

6. The commissioners were of opinion that the instrument was the only or principal or primary security for the sum of 3000l., payable annually for an indefinite period by four equal quarterly payments, that such sum was neither interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack, and that the instrument was chargeable with stamp duty under the head "Bond, covenant, or instrument of any kind whatsoever." in the First Schedule to the Stamp Act 1891 with the duty of 75l., being the *ad valorem* duty of 2s. 6d. for every 5l. of the 3000l., the sum periodically payable by the appellants to the company. They assessed the duty thereon accordingly, and the instrument has been stamped in conformity with the assessment.

The questions for the opinion of the court are: (1) Whether the instrument is chargeable with the duty of 75l. in accordance with the assessment of the commissioners? (2) If not, with what duty the instrument is chargeable?

Ralph Bankes (with him *J. E. Bankes*) for the appellants.—It is submitted that the decision of the commissioners was wrong, and that this instrument was a lease within the meaning of the Stamp Act 1891, and should have been stamped as such. It has been held that an agreement similar to this creates a tenancy, and it is therefore a lease:

Taylor v. *Overseers of Pendleton*, 57 L. T. Rep. 530; 19 Q. B. Div. 288.

It is admitted that in some respects these machines occupy a similar position to that of bookstalls at a railway station, with reference to which it has been held that the keeper of a bookstall had no exclusive occupation of any portion of the platform so as to render them liable to be rated in respect of it:

Smith v. *Lambeth Assessment Committee*, 48 L. T. Rep. 57; 10 Q. B. Div. 329.

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If this is not a lease it is only an agreement:

Conservators of River Thames v. *Commissioners of Inland Revenue*, 56 L. T. Rep. 198; 18 Q. B. Div. 279.

The instrument is not a security within the meaning of the Act so as to be stamped with this duty.

Lockwood, S.-G. (with him Sir *R. T. Reid*, A.-G. and *Danckwerts*) for the respondents.—The decision in *Conservators of River Thames* v. *Commissioners of Inland Revenue* (*ubi sup.*) turned upon the construction of the Thames Conservancy Acts, and it is not in point in the present case. This instrument is under seal, and in the second clause contains a covenant on the part of the appellants. In the schedule of the Stamp Act 1891 a covenant comes under the same heading as bond, and this instrument is therefore rightly stamped as such, being the only or principal or primary security:

Limmer Asphalte Paving Company Limited v. *Commissioners of Inland Revenue*, 26 L. T. Rep. 633; L. Rep. 7 Ex. 211.

JONES v. THE COMMISSIONERS OF INLAND REVENUE.

1. On the 16th July 1894 an instrument was presented on behalf of Fanny Rebecca Jones, carrying on business under the style or firm of Keith, Prowse, and Co. (hereinafter called the appellant) to the Commissioners of Inland Revenue, under the provisions of sect. 12 of the Stamp Act 1891 (54 & 55 Vict. c. 39) for the opinion of the commissioners as to the stamp duty with which the instrument was chargeable.

2. The instrument is an agreement under seal for supplying telephonic communication, and is dated the 1st July 1894. It is made between the National Telephone Company Limited (hereinafter called "the company") of the one part and the appellant of the other part.

3. The instrument contains recitals that the appellant was desirous of establishing telephonic communication from her head office, No. 48, Cheapside, to her London branches, and also to various theatres, hotels, and other places, such telephonic communication being by means of metallic circuits, and including telephone instruments at the head and branch offices, and that the company had agreed to supply the means of such telephonic communication, and to maintain the same upon the terms and conditions provided by the instrument.

4. By clause 1 of the instrument the company undertook to erect and maintain in good working order the telephonic lines and apparatus.

5. By clause 2 the appellant covenanted to pay by quarterly instalments in advance to the company for the use of the telephonic lines and apparatus and for the telephonic communication the annual sum of 11*l.* 5*s.* per line (the minimum amount to be payable being calculated on the rent of forty-five lines, that is, 506*l.* 5*s.* per annum.

6. By clause 3 it was provided that the agreement should continue for a term of ten years, and thereafter from year to year determinable by either party giving to the other not less than three months' previous notice in writing.

7. By clause 11 power is given to the company to determine the agreement, if the quarterly payments thereunder should at any time be in arrear for one calendar month, without prejudice to their right to recover such arrears, and the company is entitled in such case to recover as liquidated damages, and not by way of penalty, a sum equal to the whole sum which would have become payable between such determination, and the expiration of the agreement up to, but not exceeding, a maximum of 2000*l.*

8. By clause 16 provision is made for connecting other places with the appellant's head office at the rate thereinbefore mentioned.

9. The commissioners were of opinion that the instrument was the only or principal or primary security for the sum of 506*l.* 5*s.* payable annually for an indefinite period by quarterly payments, that such sum was neither interest for any principal sum secured by a duly stamped instrument nor rent reserved by a lease or tack, and that the instrument was chargeable with stamp duty under the head "Bond, covenant, or instrument of any kind whatsoever" in the First Schedule of the Stamp Act 1891 with the duty of 12*l.* 15*s.*, being the *ad valorem* duty of 2*s.* 6*d.* for every 5*l.*, and any fractional part of 5*l.*, of the 506*l.* 5*s.*, the sum annually payable by the appellant to the company, and with the duty of 10*s.* in respect of the uncertain sums payable, or which may become payable, over and above the 506*l.* 5*s.* per annum. They assessed the duty thereon accordingly, and the instrument has been stamped in conformity with the assessment.

The questions for the opinion of the court are: (1) Whether the instrument is chargeable with the duties of 12*l.* 15*s.* and 10*s.* in accordance with the assessment of the commissioners? (2) If not, with what duty the instrument is chargeable?

Gore Browne for the appellant.—This document is a lease or tack. [COLLINS, J.—Can there be a lease of anything except lands, tenements, and hereditaments?] Yes; there may be a lease of an easement:

Newmarch v. *Brandling*, 3 Swans. 99; *Osborn* v. *Wise*, 7 C. & P. 761.

This is not a bond, covenant, or instrument, being the only or principal or primary security for an annuity. Those words are not to be construed literally, or they would include any document in which a person undertook to pay money in more than one instalment:

Mounsey v. *Stephenson*, 7 B. & C. 403.

Danckwerts (with him Sir *R. T. Reid*, A.-G. and *Lockwood*, S.-G.) for the respondents.—This is clearly not a lease, and there is no rent reserved within the ordinary meaning of those words. If it is held to be a lease, every hire and purchase agreement would have to be treated as a lease. The decision in *Limmer Asphalte Company Limited* v. *Commissioners of Inland Revenue* (26 L. T. Rep. 633; L. Rep. 7 Ex. 211) is conslusive on the other point.

WRIGHT, J.—I will first give my judgment in the case that was last argued before us. The question in that case arises on a document by which the National Telephone Company agrees to put a musical agent in telephonic communication with a number of her branch offices and other places. It is a document executed under seal, and the appellant is therein called "the lessee," but there is nothing else in the document

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which purports expressly to treat it as a lease. The telephone company undertook to establish and maintain the telephonic communication, and the appellant agreed to pay the annual sum of 11*l.* 5*s.* per line, the minimum amount to be payable being 506*l.* 5*s.* per annum. This agreement was to continue in force for ten years, and thereafter from year to year, determinable by either party giving to the other not less than three months' previous notice in writing. We have, therefore, an agreement under seal containing a covenant by the so-called lessee to pay the minimum annual sum of 506*l.* 5*s.*, and we have to consider the provisions of the Stamp Act 1891 with reference to such a document. It appears to me that if, instead of being a covenant to pay by instalments the 500*l.* over ten years, it had been a covenant to pay 5000*l.*, then it would have been within that part of the schedule which is found under the heading, "Mortgage, bond, debenture, covenant," and it would have been a covenant, "being the only or principal or primary security for the payment or repayment of money." I think that that is to be clearly inferred from the judgment of the court in *Limmer Asphalte Paving Company Limited* v. *Commissioners of Inland Revenue* (26 L. T. Rep. 633; L. Rep. 7 Ex. 211). But this covenant is not one for the payment of a capital sum, but for the payment of 500*l.* at quarterly periods in each year, and, therefore, it does not fall directly within the heading "Mortgage, &c.," to which I have referred. Then there is the heading, "Bond, covenant, or instrument of any kind whatsoever," which appears to deal expressly with cases which would be within the heading "Mortgage, &c.," if the sum payable were to be paid in one amount, but which are not within it because the sum is to be paid in instalments at stated periods. The heading, "Bond, covenant, or instrument" appears to lay down the rule that, if the instalments are payable for a definite and certain period, so that the total amount payable can be ascertained, then the duty is to be assessed according to the heading "Mortgage, &c.," and is to be at the rate of 2*s.* 6*d.* per cent.; but if the payments are to extend over an indefinite period, the Legislature has assumed that the duration of that period will be twenty years, and has fixed the duty at the rate of 2*s.* 6*d.* for every 5*l.* of the sum payable. I think that *primâ facie* the commissioners were right in requiring this document to be stamped at the latter rate. In my opinion the same interpretation must be put upon the word "security" in each of these headings, and I think that the court took that view in the *Limmer Asphalte Company Limited* v. *Commissioners of Inland Revenue* (*ubi sup.*). Even if we are not bound by that decision here, I think that the word "security," as used in this schedule, does not mean some obligation which is auxiliary to some other obligation; but means an obligation created by any instrument. It was also contended on behalf of the appellant that this was a case of rent being reserved by a "lease or tack," in which case the duty would be much lower; but I do not think that that argument is well founded. This instrument is really not like a lease at all, and, even assuming that the appellant was to have the exclusive use of the wires, the provision as to the payments to be made is not to my mind like a provision for rent properly so called. The payment is to be made not merely for the occupation of the wires and instruments, but for services to be rendered by the telephone company and expenses paid by them in laying down and maintaining the wires, and for the use of the company's patents. It would be a misnomer to say that that was rent intended to be reserved by a lease at all. I also think that the words "lease or tack," as used in the Stamp Act refer to a lease or tack of land and tenements. For these reasons I think that judgment must be given for the Crown. In the *Sweetmeat Automatic Delivery Company* v. *Commissioners of Inland Revenue* there was an agreement between the appellants and a railway company by which the appellants were permitted to place and maintain some of their machines at the stations of the railway company. We are bound by authority to hold that this document was not a lease. On all other points this case is determined by some of the considerations which have determined my judgment in the other case, and I think that the document was a security for the payment of money for an indefinite period. The only difference in this case is that the sum payable is definitely fixed, so that there is no difficulty as to the amount to be paid. Judgment must also be for the Crown in this case.

Collins, J.—I am of the same opinion in both cases. The points made are common to both cases; but there is more colour for suggesting in the case last argued before us that the document was a lease. It was contended that, taking all the provisions of the agreement together. there was a lease of the thing demised—viz., the instruments, and also a lease of the right to use certain wires, which wires were also demised. But, on considering the provisions of the Stamp Act, it seems to me that the Legislature intended to deal only with leases or tacks of lands and hereditaments, and that sects. 75-78 cannot be fairly construed as applying to anything except a lease in the proper sense of the term—that is, a lease of lands, tenements, and hereditaments. A number of instances of leases are dealt with in those sections, and none of them refer to anything except such subject matters. I do not think that a lease of chattels is contemplated in the statute, so that rent reserved by a lease or tack of chattels can be said to embrace such an annual payment as is agreed to be paid for the chattels in this case. It seems to me that the decision in *Limmer Asphalte Company Limited* v. *Commissioners of Inland Revenue* (26 L. T. Rep. 633; L. Rep. 7 Ex. 211) covers the other point which was argued before us—viz., upon the heading "Bond, covenant, or instrument of any kind whatsoever, being the only or principal or primary security for any annuity or for any sum or sums of money at stated periods, &c." I was a good deal pressed as to whether the word "security" did not really refer to something in its nature collateral, something that secured a right already acquired under some other instrument or power. Under the next clause, where the amount is payable "for a definite and certain period so that the total amount to be ultimately payable can be ascertained," the duty payable is "the same *ad valorem* duty as a bond or covenant for such total amount." We are thus referred to the heading, "Mortgage, bond, debenture. covenant," and we there find that the same *ad valorem* duty is charged. That shows that the word "security" must have the same meaning in both

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cases. Under the latter heading it is clear that a primary security is referred to, and the word is not used in any collateral or auxiliary sense. I think that the exception in the heading, "Bond, covenant, or instrument of any kind whatsoever," emphasises that argument, because it begins by dealing with an instrument "being the only or principal or primary security for any annuity," and then in the case of an annuity it excepts out of that the instrument originally creating the annuity, thereby indicating that but for that exception it would have been embraced within the provision dealing with the principal or primary security for any annuity, that is to say, that the instrument creating the annuity, but for the exception, would be such a security as is dealt with in the section. Having excepted the instrument creating the annuity only, it goes on to deal with instruments being the principal or primary security "for any sum or sums of money at stated periods," and that clearly must refer to the instrument which creates the obligation to pay those sums. It seems to me, therefore, to be clear that the instrument creating the obligation may be a security within the meaning of that part of the Act. In this case we have a term of ten years, subject, no doubt, to determination, with a right and expectation apparently that that term will be extended by an interest from year to year after its expiration. That makes the term, it seems to me, indefinite, and therefore lets in the scale of assessment which the commissioners have adopted. That determines the case which was last argued before us. In the first case the two points raised were that the document was, first, a lease, or, secondly a "security" of the nature contended for in the other case. I think that there can be no question that it was not a lease, as the point was clearly decided in *Smith* v. *Lambeth Assessment Committee* (48 L. T. Rep. 57; 10 Q. B. Div. 329). I do not think that it was a security of a collateral or auxiliary kind for the reasons I have given when dealing with the other case. Therefore the appeals in both these cases must be dismissed.

Judgment for the Crown in both cases.

Solicitors for the appellants, the Sweetmeat Automatic Delivery Company Limited, *Stephens* and *Stephens*.

Solicitors for the appellant, Jones, *Beyroux, Phillips*, and *Golding*.

Solicitor for the respondent, *Solicitor of Inland Revenue*.

Dec. 11 *and* 13, 1894.

(Before POLLOCK, B. and GRANTHAM, J.)

HAMMOND (app.) *v.* PULSFORD (resp.). (*a*).

Shop Hours Act 1892 (55 *&* 56 *Vict. c.* 62), *ss*, 3, 4, 5—*Offence created—Penalty omitted.*

The Shop Hours Act 1892 *enacts by sect.* 3, *that no young person shall be employed in or about a shop for a longer period than seventy-four hours, including meal times, in any one week; by sect.* 4, *that in every shop in which a young person is employed a notice shall be kept exhibited by the employer in a conspicuous place referring to the provisions of this Act, and stating the number of hours in the week during which a young person may lawfully be employed in that shop; and by sect.* 5, *that where any young person is employed in or about a shop contrary to the provisions of this Act, the employer shall be liable to a fine not exceeding one pound for each person so employed. Held, that the respondent was not liable to a fine under sect.* 5 *for having employed a young person in a shop in which the notice required by sect.* 4 *was not kept exhibited.*

CASE stated by justices.

At a petty sessions holden at the court of summary jurisdiction, Victoria-road, Aston, in and for the division of Aston, in the County of Warwick, on the 21st Sept. 1894, an information preferred by Jesse Hammond (hereinafter called the appellant), against Francis Pulsford (hereinafter called the rsspondent), under sect. 4 of the Shop Hours Act 1892, charging that he, the said Francis Pulsford, on the 13th Sept. 1894, at No. 6, Barker-street, Aston, did employ Florrie Lamprell (a young person within the meaning of the Shop Hours Act 1892) in or about a shop there being, contrary to the provisions of the said Act, to wit, that he, the said Francis Pulsford, did employ the said Florrie Lamprell in or about the said shop, in which shop a notice referring to the provisions of the said Act, and stating the number of hours in the week during which a young person might lawfully be employed in that shop, was not kept exhibited by the said Francis Pulsford, the employer of such young person, in a conspicuous place, was heard and determined by the said justices, and upon such hearing the information against the respondent was dismissed.

The appellant being dissatisfied with the decision of the said justices, they, in compliance with the application of the appellant, stated this case for the opinion of this court.

On the hearing of the information, it was proved that the respondent did employ a young person within the meaning of the Shop Hours Act 1892, and that the notice required to be exhibited by sect. 4 of the Act was not exhibited in the shop of the respondent. It was contended on behalf of the appellant that sects. 4 and 5 of the Shop Hours Act 1892 should be read together, and that, although no penalty was specially provided in case default was made in exhibiting the notice under sect. 4, still the penalty enacted in sect. 5 was to be read and made applicable to neglect of the provisions of sect. 4, where a young person was employed.

The justices were of opinion that the information charged the respondent with committing an offence under sect. 4 of the Act, and that no penalty being provided for the contravention of this section, they could not convict the respondent, and they, therefore, dismissed the information.

Pritchett (with him *Evans Austin*) for the appellant.—It is submitted that the decision of the justices was wrong. It was contended that there was no penalty imposed by the Act upon an employer for not exhibiting the notice required by sect. 4. But a person employing a young person without exhibiting a notice employs such person contrary to the provisions of the Act, within the meaning of sect. 5, and is, therefore, liable to a fine of 1*l*. [GRANTHAM, J.—If he employed several persons he would be liable to a fine of 1*l*. for each person so employed, although they had not been employed for an illegal number of

(*a*) Reported by W. H. HORSFALL, Esq., Barrister-at-Law.

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hours.] Yes. A similar notice is required by the Factory and Workshop Act 1878 (41 Vict. c. 16, s. 78) to be exhibited in factories and workshops, and the occupier of the factory or workshop who neglects to do so is liable to a fine. [Grantham, J.—The fine in the case of a factory or workshop is only 40s., whereas, if your contention is right, in the case of a shop it is 1*l.*] Sect. 88 of the Factory and Workshop Act, which is incorporated with this Act, provides a restraint on cumulative fines, so that an employer would not be fined in respect of each person employed because he had omitted to exhibit the necessary notice.

The respondent did not appear.

Dec. 13.—Pollock, B.—This was a case stated by the justices of the county of Warwick in order to obtain the opinion of this court upon a point of law which arose before them. The respondent was summoned before them in order that he might be declared liable to a penalty for having a young person in his employment without having the notice required by the Shop Hours Act 1892 exhibited on his premises. The justices thought that it was beyond doubt that the notice was required by the statute, but that the absence of the notice did not make the respondent liable to a peualty. The Shop Hours Act 1892 (55 & 56 Vict. c. 62) was passed to amend the law relating to the employment of young persons in shops, and in furtherance of the scheme of the Acts relating to factories. It enacts by sect. 3 that no young person shall be employed in or about a shop for more than seventy-four hours in any one week, and by sect. 4 that a notice shall be exhibited by the employer referring to the provisions of the Act, and stating the number of hours in the week during which a young person may be lawfully employed in that shop. Then sect. 5 provides that where any young person is employed in or about a shop contrary to the provisions of the Act, the employer shall be liable to a fine of 1*l.* for each person so employed. On behalf of the appellant it has been argued that a penalty had been incurred by the respondent because he had employed a young person contrary to the provisions of the Act, viz., contrary to the provisions of sect. 4, because he had omitted to exhibit the notice required by that section. If he had been summoned for contravening the provisions of sect. 3, and the facts proved that he had employed a young person for more than the legal number of hours, the employer would be clearly liable to a fine, for then the young person would be employed contrary to the provisions of the Act. But I think it would be wrong to hold that a young person was employed contrary to the provisions of the Act because the notice required by sect. 4 had not been exhibited. If the contention of the appellant were right it would be a great hardship on the employer, for he would be liable to a fine of 1*l.* for each person employed, and the amount of the penalty would depend on the number of persons whom he employed. This seems to me to be a strong reason for presuming that the Legislature did not intend to include in sect. 5 such cases as the present. In the Factory and Workshop Act 1878 there is a provision that a notice shall be affixed in the factory or workshop, and there is an express enactment in sect. 78 that the occupier of the factory or workshop who contravenes that provision shall be liable to a fine of 40*s.* But under sect. 4 of the Shop Hours Act there is no provision as to a fine, and sect. 5 does not deal with the case in question. The justices were of opinion that no penalty was provided for contravening the provision of sect. 4. I think that they were right in that opinion, and that this appeal must therefore be dismissed.

Grantham, J.—I am of the same opinion. By the Factory and Workshop Act 1878 provision was made to protect young persons against being employed for an excessive number of hours, and it prescribed the number of hours during which they were allowed to work. In order that they might know what those hours were, the employer was required, by sect. 78, to affix a notice to the premises, setting forth the provisions of the Act, and if he omitted to do so he became liable to a fine not exceeding 40*s.* There is, therefore, in that section one offence specified, and one fine in respect of that offence. There has since been passed the Shop Hours Act 1892, to protect young persons working in shops, and in that Act the draftsman, for the sake of brevity or for some other reason, has not followed the wording in the section in the Factory and Workshop Act 1878. He has divided the provisions as to employing young persons for an illegal number of hours into two sections, and between those two sections he has placed one requiring a notice as to the hours to be exhibited on the premises. If he intended to make the employer liable to the same penalty in each case he has failed to do so. The whole object of the Act was to prevent young persons being employed more than seventy-four hours in any one week. I do not think it could have been intended that an employer should be fined 1*l.* for each person employed because he omitted to exhibit the notice; the penalty for that offence has been omitted. Sects. 3 and 5 deal with the offence of employing for an illegal number of hours, and provide the penalty for that offence. It seems to me to be a *casus omissus*, and no doubt it was intended that the penalty should be the same under this Act as under the Factory and Workshop Act 1878. I think, therefore, that the justices were right, and that this appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Field, Roscoe,* and *Co.*, for *Field* and *Sons*, Leamington.

Tuesday, Dec. 18, 1894.

(Before Wills and Wright, JJ.)

Smart and Son (apps.) v. Watts (resp.). (a)

Margarine—Marking cases and wrappers—Substance sold as butter—Purchase for purpose of analysis—Admission by seller that substance was margarine—Analysis condition precedent to prosecution—Margarine Act 1887 (50 & 51 *Vict. c.* 29)—*Sale of Food and Drugs Act* 1875 (38 & 39 *Vict. c.* 63).

The Margarine Act 1887 *provides by sect.* 6 *that every person selling margarine by retail, save in a package duly branded or durably marked, shall in every case deliver the same to the purchaser in or with a paper wrapper, on which shall be printed in capital letters "margarine;" and by*

(a) Reported by W. H. Horsfall, Esq., Barrister-at-Law.

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sect. 12, *that all proceedings under the Act shall, save as expressly varied by this Act, be the same as prescribed by the Sale of Food and Drugs Act* 1875.

The Sale of Food and Drugs Act 1875 *provides that an inspector may obtain samples of food and drugs, and if he suspect the same to have been sold to him contrary to the provisions of the Act, he shall submit the same to be analysed, and shall notify to the seller his intention to have the same analysed. If it appears from the certificate of the analyst that an offence against some one of the provisions of the Act has been committed, the person causing the analysis to be made may take proceedings for the recovery of the penalty therein imposed.*

Held, that it was a condition precedent to the right of a purchaser to take proceedings for a penalty under the above Acts that he should obtain a certificate from the analyst, and that this applied even in the case where a person admitted that he had sold margarine contrary to the provisions of the Margarine Act 1887.

Case stated by two justices.

At a petty sessions holden at Edgware on the 4th July 1894, the respondent in the present case preferred two complaints against the present appellants under sect. 6 of the Margarine Act 1887, as follows: (1) That on the 18th June 1894 the appellants exposed for sale by retail margarine, without having attached to each parcel thereof, so exposed in such manner as to be clearly visible to the purchaser, a label marked or printed in capital letters, not less than a quarter of an inch square "margarine;" and (2) that at the same time and place the appellants sold margarine by retail without delivering the same to the purchaser in or with a paper wrapper on which was printed in capital letters, not less than a quarter of an inch square "margarine."

The two complaints were heard together, and the respondent gave evidence as follows:

I am inspector under the Food and Drugs Act to the Middlesex County Council. On the 18th June last I called at the defendants' shop at Hendon, provision dealers. I saw butter exposed for sale on the counter. Mrs. Skillman came to serve me. I asked for a quarter of a pound of this butter, pointing to butter on which was a label "8." She served me and I paid 2d. for it. I produce the article as served to me. The paper wrapper is plain paper. No designation of what it is, is on the paper, or on the article. The butter was on a tub turned upside down on the counter. I told her who I was, the inspector under the Food and Drugs Act, and called her attention to the label. She said: "This is not butter, it is margarine." I called her attention to the label, and to its being served in plain paper. She said she was serving temporarily as the manager was out. I asked her if she had changed the label, she said "No." I said I should take proceedings. She sent for Mr. Skillman, the manager. He said it was margarine, that he had a stamp for it, but he did not think it was sufficient.

In cross-examination: I did not give them notice that it was purchased for analysis. I have not submitted it for analysis because Mr. Skillman told me it was margarine. After the purchase I did not think it was necessary to go to that expense. The tub had the word margarine on it, but it was upside down and not readable.

No evidence was offered by the appellants, but it was contended on their behalf (1) That the statements of Mrs. Skillman, and the manager, Mr. Skillman, that the article sold was margarine were not made in the presence or hearing of the appellants, and consequently were not admissible as evidence, and, therefore, that there was no evidence that the article sold was margarine. (2) That the proceedings under the Margarine Act 1887, sect. 12, should be the same as those prescribed by the sale of Food and Drugs Act 1875 (38 & 39 Vict. c. 63), that under sect. 14 of that Act the purchaser should have notified his intention to have the article analysed, and should have divided it into three parts leaving one such part with the seller or his agent. That under sects. 20 & 21 of the Sale of Food and Drugs Act the complainant should have had one portion of the article analysed, and should have produced the certificate of the analyst as to the result of such analysis. That such notification, division, and analysis were conditions precedent to a prosecution, and that the same not having been made the prosecution must fail.

The justices convicted the appellants and imposed a fine.

The question for the opinion of the court is, whether the justices were justified in point of law under the circumstances in convicting the appellants.

Bonsey for the appellants.—It is submitted that the justices were wrong in convicting the appellants. The respondent did not comply with the requirements of the Sale of Food and Drugs Act 1875, in not leaving a part of the substance with the appellants' manager, and in not submitting it to the public analyst. He ought to have warned the appellants' manager that he was going to send the sample to the public analyst:

Barnes v. *Chipp*, 38 L. T. Rep. 570; 3 Ex. Div. 176.

It is a condition precedent to the right to recover the penalty that the respondent himself should have complied with the requirements of the Act:

Parsons v. *Birmingham Dairy Company*, 9 Q. B. Div. 172.

The principle in those cases applies to proceedings under the Margarine Act 1887.

J. C. Earle for the respondent.—There was ample evidence that an offence against the Act had been committed both in the admissions of the appellants' manager and in the appearance of the substance which was produced in the court below. It would be a very unnecessary expense to have an analysis, when it was admitted that the substance was margarine. The quality of the substance is not material, and, as it was margarine, it must be served in a certain way. [Wright, J.—But sect. 20 of the Sale of Food and Drugs Act 1875 provides that proceedings are to be taken only on the result of the analysis.] If that be so, it must be admitted that we have not complied with that requirement.

Wills, J.—I regret that we have to come to the conclusion in this case that the conviction must be quashed, but it seems to me that from the language of the Act we have no alternative. I think that sect. 8 of the Margarine Act 1887 does not apply to this transaction. But by sect. 12 of that Act, certain provisions of the Sale of Food and Drugs Act 1875 are expressly incorporated with that Act, and those provisions have not been complied with in the present case. No doubt this

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will entail a good deal of what appears to be needless expense, and I regret that this should be so, but we cannot overrule the words of the Act of Parliament.

Wright, J.—I am of the same opinion.

Conviction quashed.

Solicitors for the appellants, *Neve* and *Beck*.
Solicitor for the respondent, *R. Nicholson*.

Nov. 8 *and* 12, 1894.
(Before Bruce, J.)
Brown *v.* Law. (*a*)

Warranty—Warranty given in error to another's agent—Damage —Right of principal to sue the warrantor.

The plaintiffs entered into a contract with the defendant to supply the defendant's ship, then at Newcastle, New South Wales, with coal. The plaintiffs sent a telegram from London to their house in Newcastle, New South Wales, with instructions as to drawing upon the defendant for the price of the coal. The telegram contained a code word "journee" which meant "after this vessel is loaded owners order her to proceed to R." By a mistake in the transmission of the telegram, the code word "jounce" was substituted for "journee." "Jounce" meant an order to proceed to C. The plaintiffs' house in Newcastle informed the master of the ship of the instructions they had received. The master doubted the accuracy of the instructions, and the plaintiffs' house gave him a letter confirming the contents of the telegram. The master accordingly proceeded with the ship to C. The result of the ship's going to C. instead of to R. was a loss to the defendant, for which the defendant counter-claimed against the plaintiffs in an action by the plaintiffs for the price of the coal. The jury found that the master acted reasonably under the circumstances.

Held, that the letter given by the plaintiffs to the master, though a warranty to the master was not a warranty on which the defendant could sue the plaintiffs; that on the finding of the jury the defendant had no right of action against the master, and could not therefore claim to sue the plaintiffs in order to avoid a multiplicity of actions; that the plaintiffs had not by the giving of the letter constituted the master their agent.

Further consideration of an action tried before Bruce, J. and a special jury.

The plaintiffs' claim was for 490*l.* 10*s* for the price of coal supplied to the defendant's ship *Dumbartonshire*.

By his defence the defendant admitted the plaintiffs' claim subject to his counter-claim. The defendant counter-claimed for 325*l.* 12*d.* 4*d.* being the amount of damages after giving credit for the amount claimed, incurred by him through certain instructions alleged to have been given by the plaintiffs to the master of the defendant's ship, negligently, and wrongfully, and without any authority or request from the defendant.

The facts of the case and the arguments of counsel are fully set out in the judgment.

(*a*) Reported by F. O. Robinson, Esq., Barrister-at-Law.

Lawson Walton, Q.C. and *Hollams* for the plaintiffs.

Bigham, Q.C. and *Leck* for the defendant.

Cur. adv. vult.

Nov. 12.—Bruce, J. read the following judgment:—In this action the plaintiffs sue for 490*l* 10*s*., the price of 1000 tons of coal supplied to the defendant's ship *Dumbartonshire*. The defendant admitted this claim, but he set up in answer a counter-claim in which it was alleged that the plaintiffs wrongfully and negligently, and without the authority of the defendant, informed the master of the *Dumbartonshire* that they had his master's instructions to order him to proceed to Callao, and the master of the ship in consequence sailed to Callao instead of to Rangoon, and the defendant alleges that by reason of the ship sailing to Calloa instead of to Rangoon he has incurred a loss of 816*l*. The question to be determined is whether the facts proved are such as to entitle the defendant to sustain his counter-claim. The defendant's ship was at Newcastle, New South Wales, in November 1892. The plaintiffs are merchants carrying on business in London and at Newcastle, New South Wales. The defendant entered into a contract with the plaintiffs in London for the supply by them to his ship at Newcastle of 1000 tons of coal at 10*s*. per ton. It was a term of the contract that the expense of cable instructions should be paid by the plaintiffs. The defendant had arranged for the ship to proceed to Rangoon to take in there a cargo of rice. On the 8th Nov. the defendant telegraphed to the ship's agent at Newcastle telling him to take on board 1000 tons of coal from the plaintiffs, and to despatch the ship when coaled to Rangoon. On the same day the plaintiffs telegraphed to their Newcastle house telling them to supply the coal to the ship. On the 12th Nov. the plaintiffs sent to their Newcastle house another telegram telling them to draw upon the owners, at sixty days, for the price of the coal. This telegram was a code telegram, and as despatched it contained the code word "journee" which meant, "after this vessel is loaded owners or charterers order her to proceed to Rangoon." In transmission the code word "jounce," by some unexplained mistake, was substituted for "journee," and "jounce" meant, "owners order vessel to proceed to Callao." On the 14th Nov. the plaintiffs' house at Newcastle informed the master that they had received orders from his owners through their London house requesting them to order him to proceed to Callao when loaded. The master was somewhat incredulous, and a discussion took place between the ship's agent, the master, and the plaintiffs' representative at Newcastle. In the result, on the 18th Nov., the plaintiffs gave the master the following letter: "For your satisfaction we beg to confirm our verbal instructions respecting draft against your cargo and destination. They came from your owners, and were conveyed to us in a cablegram, which arrived on the 13th inst., from our London house. In it we were instructed to limit the quantity supplied your ship to 1000 tons, and, after loading, to dispatch you for Callao, we taking your draft for cost on your owners, Messrs. T. Law and Co. This letter will be a sufficient guarantee for your proceeding on your voyage, as we understand your only difficulty lies in absence

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of any direct communication on the point from Messrs. Law and Co. We wish you a pleasant voyage. (Signed by the plaintiffs.)" The giving of this letter satisfied the master, and, in reliance upon it, he was induced to sail, and did sail when loaded from Newcastle to Callao. The jury, in answer to the questions put to them by me, have found that the plaintiffs warranted to the master that they had received orders from the defendant that the ship should proceed to Callao, that the master was induced by such warranty to go to Callao, and that the master acted reasonably in going to Callao without further communication with the defendant. No doubt the defendant has suffered considerable loss by the mistake in the telegram, and the question I am to decide is whether in the circumstances the plaintiffs can be made liable for the loss. There is no evidence of any negligence on the part of the plaintiffs. Had the telegram been delivered as they despatched it no difficulty would have arisen, but it is sought to make the plaintiffs liable on the ground that the letter of the 18th Nov. amounts to a warranty, on which the defendant can sue. It amounted to a warranty to the master of the ship, but what privity of contract is there between the plaintiffs and defendant? Counsel for the defendant contended that the letter was given to the master as the agent for the owner of the ship, and was intended to operate, and did operate, as a warranty to the owners. But I cannot put that construction upon it. I think that, on the face of it, it appears clearly to be nothing more than a warranty to the master to protect him against his owners, in case it should turn out that the order to go to Callao did not come from his owners. The letter, I think, only amounts to this: You, the master, entertain a doubt whether the orders we, the merchants, have received came from your owners, we warrant that they do; if you act upon these orders, we agree to protect you against any loss you may sustain by so doing. I am of opinion that the master is the only person who can sue upon that letter. Then it was said, but if the master could sue, why are the owners to go through the idle form of bringing an action against him, and then leaving him to sue the plaintiffs. But, on the facts, I am not satisfied that the defendant could recover against the master the loss caused by reason of the vessel being taken to Callao instead of Rangoon. The duty of a master of a ship is to use all reasonable diligence in the management of the ship under his charge. In a foreign port he must often be placed in circumstances of difficulty, and all that can be required of him is that he should act with reasonable care and prudence. The jury have found that the master in the emergency in which he was placed acted as a reasonable man would have acted. I cannot, therefore, see that any action for breach of duty can be maintained against him, and therefore the argument founded upon the inconvenience arising from multiplicity of actions does not arise. There was another point raised by Mr. Bigham which demands consideration. He said that the plaintiffs had undertaken, without any authority from the defendant, the owner, to give orders as to the destination of the ship. That, he said, amounted to an exercise of dominion over the ship, and that the plaintiffs, by giving orders, had made the master their agent, and so have become answerable for his acts. I cannot assent to the proposition that the plaintiffs exercised any dominion over the ship, or made the master their agent. They gave him a message which turned out to be a mistaken message, but he was free to act upon it or not. The whole conduct of the parties shows that the plaintiffs considered the master as the ship owner's agent, and intended that he should act only upon orders given by the owner. It may be, on the authority of *Firbank's Executors* v. *Humphreys* (56 L. T. Rep. 36; 18 Q. B. Div. 54), which was cited by Mr. Bigham, that, even if the plaintiffs had not given any express warranty to the master, an implied warranty would have arisen from the circumstance that they induced him to act upon an assertion which is not true in fact. But the defendant was not induced to do anything by reason of the representation made by the plaintiffs, and I do not think that any implied warranty to defendant can be said to arise from the statement made in good faith by the plaintiffs to the defendant's master. I must hold that the counter-claim cannot be maintained. I give judgment for the plaintiffs on the claim and counter-claim.

Judgment for the plaintiffs on the claim and counter-claim.

Solicitors for the plaintiffs, *Hollams, Son, Coward,* and *Hawskley.*

Solicitors for the defendant, *Lowless* and *Co.*

Nov. 2, 3, *and* 19, 1894.

(Before WRIGHT and COLLINS, JJ.)

ATTORNEY-GENERAL (on the relation of the Local Board of the Brownhills District) AND THE LOCAL BOARD OF THE BROWNHILLS DISTRICT *v.* THE CONDUIT COLLIERY COMPANY. (*a*)

Highway — Subsidence through working of mines —Railway crossing highway on level—Maintenance of level by construction of embankment—Obstruction of highway — Right of highway authority to recover nominal damages from mine owner—Highways and Locomotives (Amendment) Act 1878 (41 & 42 *Vict. c.* 77), *s.* 27.

The plaintiffs were the sanitary authority for the B. district, and as such were surveyors of highways within the district, and responsible for the maintenance and repair of highways. By reason of the working of the defendants' mines the surface of a highway within the plaintiffs' district, together with the adjoining land, had been caused to subside; but no injury had been done by the subsidence to the surface of the highway. The highway had previously to the subsidence been crossed on the level by a railway. As the highway subsided the railway company placed ballast underneath the railway, so as to maintain it at the original level, with the result that an embankment ten feet high was formed across the highway rendering it impassable. The highway was a public carriage-way at and before the time when the railway was constructed. The special Act under which the railway was constructed did not authorise the company to make a level crossing at the place in question; but the Act contained a general power to the company to make

(*a*) Reported by F. O. ROBINSON, Esq., Barrister-at-Law.

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and maintain the railway on the levels shown on the deposited plans.

Held, that the obstruction was caused by the railway company, and not by the defendants.

Per Collins, J. (Wright, J. dissenting): An action for nominal damages for subsidence would lie at the suit of an ordinary owner of land without proof of special damage; the plaintiffs, as highway authority had the same rights as an ordinary owner of land, and were, therefore, entitled to judgment against the defendants for nominal damages.

Motion by the plaintiffs for judgment on the pleadings, and on facts admitted by the plaintiffs and defendants, and on the report of a referee.

The facts of the case were as follows:—

The defendants were mine-owners, and worked certain mines known as the Conduit Colliery at Brownhills in the county of Stafford. By reason of the working of the defendants' mines a highway called Lion Lane, together with the adjoining land, had been caused to subside, but the surface of Lion Lane had in no way been injured by the subsidence, and had continued to be on the same level as the land adjoining it on either side. The defendants had worked their mines in a manner proper and necessary for the beneficial working thereof, and according to the usual manner of working such mines in the district. It was alleged in the statement of claim, and not denied by the defendants, that Lion Lane was a highway, and was situate within the district of which the Local Board of the Brownhills District (the plaintiffs and relators) was the urban authority, and that the local board, as surveyors of highways within the district, was liable for the maintenance and repair of Lion Lane at the spot in question.

In 1854 a railway was constructed by the London and North-Western Railway Company, which crossed Lion Lane on the level. The special Act (17 Vict. c. liii.), under which the railway was constructed did not authorise a level crossing in Lion Lane; but the Act contained a general power authorising the undertakers to make and maintain the railway on the levels shown on the plans. In order to protect the railway from damage by the subsidence of the surface of Lion Lane, the railway company from time to time caused ballast to be placed underneath the rails so as to maintain them at their original level, with the result that in the course of time an embankment was formed across Lion Lane of the height of ten feet above the adjacent part of the lane whereby it was rendered impassable. If the railway company had not put up this embankment the surface of the lane at the place in question would have sunk with and continued to be upon the same level as the adjacent part of the lane, and there would have been no obstruction or impediment to the traffic passing along the lane.

A referee had found as a fact that Lion Lane was an ancient highway and carriage way before and at the time when the railway was constructed.

The plaintiffs claimed: (1) an injunction to restrain the defendants from causing a nuisance upon the highway above-mentioned, by letting down or otherwise injuring the surface of the same through mining operations, and so rendering the same impassable to the public; (2) an injunction to restrain the defendants from causing damage to the highway by letting down or otherwise injuring the surface of the same, so as to oblige the relators to incur extra expenditure in repairing the same; (3) 1400*l.* as damages, that being the estimated cost of making the road passable by construction of a subway underneath the railway. (4) costs.

The defendants, by their defence, pleaded that the obstruction had been caused by the wrongful acts of the railway company and not by the defendants, and alternatively that, under the provisions of an inclosure award, they were relieved from liability for any subsidence of the road. As no decision was given by the court on the latter plea it becomes unnecessary to refer to it more fully.

The Highways and Locomotive (Amendment) Act 1878 enacts:

Sect. 27. Notwithstanding anything contained in sect. 68 of the Public Health Act 1848, or in sect. 149 of the Public Health Act 1875, all mines and minerals of any description whatsoever under any disturnpiked road or highway which has or shall become vested in an urban sanitary authority by virtue of the said sections or either of them, shall belong to the person who would be entitled thereto in case such road or highway had not become so vested, and the person entitled to any such mine or minerals shall have the same powers of working and of getting the same or other minerals as if the road or highway had not become vested in the urban sanitary authority, but so, nevertheless, that in such working and getting no damage shall be done to the road or highway.

Jelf, Q.C. and *Disturnal* for the plaintiffs.

Moulton, Q.C. and *M'Intyre* for the defendants.

Cur. adv. vult.

Nov. 19.—Wright, J. read the following judgment:—This is a motion for judgment on admissions and on the report of a referee. The relators are a local board, in whose district is a road called Lion Lane, across which the London and North-Western Railway Company about 1854 carried a railway on the level in the ordinary way, but so far as at present appears without any specific authority. At some subsequent time the defendants worked their coal in the usual and proper manner under and in the neighbourhood of Lion Lane, with the result that a gradual and uniform subsidence of a large area of ground occurred and altered the level of the road and of the railway, together with the rest of the surrounding land. There is no admission or finding that any actual damage has been done to the roadway itself by this subsidence, or that it has thereby been rendered less convenient in itself, or that the highway board has been or was put to any expense. But what had happened was this: The railway company, from time to time, as the country and their line gradually subsided, have placed ballast under their rails so as to maintain the original level of the line, with the ultimate result that in place of a level crossing there is now an embankment some ten feet high barring the use of the lane. The relators claim that the lane is vested in them as the urban sanitary authority, and they bring this action for the purpose of obtaining some remedy against the colliery company. In the first place, they claim an injunction to restrain the defendants from causing further subsidence; this part of the claim is enough to say that there is no admission or finding that further subsidence is likely to

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occur without further working or that further working is intended, and we cannot on the materials before us draw any such inference. The only other claim is for 1400*l.* as the cost of "making the road passable by the construction of a subway underneath the railway:" as to this it may be enough to say that no such expenditure has been incurred or is to be incurred by the plaintiffs; nor probably have the plaintiffs any power to construct such a subway unless by the consent of the railway company. The real object of the action is to obtain as damages such a sum as will provide funds for the construction of a subway. The defendants are not under any such liability to the relators. It is not the defendants who have placed or who maintain the obstruction. The remedy, if any, is against the railway company. They have special statutory power to make a proper subway; and, assuming that the lane was dedicated to the public before the construction of the railway, it may be that, on the doctrine applied in the cases of *Geddis* v. *Proprietors of the Bann Reservoir* (3 App. Cas. 430) and *Oliver* v. *The North-Eastern Railway Company* (L. Rep. 9 Q. B. 409), they can be compelled to abate the nuisance, or, indeed, that apart from that doctrine they are liable to indictment. But although the action fails so far as regards its only substantial objects, it was suggested in argument that the relators are entitled to nominal damages and costs of action, on the grounds that the soil of the highway is vested in them by the Public Health Act, and that any alteration of the level is an infringement on their proprietary right. I doubt whether, assuming the highway to be repairable by the inhabitants at large and therefore vested in the board, the decision in *Coverdale* v. *Charlton* (40 L. T. Rep. 88; 4 Q. B. Div. 104) is applicable so as to give a right of action where there is no real damage; but it is not necessary to decide that important question, in relation to which *Smith* v. *Thackerah* (14 L. T. Rep. 761; L. Rep. 1 C. P. 564) may have to be considered. The defendants claim to be entitled under the provisions of an inclosure award, as against the surface owners, to let down the surface by proper mining, and if they are so entitled, then it appears to me that the provisions of the Highway Act 1878, sect. 27, control the operation of the Public Health Act; and, in my opinion, under that section no action could be maintained except for actual damage. It may even be arguable that the *Dudley Canal Company* v. *Grazebrook* (1 B. & Ad. 59), and not *Knowles* v. *Lancashire and Yorkshire Railway Company* (61 L. T. Rep. 91; 14 App. Cas. 248), applies, and that negligent or improper working must be shown. But it seems to me that the case comes before us in a way which does not enable us to deal satisfactorily with these questions. The attention of the parties has never been directed even to the initial question whether Lion Lane is a highway repairable by the inhabitants at large. It is said to be doubtful whether it was a highway at all in 1854. But, unless it was a public highway before 1835, it cannot have become a highway repairable by the inhabitants at large, unless by virtue of the proceedings prescribed by the Highway Act 1885, or the Public Health Act, and no such proceedings are alleged. Nor are there any admissions or findings which enable us to say whether the defendants have not, under the inclosure award, a right as against the surface-owners to let down the surface. It seems to be admitted that they have, unless the soil of the roadway is to be taken to be excepted; but it is at least arguable that they have the same rights in respect of the roadway as in respect of the adjoining lands, subject to the provisions of the Public Health Act as altered by the Highway Act 1878. The attention of the parties not having been directed to these points, and the admissions and findings not being sufficient to enable us to come to any satisfactory conclusion upon these points, and the relators having clearly failed on the only real point, I think the motion for judgment must be dismissed, leaving it open to either of the parties to bring the case on for trial, if they think it worth while, on the question of nominal damage.

Collins, J. read the following judgment:—In this case the plaintiffs, a local authority in whom a highway (being as I assume, for the defendants did not dispute it, a highway repairable by the inhabitants) is vested under the Public Health Act, seek to recover damages from the defendants, who are mine-owners, for the withdrawal by them of vertical and lateral support which has had the effect of letting down the highway to the extent of about ten feet. The subsidence of the highway is part of a general subsidence of a large tract of country brought about by the defendants' workings, and no inconvenience would be caused to the public, and no expense to the plaintiffs, but for the fact that a railway crossed the highway at its original level, and while the highway has been allowed to subside the railway has been maintained at its old level. The consequence is, that the railway now crosses the road on a solid wall or embankment ten feet high forming an absolute bar to the passage of traffic. Before beginning the workings which caused the subsidence, the mine-owners gave to the railway company notice pursuant to the Railways Clauses Act; but the latter declined to purchase, preferring to bear the expense of such works as should be necessary in order to maintain the line at its old level. This case comes before us upon admissions and upon the finding of a referee, and it is found as a fact that the road in question was an ancient highway and public carriage-way at the date when the railway was made, and though this admission in no way binds the railway company, the rights of the parties to this action must be ascertained on the basis of such being the fact. There is no special provision whatever in the railway company's Act providing for the crossing of this road. There is merely a general power authorising the undertakers to make and maintain the railway in the lines and at the levels shown on the plans, and it is admitted that the rails are now at the level shown on such plans. The plaintiffs contend that they can recover from the mine-owner the estimated cost of making a subway under the railway as part of the damages flowing from the subsidence brought about by his acts. The mere statement of this proposition seems to carry with it its refutation. In what sense can the railway embankment be said to be caused by or legally consequent upon the subsidence? On the assumption that the road was a public highway, the railway company had no right to cross it otherwise than as provided by sect. 46 of the Railways Clauses Act; that is to say, over or under it if it was a carriage-way, or with the consent of justices on a level if it was not a carriage-way; but in

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took no power to obstruct the road by erecting a wall across it. It was argued that the railway have a right to maintain their line at the original level, and so they have; but this could not justify them committing a nuisance by obstructing the highway, nor can the defendants be made responsible for the independent wrong of the railway company. Suppose after the Bill had passed and before the railway was built the road had sunk, would the railway company have been justified in building a solid wall across it? If not, what difference can it make that the wall has been built by degrees and not all at once? I am clearly of opinion, therefore, that the defendants cannot be made responsible for the costs of removing the obstruction placed on the road by the railway company. These considerations suffice to determine the real question in the action against the plaintiffs; but it was contended by Mr. Moulton that the plaintiffs, being only owners *sub modo* of the surface of the highway, cannot maintain an action even for nominal damages; as but for the existence of the railway the subsidence has caused them and will cause them no pecuniary loss, nor in any way interfere with their user of the road under their various powers. It seems to me, however, that to take this view would be to adopt the contention that was rejected in *Coverdale* v. *Charlton* (40 L. T. Rep. 88; 4 Q. B. Div. 104). In that case it was held that the local authority took such an interest in the soil of the road as to enable them to confer a right upon a grantee to maintain trespass. I think the limitations placed upon their interest in air above the surface in the subsequent case of *Wandsworth Board of Works* v. *United Kingdom Telephone Company* (51 L. T. Rep. 148; 13 Q. B. Div. 904), and upon the duration of their interest in *Rolls* v. *The Vestry of St. George's, Southwark* (43 L. T. Rep. 140; 14 Ch. Div. 785), in no way modify the effect of the former decision as to their right in the soil of the street itself. Those cases seem to me clearly to establish that a property as distinguished from an easement in that which constitutes the street is vested in the authority, and I think it would be to put an anomalous limitation upon ownership to hold that the persons in whom such property is vested cannot maintain an action for an invasion of their proprietary rights on proof of a substantial subsidence such as I think is shown in this case, even though unaccompanied by proved pecuniary damage. "I think," says Brett. L.J. n *Coverdale* v. *Charlton* (4 Q. B. Div. at p. 121), 'that the local board had to a certain depth of the land and to the whole of the surface the ordinary rights of proprietors." Mr. Moulton did not contend that an ordinary owner would not have this right, nor did he suggest that there were any special limitations in this case placed on the rights of the owner of the surface unless they were to be found in the provisions of the Inclosure Act referred to in the admissions, as to which, however, he did not contest the authority of *Benfieldside Local Board* v. *Consett Iron Company* (38 L. T. Rep. 530; 3 Ex. Div. 54); but in consequence of an observation from the bench, the point was raised and discussed, and as the plaintiffs' rights are certainly not higher than those of a private owner it is necessary to decide it. I have no doubt whatever that such an action would lie without proof of pecuniary loss. I think the principle at the root of the matter is, "that the owner is entitled to the support of the adjoining land for his own land in its natural state unaffected by any act done in the neighbouring land" (see per Willes, J., delivering the judgment of the Exchequer Chamber, in *Bonomi* v. *Backhouse*, Ell. Bl. & Ell. 622, at p. 657), and that as soon as the condition of the plaintiffs' land has been in fact changed to a substantial extent by the withdrawal of lateral support, the plaintiff has sustained an *injuria* for which he may maintain an action without proof of pecuniary loss. In the same case Willes, J. compares the right to that in the flow of a natural river—a right which is unquestionably invaded where a sensible alteration has been produced in the character of the water where it passes the plaintiffs' land, although there is no money damage: (see *Ormerod* v. *Todmorden Joint Stock Mill Company Limited*, 11 Q. B. Div. 155; *Crossley* v. *Lightowler*, L. Rep. 2 Ch. 478). That such is the true principle, *i.e.*, that it is the subsidence and not the pecuniary loss which grounds the cause of action is, I think, apparent from those decisions which establish that, on proof, that the weight of a newly-erected house has not contributed to the subsidence, its value may be recovered by way of damage consequent on the original injury in an action against the adjoining owner who has withdrawn the support of the adjacent land: (*Brown* v. *Robins*, 4 H. & N. 186; *Hamer* v. *Knowles*, 6 H. & N. 454.) In these cases the fall of the house itself could give no cause of action, for there was no right to have it supported; therefore, an *injuria* giving a right of action had to be shown before the consequential damage by reason of the falling house could be claimed; and such an *injuria* was shown on proof that the unincumbered soil would have subsided although no pecuniary damage, even to the extent of a farthing, was suggested or proved had not the house been there. The judgments in *Mitchell* v. *Darley Main Colliery Company* (52 L. T. Rep. 675; 14 Q. B. Div. 125; 11 App. Cas. 127), which it was suggested countenanced the contrary view, seem to me to be entirely opposed to it. In the Court of Appeal Lord Esher throughout treats the subsidence itself as the cause of action, and Bowen and Fry, L.JJ. both express their preferment for that view. In the House of Lords nothing to the contrary of this is raised by any of the learned lords, and it is formulated in most distinct terms by Lord Fitzgerald in four propositions of which the first and fourth are as follows: 1. The owner of the surface has a natural and legal right to the undisturbed enjoyment of that surface in the absence of any binding agreement to the contrary. 4. Where in consequence of (the owner of the minerals) not leaving or providing sufficient supports, a disturbance of the surface takes place, that disturbance is an invasion of the right of the owner of the surface and constitutes his cause of action. I do not think the words of Lord Cranworth, in *Backhouse* v. *Bonomi* (9 H. of L. Cas. 503) in any way conflict with this view. He says (p. 112), "his (*i.e.*, the plaintiff's) right is a right to the ordinary enjoyment of his land, and till that ordinary enjoyment is interfered with he has nothing of which to complain." I think he merely means that there must be some real sensible interference with the land, and that he did not mean to suggest that the ordinary enjoyment of the land was not interfered with wherever

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the damage caused by such interference was not measurable in money. He is merely excluding as causes of action interference so slight as to come under the rule *de minimis*. No doubt learned judges have not always used the words damage and injury in their strictest technical sense in dealing with such questions. It was frequently quite unnecessary to do so, as there was pecuniary damage as well as injury. Another source of some confusion is that damage not measurable in money has been treated as equivalent to a physical alteration so small as to amount to nothing in contemplation of law, an observation which may perhaps explain *Smith* v. *Thackerah* (14 L. T. Rep. 761; L. Rep. 1 C. P. 564), which is the only case, so far as I know, which might seem to throw doubt on the principle which I have stated. The report, too, of that case in 35 L. J. 276, C. P., gives more ground for supposing that the weight of the buildings may have contributed to the subsidence: see the judgment of Byles, J. and the arguments of defendant's counsel. On the whole, I am clearly of opinion that an ordinary owner could maintain an action for nominal damages on the facts in this case, and, as I have already said, I think the local authority stands in no worse position subject to another point which was not indeed taken by counsel, but which was raised during the argument, and must be decided, viz., the effect of sect. 27 of the Highway Act 1878, which permits the mine-owner to mine just as he might do if the road had not become vested in the authority, "but so, nevertheless, that in such working or getting no damage shall be done to the road or highway." Road or highway in this connection cannot mean the right of passage only as distinguished from that which constitutes the street, and I do not think the word damage is used to denote only damage measurable in money, or that the section was intended to give the miner larger rights against a local authority than he would have had against any other owner of the surface only, so as to debar the former from suing without showing pecuniary loss where the latter might sue for the *injuria* only. The argument which might be urged against the view which I have taken, based on the absence of any provision for compensation to the mine owner is to some extent met by the observations of Brett, M.R., in *Coverdale* v. *Charlton* (*ubi sup.*), and when it is remembered that the origin of highways is dedication which is *primâ facie* a renunciation by the grantor of the right to derogate from his grant by interfering with the enjoyment of the highway, the alleged injustice could hardly in most cases amount to a real grievance. As against the adjoining mine-owner, in the absence of some contract between him and the dedicating owner, there is no alteration of rights, and therefore nothing to compensate. What would be the position of the local authority, if at the time of the dedication there were rights subsisting for third persons against the grantor, it is not necessary to determine as there is no suggestion that any such rights existed in this case. Lastly remains the claim for an injunction. Upon this part of the case I think the plaintiffs have not made out such a case of probable continuance by the defendants of workings likely to affect the highway as to warrant us in granting an injunction. In the result I think the plaintiffs are entitled to judgment with nominal damages against the defendants, but, as they have failed in the real claim in the action, I think it should be without costs.

Motion dismissed.

Solicitors for plaintiffs, *Frith Needham*, for *Stanley* and *Jackson*, Walsall.

Solicitors for defendants, *Smiles*, *Ollard*, and *Yates*, for *Duignan* and *Elliot*, Walsall.

QUEEN'S BENCH DIVISION, IN BANKRUPTCY.

Nov. 16 *and* 19, 1894.

(Before Williams, J.)

Scobie *v.* Collins. (*a*)

Bankruptcy—Mortgage—Landlord and tenant—Death of mortgagor—Possession and payment of interest by his heir-at-law.

A mortgagor, who was tenant at will to his mortgagee under an attornment clause in the mortgage, died intestate, and his heir-at-law entered into possession, and paid interest on the mortgage debt, receiving receipts as for interest and not rent. The interest being in arrear the mortgagees distrained; the trustee in bankruptcy of the heir brought an action for illegal distress.

Held, that the original tenancy was put an end to by the death of the mortgagor; that a new tenancy had not been created between the heir-at-law and the mortgagees; that, therefore, the distress was illegal.

Semble, *that, had the original tenancy continued, the attornment clause would, in so far as it gave a right of distress, have been void as a bill of sale.*

This was an action by the trustee in bankruptcy of T. P. Pymber, to recover damages against the defendant for an improper distraint upon his goods.

In the year 1860 Thomas Pymber borrowed from Mr. A. Hancocks the sum of 10,000*l.* at 5 per cent. interest, reducible to 4 per cent. on punctual payment.

In the mortgage deed there was the following attornment clause:

And the said Thomas Pymber doth hereby attorn and agree to become tenant to the said Arthur Annesley Hancocks, of the said estate, messuage, or tenement, and farm cottages, or tenements, lands, hereditaments, and premises, hereby released at the yearly rent of 500*l.*, to be paid and payable by two equal half-yearly payments on the 26th day of September and the 15th day of March in every year whilst he shall be permitted to remain tenant of such estate, messuage, or tenement, and farm cottages or tenements, lands, hereditaments, and premises. And the said Thomas Pymber hath this day paid into the hands of the said A. A. Hancocks the sum of 1*s.* upon such attornment and on account of the accruing rent.

The interest on the mortgage debt was paid regularly every half-year by Thomas Pymber during his life.

On the 14th Oct. 1863, by a marriage settlement the mortgagee assigned over the mortgage to the defendants as trustees upon trust to pay the interest on the 10,000*l.* to himself for life, and after his death to his intended wife for her life, and after the death of the survivor for the issue of the said intended marriage.

(*a*) Reported by Walter B. Yates, Esq., Barrister-at-Law.

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In 1888 Thomas Pymber died intestate, leaving an only son Thomas Philip Pymber.

The son took possession of his deceased father's household effects, farming stock, &c., without obtaining letters of administration, and as heir-at-law entered into possession of the estate, and farmed it for his own use, and kept down the interest on the mortgage debt.

The receipts were made out as for interest and not for rent.

Thomas Philip Pymber was adjudged bankrupt on the 30th Nov. 1893 and on the 6th Dec. the plaintiff was appointed trustee.

On the 26th Sept. 1893 there was due from Thomas Philip Pymber one half-year's interest upon the principal sum, secured on the mortgage made between Thomas Pymber and Arthur A. Hancocks.

In October the trustees under the marriage settlement levied a distress on the estate to recover the above half-year's interest as rent, claiming to do so as landlords under the attornment clause.

The trustee in bankruptcy commenced an action against the defendants for an improper distress.

The case was tried before Williams, J.

Bosanquet, Q.C. and *Patey* for the plaintiff.—The plaintiff is entitled to a verdict. The attornment clause could only create the relationship of landlord and tenant at will between the original mortgagor and the mortgagee. That, however, was a personal relationship which terminated by the death of the mortgagor in 1888:

Turner v. *Barnes*, 2 B. & S. 435.

There is no evidence that a new tenancy was created here. The son paid 400*l.* a year as interest and not rent; there was nothing done which was consistent only with the creation of a new tenancy:

Doe v. *Rock*, 4 M. & Gr. 30.

A. T. Lawrence (*Prance* with him) for the defendants.—There was a tenancy between the mortgagor and mortgagee, the son went on paying interest from 1888 to 1893 really as rent; this would be sufficient evidence of a new tenancy. The tenancy created by the attornment clause was a yearly tenancy, and this vested in the son as administrator *de son tort* of his father:

Re Threlfall; Ex parte The Queen's Society, 42 L. T. Rep. 596: 16 Ch. Div. 274.

Bosanquet in reply.

WILLIAMS, J.—This was an action of trespass, and the question raised was whether the defendants had a right to distrain as they did. The defendants, by their statement of defence, rely upon an attornment clause contained in an indenture of mortgage dated the 26th March 1881, and the relationship of landlord and tenant arising thereunder. The defendants cannot, strictly speaking, rely on this attornment and consequent tenancy. The original mortgagor who attorned is dead, and the tenancy at will founded upon the attornment clause came to an end with his death: (*Turner* v. *Barnes*.) Had the tenancy continued the attornment clause, in so far as it gave a right of distress, would have been void as a bill of sale, on the authority of *Mumford* v. *Collier* (25 Q. B. Div. 279). The defence must be based on a new tenancy arising on the occupation of the mortgagor's son, which commenced in 1888. I do not know that the defence as drawn really raises the defence founded upon this new tenancy; but I think I ought to treat the defence as amended, so as to raise the defence founded on this new tenancy. This being done, the question is whether there is evidence of a new tenancy at will under which the bankrupt became tenant of the mortgagee. There is no doubt that the occupation by the bankrupt was an occupation connected with the mortgage, because that which the bankrupt paid was called in the receipts, interest; but am I entitled to hold that the interest so paid by a person who never attorned tenant was paid as rent? In *West* v. *Fritche* (3 Ex. 216) the interest was not paid as rent; but the court held there was a tenancy. That decision was based entirely on occupation by one who had executed a deed containing an attornment clause. Here the suggested tenancy was by one who has not executed any attornment clause, and who had merely occupied and paid interest as mortgagor in possession. A mortgagor in possession is not necessarily more than a tenant at sufferance. Occupation and payment of interest not connected with the mortgage is not necessarily referable to a tenancy other than a tenancy at sufferance. I think it is tolerably clear that the occupation of Mr. Pymber here was to his knowledge subject to the rights of the mortgagee. I am afraid I cannot find that he ever attorned tenant, or that the evidence shows that he knew he was tenant. It is unfortunate that the receipts were not given as for rent, but only given for interest. My judgment must be for the plaintiff for the amount that the goods realised at the sale less certain deductions. I have no reason to doubt that the trustee would have had to realise the goods by sale, or that he would have realised by a sale more than was realised.

Judgment for plaintiff.

Solicitor for the plaintiff, *A. Hunt*.

Solicitors for the defendant, *Gissing* and *Skelton*, for *F. H. Adams*, Upton Bishop.

Tuesday, Nov. 27, 1894.

(Before WILLIAMS, J.)

Re MARSH; *Ex parte* THE BOARD OF TRADE. (a)

Bankruptcy—Small bankruptcy—Motions by trustee dismissed with costs—Trustee's costs payable out of the estate—Three-fifths of the costs only—Bankruptcy Rules 1886, *r.* 112.

Motions made by the trustee in a small bankruptcy against creditors, to have payments made to them by the debtor declared void as fraudulent preferences were dismissed with costs, but the trustee was allowed to recoup himself out of the estate: (*Bankruptcy Rules* 1886, *r.* 112.)

Held, that the trustee was only entitled to the lower scale of costs out of the estate, namely, three-fifths of the charges ordinarily allowed, disbursements being added, and not to his costs in full.

THIS was a small bankruptcy. The trustee in bankruptcy of the debtor had made motions against creditors to have declared void as fraudulent preferences payments made by them to the debtor. The motions were dismissed with costs, but the trustee was allowed to recoup himself his costs out of the estate.

(a) Reported by WALTER B. YATES, Esq., Barrister-at-Law

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The registrar of the County Court at Huddersfield on taxation allowed the trustee his full costs out of the estate without deduction.

The Board of Trade objected, and required the taxation to be reviewed under rule 124 (1) of the Bankruptcy Rules 1886 by a taxing master of the High Court. The taxing master allowed the trustee only three-fifths of the costs out of the estate under the provisions of rule 112 of the Bankruptcy Rules 1886.

This was an application to the court to review that taxation.

R. W. Barnett in support of the application.—The decision of the registrar was right and that of the taxing master was wrong. The trustee has had to pay his opponent's costs in full, and he is entitled to recoup himself in full from the estate. The case is governed by

Re Dowson; Ex parte Jaynes, 59 L. T. Rep. 446; 21 Q. B. Div. 417.

These costs were "costs which are in the discretion of the court," and which only come to be paid out of the estate in consequence of the court exercising its discretion in a particular way. The trustee has had to pay these costs, and, inasmuch as he was allowed to recoup himself out of the estate, he ought to have what he has actually paid. The County Court judge said the trustee would have failed in his duty had he not brought the motions, and he specially allowed his costs out of the estate. The case of *Re Proctor* (65 L. T. Rep. 348; (1891) 2 Q. B. 433) is quite different. In that case the trustee applied to disclaim leaseholds, and the court held that the costs of his application were costs of a proceeding under the Act which as a general rule were payable out of the estate, and must be therefore taxed on the lower scale.

M. Mackenzie.—The decision of the taxing master was correct. The applicant is only entitled to have three-fifths of his costs out of the estate, as the requirements of rule 112 are complete; this was a small bankruptcy, and the costs were "payable out of the estate." A trustee is only allowed his proper costs if no remuneration is voted him:

Sect. 72 of the Bankruptcy Act 1886;
Sect. 15 of the Bankruptcy Act 1890;
Re Pooley; Ex parte Harper, 20 Ch. Div. 685.

The case of *Re Dowson* decides that, when a trustee takes proceedings, he must pay if the order is against him the full taxed costs to his opponent; and that case is distinguished in *Re Proctor*, where the same judge says that rule 112 applies where "a solicitor who under the Act or rules is doing something for the benefit of the estate which will give him a right to have his costs paid out of the estate," and the fact that the court has a discretion to disallow costs which otherwise would be payable out of the estate does not prevent the application of the rule.

WILLIAMS, J.—I am afraid I must put a very impracticable meaning on this rule, for I must support the decision of the taxing master, which I do with considerable regret, as I feel that what I am doing is not serving really any useful purpose. Here are the words of rule 112 (2): "Subject to the provisions of No. 1 of the scale of costs, where the estimated assets of the debtor do not exceed the sum of three hundred pounds, a lower scale of solicitors' costs shall be allowed in all proceedings under the Act in which costs are payable out of the estate, namely, three-fifths of the charges ordinarily allowed, disbursements being added; and if in error any charges have been allowed or paid on the higher scale, and the gross proceeds of the assets shall be ascertained not to exceed three hundred pounds, the excess shall be disallowed, and if paid, shall be repaid to the trustee." I very much doubt if it was intended that that rule should apply at all to litigious proceedings; but at the same time I do not feel justified, in the face of the decision of Cave, J. in *Re Proctor*, in so deciding; and, if I cannot do so, it would seem that all the requirements necessary to bring this case within the rule are here. The assets do not exceed 300*l.*, and this is a proceeding under the Act, and unless litigious proceedings are excluded I do not see how I can do otherwise than hold that the rule applies. I hope someone will take the steps necessary to have this set right. I do not like to criticise the rules; but it would appear that according to the judgment of Cave, J. in *Re Dowson*, the trustee, if he succeeds, will get full costs from the respondent; but it is obvious that all he is entitled to from the unsuccessful respondent is an indemnity, he cannot in honesty be entitled to burden his unsuccessful opponent with more than he will have to pay himself. It is not, because you are administering an estate, whether of a bankrupt or a deceased person, that you can overlook the elementary rules of morality. It is common honesty that a man who recovers under an indemnity should not recover in excess of his loss, in excess of what he will have to pay. But if the law remains as now, the trustee when he succeeds will recover the full amount of costs as between party and party, although if he loses he can only charge the estate with the reduced amount. To make the matter clear, suppose an order is made for costs against a respondent, and suppose the unsuccessful respondent is impecunious and cannot pay, the costs may be taxed on the higher scale, and, under these circumstances, as the impecunious respondent cannot pay, the solicitor would have a right to come upon the estate, and will then get a less amount than he had attempted to get and would have got from the respondent if he had been able to recover it. I do hope that this matter may be put right. The fact is, it is as much to the advantage of the estate as it is to the advantage of anybody, that in litigious business the scale of costs for a solicitor should be the same, whether he is going to charge his client the estate, or whether he is going to charge the unsuccessful opponent in the litigation.

Application dismissed.

Solicitor for the applicant, *A. G. Foulkes.*

Solicitor for the respondent, *The Solicitor to the Board of Trade.*

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Tuesday, Dec. 4, 1894.

(Before WILLIAMS, J.)

Re CHAPMAN; *Ex parte* CLARK. (*a*)

Bankruptcy—Administration of deceased's estate—Costs of administration — "Testamentary expenses"—Payable in full—Bankruptcy Act 1883 (46 & 47 *Vict. c.* 52), *s.* 123.

By sect. 125 (7) *of the Bankruptcy Act* 1883, "*In the administration of the property of the deceased debtor under an order of administration . . . any claim by the legal personal representative of the deceased debtor to payment of the proper funeral and testamentary expenses incurred by him in and about the debtor's estate . . . shall be deemed a preferential debt under the order and be payable in full.*"

The words "testamentary expenses" include the costs incurred by an executrix in connection with an action brought to administer the deceased's estate by creditors, and are payable in full out of the estate.

THIS was an application for costs.

J. R. Chapman, by his will, appointed his wife as executrix, and on his death an action was commenced against the executrix in the Chancery Division by the creditors to have his estate administered.

Subsequently, all matters having been referred to the Bankruptcy Court, the executrix lodged an account of her dealings with the estate according to the provisions of rule 278 of the Bankruptcy Rules 1886.

The executrix became bankrupt, and a trustee was appointed.

The present application was by her for an order that the costs of herself and those of the plaintiff in the administration action, including all costs incurred about the administration of the deceased's (J. R. Chapman) estate might be taxed and paid in full out of the estate.

The question for the opinion of the court was, whether such costs were "testamentary expenses" within the meaning of sect. 125 of the Bankruptcy Act 1883, and therefore payable in full.

Stokes for the executor.—*Harloe* v. *Harloe* (33 L. T. Rep. 247; 20 Eq. 471) shows that "testamentary expenses" include the costs of an administration action. She carried in an account, but there is no provision for these costs.

F. C. Willis for the trustee in bankruptcy of the executrix.

WILLIAMS, J.—I order that the costs of the plaintiff and defendant be taxed and paid out of the estate in full, together with the costs of this application.

Solicitor for the applicant, *George Clark.*

Solicitors for the trustee, *Green* and *Green.*

Friday, Dec. 14, 1894.

(Before WILLIAMS and WRIGHT, JJ.)

Re WAITE; *Ex parte* BENTLEY'S YORKSHIRE BREWERIES. (*a*)

Bankruptcy—Act of bankruptcy—Notice of suspension of payment — Bankruptcy Act 1883 (46 & 47 *Vict. c.* 52), *s.* 4 (*h*).

By the Bankruptcy Act 1883, *s.* 4, *a debtor commits an act of bankruptcy* (*h.*) *if he gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts.*

A debtor's solicitor wrote to the creditors, "I have been consulted by Mr. J. B. W. . . . and I find that his affairs are in so complicated a state that it is only right his creditors should be called together to decide whether the serious loss to them in bankruptcy can be avoided. I therefore respectfully request your attendance at a meeting of creditors to be held at . . . when and where a statement of affairs will be submitted."

Held, that this letter was a notice within the meaning of sect. 4, *and therefore an act of bankruptcy on which a receiving order should be made.*

THIS was an appeal by the petitioning creditors from the refusal of the registrar of the Yorkshire County Court, to make a receiving order against the debtor

On the 3rd May 1894 a petition was presented by the Yorkshire Breweries Company against the debtor, the alleged act of bankruptcy being that the debtor had issued to his creditors a notice that he was about to suspend payment of his debts.

Muir Mackenzie, for the appellant, cited

Crook v. *Morley*, 65 L. T. Rep. 389; (1891) A. C. 316;

Re Simonsen; Ex parte Ball, 70 L. T. Rep. 32;

Re Lamb, 55 L. T. Rep. 817.

The debtor did not appear, and was not represented.

WILLIAMS, J.—I am of opinion that the receiving order ought to be made in this case. I am not acting upon either of the recent decisions of my own to which my attention has been drawn, but I am acting on the principles laid down in *Re Lamb* and *Crook* v. *Morley*. No doubt after this section first appeared in the Bankruptcy Act, there were decisions going to show that nothing could be a notice of suspension which was not given formally and deliberately, and complied in form with the very words of the section, but if that was the intention of the earlier decisions these cases have been departed from, and the rule now is that provided that the notice is an unqualified notice, and not merely that the debtor will or proposes to do something upon the happening of an event which has not arrived, but is that which he intends to do independently of the happening of any future event, then, if the notice is one from which an ordinary business man would infer such an unqualified intention, the notice is within the section. Such being the rule, one has to see whether this is such an unqualified notice. I do not mean, and I did not mean, that it is impossible that a debtor should give a notice through an accountant; but I do say that, when a debtor calls in an accountant to advise him, and in the result addresses a notice to all his creditors inviting them to consider what is best to be done, it requires very little to make one read such a notice as a notice of suspension of payment. Then, if you have words which could be read into such a notice by commercial men, it is plain that, when a debtor says it is right that his creditors should be called together, he must mean that he is not in a position to make payment, and

(*a*) Reported by WALTER B. YATES, Esq. Barrister-at-Law.

(*a*) Reported by WALTER B. YATES, Esq., Barrister-at-Law.

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he must suspend, and the only question is will the creditors meet it by a scheme, or allow him to go into bankruptcy. *Receiving order made.*

Solicitors for the appellant, *Scott Lawson.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

DIVORCE BUSINESS.

Nov. 5 *and* 15, 1894.

(Before the PRESIDENT (Sir F. H. Jeune.)

TASKER *v.* TASKER. (*a*)

Husband and wife — Jewellery given during marriage—Paraphernalia — Married Women's Property Act 1882 (45 *&* 46 *Vict. c.* 75), *s.* 17—*Husband's claim dismissed.*

The husband and wife, who were married in 1888, *lived together till* 1893, *when the husband filed a petition for divorce against his wife. During the time they lived together, he at various times presented his wife with jewellery of the value of over* 8000*l. Some of the articles were given about Christmas time and the anniversaries of the wife's birthday, and more than one article of considerable value was given "as a peace-offering" after quarrels between husband and wife.*

Upon a summons by the husband under sect. 17 *of the Married Women's Property Act* 1882:

Held, that the jewellery in question did not constitute paraphernalia, but was the absolute property of the wife.

THIS was an appeal from chambers where the President had upheld the report of the registrar made upon an inquiry under sect. 17 of the Married Women's Property Act 1882 (45 & 46 Vict. c. 75), and had dismissed a summons by the husband calling upon the wife to hand over to him certain jewels which he alleged to be paraphernalia, and not her absolute property.

The value of the jewels originally in dispute was over 9000*l.*, but this was reduced to about 8000*l.* by the withdrawal of the husband's claim to a certain portion of the jewels which had been presented to the wife before marriage.

The parties were married in Nov. 1888, and the property now in question was given to the wife at various times between that date and the final separation of the parties in 1893, after which the husband instituted divorce proceedings in this court. Those proceedings were now pending.

The wife stated that her husband's income was 40,000*l.* a year, and, although this was said to be an exaggerated estimate, he was admitted to be a man of very large means.

The only witnesses before the registrar were the husband and wife, and their evidence was in complete conflict. On the one hand, the husband swore that he had used expressions to his wife in regard to the jewels, clearly indicating to her at the times of presentation that the articles were to remain his property, and were only to be used by her for her personal adornment so long as she remained his wife. The wife, on the other hand, denied upon oath that any such expressions were used by her husband at any time.

The registrar reported that, from the demeanour of the wife, he preferred to rely upon her evidence rather than on that given by the husband, and he considered that she was corroborated by the following circumstances:—(1) That, notwithstanding the evidence given by him to the contrary, the husband had never, till the divorce proceedings were threatened, given his wife to understand that the jewels were only lent to her for her use; (2) that the jewels presented after marriage were handed to the wife in the same manner, and, in effect, with the same words, as those given before marriage; (3) that the jewels were always in her possession, and, when the parties went abroad, were, with the knowledge and approval of the husband, deposited in the wife's name at a bank; (4) that some of the articles were purchased about Christmas time, and some others at the time of her birthday anniversaries, thus tending to confirm her statement that these articles were Christmas or birthday presents; (5) that the cases containing the articles were all marked with the wife's initials—of her maiden name before marriage, and of her married name after marriage—and this was done, in every case, by the husband's orders.

Upon the report being brought before the President, in chambers, he intimated that he saw no reason why he should differ from the view taken by the registrar on the facts, this being a case in which so much depended on the demeanour of the witnesses, whom the registrar had had an opportunity of seeing. He also agreed with the registrar that the circumstances above mentioned tended to corroborate the wife's account, which was further substantiated by the fact that a portion of the jewels in question, of considerable value, were given as what were termed "peace-offerings," upon occasions when differences between the husband and wife had arisen and been dispelled.

Another point taken in chambers and relied on in court was that, allowing that the jewels were presented by the husband to his wife, they were given as paraphernalia, and that, therefore, the husband could alien or reclaim them.

The President (in chambers) declined to accede to this view, and dismissed the summons.

The husband appealed.

Inderwick, Q.C. and *Priestley* for the appellant. —Before the Married Women's Property Act 1882, presents made by a husband to his wife before marriage became, upon marriage, the property of the husband. Since that Act, presents given to a wife before marriage remain her absolute property on the marriage. On the other hand, family jewels and heirlooms never became the absolute property of a wife; she had merely the right to wear them if she chose to do so. In another category are to be placed presents made to a wife by third parties, either before or during marriage. The old law appears to have been, that presents made to the wife before marriage by third parties, with the knowledge and assent of the husband, became the absolute property of the wife, if she survived him and he had not disposed of them during his life; presents made to a wife by third parties during her marriage, with the knowledge and assent of the husband, became the absolute property of the wife, if she survived him and they had not been disposed of. Before

(*a*) Reported by H. DURLEY GRAZEBROOK, Esq., Barrister-at-Law.

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the Act, jewellery given by a husband to his wife in order that she might use the articles for the adornment of her person before the world became the qualified property of the wife, and was considered as paraphernalia. They did not stand on the same footing as any other class of property known to the law. The husband during the marriage could, if he thought proper, recall those gifts, and his creditors could, if necessary, have recourse to them; but if that were not done during the marriage, then, without any further form of gift or proceeding, they, on the husband's death, became the absolute property of his wife; subject, however, to the condition that, if the estate left by the husband proved insufficient to satisfy his debts, the creditors of the husband could have recourse to the jewellery in order to satisfy their just claims:

Graham v. *Londonderry*, 3 Atk. 392, and cases there cited;
Seymore v. *Tresilian*, Ib. 358.

Now, the Married Women's Property Act puts the parties in this position, that it is not necessary to go through the process of declaring gifts to be the separate property of the wife if the donor so intend; they become her property by the mere delivery of the chattels. But there is nothing in the Act affecting this particular question; there is nothing in it which says that jewels given to the wife by the husband for the purpose of her personal adornment during the marriage are not to be held by her merely upon the restricted ownership attaching to paraphernalia. The question in every case must still be, was this a gift of paraphernalia, or was it a gift out and out? It is a question of fact. [The PRESIDENT.—I suppose that a husband may still make presents to his wife as paraphernalia.]

Williams v. *Mercier*, 47 L. T. Rep. 140; 9 Q. B. Div. 337; 10 App. Cas. 1;
Jervoise v. *Jervoise*, 17 Beav. at p. 570;
Re Jamieson; *Ex parte Pannell*, 60 L. T. Rep. 159; 6 Morrell, 24;
Re Player; *Ex parte Harvey*, 53 L. T. Rep. 768; 15 Q. B. Div. 682;
Re Vansittart; *Ex parte Brown* v. *Vansittart*, 67 L. T. Rep. 592; (1893) 1 Q. B. Div. 181.

[The PRESIDENT.—This is not the first time that the diamond necklace case has been quoted to me, but I confess I cannot quite understand it. To say broadly that when a man makes a gift of diamonds to his wife he makes a settlement upon her, is to say something that I cannot understand.] The test to be applied in order to find out whether the articles given constitute paraphernalia or are a gift out and out is the old test, namely, whether they were given for the personal adornment of the wife's person. Where a man gives jewels to his wife, and says nothing whatever about them, they would be paraphernalia, even if given on her birthday. [The PRESIDENT.—Then cannot a man make a present of jewellery to his wife out and out? The point that is pressing on my mind is whether, where there is a present without anything being said, the gift can be held to be paraphernalia, or, whether it is not a gift out and out.] The question is, now that the parties are placed to each other in different relations to those which they occupied at the times when the gifts were made, whether the presents should be held to be gifts out and out. The value is large, even looking to the income of the parties. Where large quantities of jewels are handed by a husband to his wife, this can be only that they should be in the condition in which they are handed to her, and in order that they may be worn by her qua wife. The intention to be gathered is to be gathered very much from what passes at the time of handing them over, but also very much from the kind, quantity, and value of the jewels themselves.

Whateley for the respondent.—The original claim put forward by the husband comprised not merely articles given to his wife during the marriage, but articles given to her before marriage. As the law stood in the time of Lord Hardwicke, a man could give to his wife jewels for her separate use. *Primâ facie*, at that period, the whole of a wife's property belonged to her husband from the date of their marriage; but, even then, there was no difficulty in law, provided that the evidence of his intention were clear, in a husband giving jewels to his wife absolutely. Now, however, the old state of the law has been entirely altered by the provisions of the Married Women's Property Act 1882. By sect. 1 all property which a wife acquires she is entitled to hold as if she were a *feme sole*, and she is exactly like a *feme sole* for purposes of acquiring property. The sole question, therefore, is whether she has in fact acquired it. The presumption is altered; it now is that the property held by the wife belongs to her for her separate use, and she is to hold it in all respects as if she were a *feme sole*. Where you find words of gift, and nothing else, the presumption is that the wife holds the property for her separate use, the former presumption which arose under the old law being entirely gone: (McQueen's Husband and Wife, 114.) The case of *Re Vansittart* (*ubi sup.*) is a strong authority in favour of the wife. At all times, by the use of apt words, an absolute gift might be made by a husband to a wife; but, whereas under the old law the onus was upon the wife, it now lies upon the husband to show that the gift is not absolute, the husband and wife being no longer one, but two persons, for purposes of property. The former law as to the unity of husband and wife for purposes of property is now completely altered. In *Re March*; *Mander* v. *Harris* (49 L. T. Rep. 168; 24 Ch. Div. 222), the decision of the court below was reversed in the Court of Appeal (51 L. T. Rep. 380; 27 Ch. Div. 166; 32 W. R. 941) because the will in question had been made before the Married Women's Property Act. The right of the husband or wife was always a question of fact. The registrar was quite right in reporting as he did, and the order in chambers dismissing the husband's summons should be upheld.

Cur. adv. vult.

Nov. 15.—The PRESIDENT.—In this case a claim was made by the husband, the petitioner in a divorce suit, for jewels of considerable value, against his wife, under sect. 17 of the Married Women's Property Act 1882. The claim was referred to the registrar, and I had his report before me. It appears from that document, and from figures supplied to me on the arguments, that the value of the jewels originally in dispute was 9319*l.* 5*s.*, but that as to a portion of those jewels worth 1163*l.* 5*s.*, the claim of the husband was withdrawn, for the reason, as to almost all of

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them, that they were presents before marriage. The learned registrar states that it was said, but not proved, that the husband's income was about 40,000*l.* a year. I was told that this was an exaggeration, but that undoubtedly he is a man of large means. Before the registrar the husband contended that the jewels were his absolute property, and that he only allowed his wife to use them. The wife, on the other hand, maintained that the jewels were given to her absolutely. The only witnesses were the husband and the wife, and there can be no doubt that their evidence was in complete contradiction. He alleged that he had used expressions to his wife about the jewels clearly indicating that they were to remain his property, all of which the wife denied. The learned registrar has stated that from the demeanour of the wife he considered her evidence was to be relied upon rather than that of the husband, and he thought that she was corroborated by the circumstances. [The learned Judge read the circumstances mentioned in the report, and continued:] I see no reason to differ from the learned registrar on the question of fact. It was a case in which much depended on the demeanour of the witnesses, whom the registrar had the opportunity of seeing. I also agree with the registrar that the circumstances mentioned by him corroborate the wife's account, and I may add that it appears further to have been proved that a portion of the jewels in question, of considerable value, were given as what were termed peace-offerings, on occasions when differences between the husband and wife had arisen and been dispelled. Before me, however, at chambers, another point was taken as an alternative to that submitted to the registrar, and this point was wholly, or almost wholly, relied on before me in court. It was said that, admitting that these jewels were given by the husband to the wife, they were given as paraphernalia, and that so the husband could alien, and can reclaim them. The effect of a divorce was not suggested, but I should suppose that, on divorce, a wife would lose her right to paraphernalia. The law of paraphernalia and the practice of constituting paraphernalia are unfamiliar, if not antiquated. But, no doubt, before the Married Women's Property Act 1882, if a husband expressly indicated his intention to make a gift of paraphernalia, he could do so, and, even if he had never heard of paraphernalia, but the intention were made manifest that the jewels were given to the wife not absolutely, but for her use as a wife, this peculiar kind of property might be created. But I think that in some way, either from the use of apt words, or by inference from the facts of the case, it must have been shown that the intentic n was not to make a present of jewels, as of any other article not of personal use, in the ordinary sense, which would formerly have created a trust for separate use and would now vest the property in the wife, but to hand over the jewellery only for the wife's decoration so long as the husband, during his lifetime, chose she should be so adorned. It was suggested to me that the Married Women's Property Act 1882 abolished paraphernalia. I do not think that Act affects a gift of paraphernalia, although the best writers may have taken a different view: (see Macqueen's Husband and Wife, 115; Lush. Husband and Wife, 41.) The creation of paraphernalia did not imply, nor was it dependent on, the legal identity which, for most purposes, existed between husband and wife before that Act, and which it so largely modified. The question, therefore, whether any gift was a gift of paraphernalia is to be determined now on the same principles as before that Act. In the case of *Graham* v. *Londonderry* (3 Atk. 392) a question arose before Lord Hardwicke as to various articles given to Lady Londonderry. Some of them were given to her by her father-in-law, Governor Pitt, before her marriage, some by the Regent of France during her marriage with Lord Londonderry. All these were held to be gifts to her separate use, as being given by strangers to the coverture. Lord Hardwicke further referred to several cases in which gifts of jewels and other property to a wife by a husband were held to be gifts to her separate use. But with regard to the diamonds in a necklace given by Lord to Lady Londonderry, Lord Hardwicke said: "This is not to be considered as a gift merely to the separate use of the wife. I have, indeed, admitted that a husband may make such gifts, but where he expressly gave any things to a wife which were to be worn as ornaments of her person only, they are to be considered merely as paraphernalia, and it would be of bad consequence to consider them as otherwise; for, if they were looked upon as a gift to her separate use, she might dispose of them absolutely, which would be contrary to his intention." It was not, indeed, in that case necessary to decide whether the jewels were an absolute gift or paraphernalia, because, in either case, as Lord Hardwicke points out, the plaintiff, Lady Londonderry's second husband, was entitled to them. But it is, I think, to be observed that, although we do not know what the evidence before Lord Hardwicke was, by the words "when he expressly gives anything to a wife to be worn as ornaments of her person only," his Lordship would seem to be referring to some words or act showing the husband's intention, and to indicate that some proof of the kind is necessary. In the case of *Northey* v. *Northey* (2 Atk. 77), previously decided by Lord Hardwicke, there was evidence which pointed to a gift of paraphernalia, because it would seem that the husband himself kept the jewels and only sometimes permitted his wife to wear them. In the case of *Jervoise* v. *Jervoise* (17 Beav. 566) the husband bequeathed to his wife the use during her life of all his jewels, and an annuity, as well as some other property. There were certain family jewels which the wife had worn; some pearl ornaments had been given to her by her husband's aunt; and her husband had given her two diamond bracelets. It was held that the family jewels did not pass to the wife, either to her separate use or as paraphernalia. It would appear, therefore, that, as the will could operate on them, it was not material whether the pearls and bracelets belonged to the wife to her separate use or as paraphernalia. It was, however, no doubt decided that both the pearls and the diamond bracelets were paraphernalia. With regard to the pearls, I feel a difficulty in reconciling the decision of the learned judge on what was, as I have said, not a material point, with the rule laid down by Lord Hardwicke, that articles cannot be paraphernalia which come from a stranger to the coverture. But, as regards the bracelets, there was evidence on which it might well be held that they were paraphernalia. They were not given by the

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husband on any particular occasion, but were rather given to be worn, as they were, with the family jewels, though not necessarily to become themselves family jewels, and one bracelet was given to match the other. "The husband," the Master of the Rolls said, "evidently bought them for the purpose of adorning his wife." In the present case the evidence seems to me to point to a different conclusion. Clearly, most, if not all, the jewels were Christmas or birthday presents, or mere peace-offerings in the sense I have referred to. Jewellery liable at any moment to be reclaimed would not make a very graceful or grateful offering; and I see nothing to show that the husband intended to impress the character of paraphernalia on his gifts. The case of *Re Vansittart* (67 L. T. Rep. 592; (1893) 1 Q. B. 181) was referred to by counsel for the husband, as showing the legal effect of a gift of jewels from a husband to a wife. In that case it was held that such a gift was a settlement within sect. 47 of the Bankruptcy Act 1883, on the ground that the donor contemplated the retention by his wife of the present that he gave her. But the inference which I draw from that case is the reverse of that suggested to me. It may well be that a voluntary settlement, voidable by creditors, was created, because the jewels were given, not as some small sums might be given for immediate expenditure, but to constitute a permanent possession of the wife. But the jewels became the property of the wife, and, no doubt, she could have given a good title had she sold them. And, therefore, the inference drawn by the learned judge from the facts, which, as to the occasions of the gifts, were very like those in the present case, was not that the wife took the jewels as paraphernalia, but rather as settled to her separate use. Indeed, it does not seem to have occurred to any one to think of paraphernalia in connection with that case, though such a view would have been conclusive in favour of the creditors. I think, therefore, that the jewels in this case belong to the wife, and that the husband's claim fails.

Summons dismissed with costs.

Solicitors for the husband, *Hawks, Stokes*, and *McKewan*.

Solicitors for the wife, *Elliot* and *Hutchinson*.

Nov. 8, 9, *and* 21, 1894.

(Before the PRESIDENT (Sir F. H. Jeune.)

CHURCHWARD *v.* CHURCHWARD AND HOLLIDAY (the QUEEN'S PROCTOR showing cause). (*a*)

Divorce — Collusion — Collusive arrangements brought before the court at the hearing—Decree nisi*—Papers sent to Queen's Proctor—Intervention—Decree rescinded—Costs.*

Collusion between the parties to a divorce suit, even where all the facts in relation to the collusive arrangement are brought before the court at the hearing of the petition, is sufficient ground for rescinding the decree nisi *then pronounced; for, where the parties are acting in concert in presenting and prosecuting the suit, the court is not able to act with certainty that it has all the circumstances before it when pronouncing a decree. If the initiation of a suit be procured, and its conduct provided for by agreement, this constitutes collusion, although a finger cannot be placed on any specific fact as having been falsely dealt with or withheld. The court, on public grounds, should be able to rely on the protection afforded by the parties being presumably at arm's length the one from the other, and, even where the petitioner has, apart from the question of collusion, an indisputable ground for petitioning the court to dissolve his marriage, and where his object in entering into arrangements with his adulterous wife is shown to have been substantially to benefit their child; yet the court will, upon the intervention of the Queen's Proctor, rescind the decree upon the ground of the collusion voluntarily disclosed by the petitioner at the hearing of the petition.*

The meaning to be attached to collusion in 20 & 21 *Vict. c.* 85, *s.* 30, *and in* 23 & 24 *Vict. c.* 144, *s.* 7, *is the same, namely, "acting in concert," and it is not necessary for the Queen's Proctor, intervening under the later Act, to show, after he has once proved collusion, that the decree* nisi *which has been obtained was, apart from the question of collusion, in fact obtained "contrary to the justice of the case." The intention of the Legislature, in sect.* 30 *of the Divorce Act* 1857, *was to continue the practice of the House of Lords in regard to Divorce Bills.*

In view, however, of the fact that substantially all the matters relied on upon the intervention were brought to the knowledge of the judge at the hearing of the petition,

The Court, in rescinding the decree, made no order as to costs.

THIS was the hearing of an intervention by the Queen's Proctor upon the ground of collusion.

Inderwick, Q.C. and *Guy Stephenson* for the Queen's Proctor.

Lawson Walton, Q.C. and *R. H. Pritchard* for the petitioner.

Cur. adv. vult.

Nov. 21.—The PRESIDENT.—From the evidence before me I draw the following conclusions:—1. That the respondent and co-respondent are guilty of adultery. 2. That the petitioner did not connive at such adultery. 3. That there was no collusion to present to the court false facts in proof of adultery. 4. That the petition was presented in accordance with, and in consequence of, the agreement come to between the parties. By this, I mean that the petitioner would have been content with a separation, could he so have obtained the pecuniary settlement he sought; and he would not have presented the petition, if he could not have secured himself against the risk of diverting his wife's property from his child. It was strongly urged on me that the petitioner would, in any case, have presented a petition for a divorce, and that the unwillingness exhibited to the respondent's solicitor was a justifiable stratagem to secure a favourable settlement. I cannot accept this view. 5. That it was, in fact, part of the agreement that the wife and co-respondent should not defend the suit. 6. That it was not shown that there were any specific facts material to defence or recrimination which might have been brought forward by the wife. But it appears to me impossible to say that it was proved that

(*a*) Reported by H. DURLEY GRAZEBROOK, Esq., Barrister-at-Law.

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there were no material facts which she could have brought forward by way of defence or recrimination. The petitioner, the petitioner's solicitors, and the respondent's solicitors denied that they knew of any such facts, but such statements do not appear to be conclusive on the point. The question is, whether, under these circumstances, the petitioner should be held disentitled to a divorce by reason of collusion with the respondent. It was contended for the petitioner that the collusion necessary to be shown was that described in the latter part of sect. 7 of the Matrimonial Causes Act 1860, as "collusion for the purpose of obtaining a divorce contrary to the justice of the case," and his counsel drew a distinction between such collusion and that referred to in sect. 30 of the Act of 1857. It is, however, to be observed that the intervention of the Queen's Proctor is not under the latter, but under the earlier, part of sect. 7, where the phrase is simply "collusion." But the point is not very material, because, as an alternative, it was urged—and this is, indeed, the real gist of his argument—that all collusion meant "collusion for the purpose of obtaining a divorce contrary to the justice of the case," in a sense, presently to be mentioned, which counsel ascribed to the words. Whatever be the meaning of collusion, I cannot doubt that it bears the same meaning in sect. 30 of the Act of 1857 and in both parts of sect. 7 of the Act of 1860. It seems to be impossible to suppose that a totally different sense is to be assigned to the collusion which vitiates a claim for divorce if discovered by the judge at the trial, before a decree *nisi* is pronounced, and that brought to his knowledge by the Queen's Proctor before or after such decree. The contest raised in this case as to the meaning of collusion proceeds on clear lines. On the one hand, it is urged that collusion is agreement, either, on the positive side, to put forward true facts in support of a false case, or false facts in support of a true case; or, on the negative side, to suppress facts which would prevent, or tend to prevent, the court granting a divorce. It was insisted that, in a suit against a wife, unless it be shown that the petitioner's charge of adultery was, in fact, unfounded, or was supported by false evidence, in that material facts in support of defence or recrimination were concealed, there was no collusion. On the other hand, it was maintained that collusion has a wider scope; and that if there be an agreement to prosecute a suit which induces the petitioner to prosecute it, and, *à fortiori*, if such agreement contain terms providing for the petitioner's costs, and providing that the case shall not be defended and damages not asked, that is collusion, even though it be not shown that adultery was not, in fact, committed or any false facts put forward to prove it, and though no specific facts adverse to the success of the claim for divorce are shown to have been concealed. There would seem, therefore, to be four questions that may be asked. First, is it collusion to procure the initiation and prosecution of a suit, and arrange the mode and terms of its conduct, by agreement, though there be no express stipulation that there shall be no defence and no specific ground for suspicion that a false case is put forward or material facts concealed? Secondly, does the addition of a term that there shall be no defence render the agreement collusive? Thirdly, is it collusion when, besides such an agreement, there is ground for suspicion that material facts may be concealed? Or, fourthly, is there collusion only when it is shown that, in consequence of such agreement, false matter has been introduced into the case or material facts suppressed? In support of the more limited view of the nature of collusion, reliance is placed on definitions which, at various times, and with more or less authority, have been given of collusion. Mr. Macqueen in his book on Marriage and Divorce (2nd edition, p. 67) summarises the matter thus: "According to the authorities there appear to be two kinds of collusion—first, where the parties put forward false facts to form the basis of the judgment; secondly, where the parties put forward facts which are true, but which have been corruptly and fraudulently preconcerted to form the basis of the judgment." This definition is, however, obviously incomplete in omitting the suppression of material facts of defence or recrimination as one kind of collusion, and it therefore shuts out the further consideration which arises—if it be admitted that such suppression does constitute collusion—namely, whether it must be shown that material facts were, in fact, concealed. It is remarkable that the learned author goes on to mention *Chisim's* case in the House of Lords, without apparently noticing, as I shall presently remark, what an extension of collusion that case appears to afford. In *Crewe* v. *Crewe* (3 Hagg. Eccl. 123, 129) Lord Stowell said: "Collusion may exist without connivance, but connivance is (generally) collusion for a particular purpose. Collusion, as applied to this subject, is an agreement between the parties for one to commit, or appear to commit, an act of adultery, in order that the other may obtain a remedy at law as for a real injury. Real injury there is none, where there is a common agreement between the parties to effect their object by fraud in a court of justice. If such conduct were permissible, it would authorise parties to violate their marriage vow, and would encourage profligate and dissolute manners. The law, therefore, requires that there should be no co-operation for such a purpose, and does not grant a remedy where the adultery is committed with any such view. It is a fraud difficult of proof, since the agreement may be known to no one but the two parties in the cause, who, alone, may be concerned in it, for the adulterer may be ignorant of the understanding. However, it is no decisive proof of collusion that, after the adultery has been committed, both parties desire a separation; it would be hard that the husband should not be released because the offending wife equally wishes it. She may have honest or dishonest reasons, innocent or profligate; an aversion to live with the man she has injured, a desire to live uncontrolled or to fly into the arms of the adulterer; it would be unjust that the husband should depend upon her inclinations for his release; he has a right to it. It has often been said, and with peculiar injustice, that, although the original adultery was not collusive, yet the proceedings in these courts lead ultimately to collusion in the conduct of the cause; because, as the suit is between the suffering and the offending party, the latter frequently prays a sentence which she does not wish to obtain. On a little consideration, however, it will be seen that this arises from a wise provision of law: the Canon

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directs that a divorce shall not go upon the mere confession of the party; the wife, therefore, must give a negative issue (indeed, the court is almost bound to reject an affirmative issue, since it is necessary, by the Canon, that evidence should be produced); she must deny her guilt, and her prayer must be according to her denial. But this is mere style and form. If the court sees a fair case made out, what may be the inclination of the wife, be it corrupt or honest, is of little importance; the question is whether the husband has received a real injury, and *bonâ fide* seeks relief." I think that in this passage Lord Stowell was considering, as indeed he says, only the view of the matter applicable to the case before him. It is, no doubt, collusion where there is an agreement between the parties for one to commit, or appear to commit, an act of adultery, in order that the other may obtain a remedy at law, as for a real injury. But, there again, is omitted, because in that case not relevant, the kind of collusion which results from suppression. It is to be observed, however, how carefully Lord Stowell limits the case in which he excludes collusion to that of a mere desire of both parties to obtain a separation, and does not deal with the results of such a common desire leading to an agreement relative to the suit, still less those of the desire on the part of the husband being induced by extraneous considerations offered by the wife; and it is to be further observed, that Lord Stowell insists that the husband must have received a real and *bonâ fide* injury. This leaves open the question: in what cases is relief sought *bonâ fide?* Great reliance was placed by Mr. Walton on the definitions of collusion given by Dr. Lushington and the Lord Advocate for Scotland before the Select Committee of the House of Lords in 1844, appended to the Report of the Royal Commission appointed in 1850. I therefore refer to them, though they are extra-judicial opinions. Dr. Lushington said (Report, p. 47): "190. A question was put to me as to collusion. Now I beg leave to observe that, in the sense in which it is used in Doctors' Commons, it does not mean even consent or facility, where there is just cause for the husband prosecuting the suit, or *vice versâ*; but it is permitting a false case to be substantiated, or keeping back a just defence. It may be a question whether this rule of collusion extends to cases where recrimination, though practicable, is not resorted to. 191. Do you mean, by saying "where recrimination is practicable and is not resorted to," that the collusion consists in the abstaining from recrimination?—Yes; but I do not say that so doing has been deemed to be collusion in the legal sense of the term. . . . 194. Then, do you understand that wherever there is a case where the fact of adultery, cruelty, and so forth exists, provided that the fact is not got up for the purpose of the proceeding, it would not be a case of collusion, though the parties were in collusion as to the proceeding in court?—Certainly, we should not call it collusion; on the contrary, the expressions which have fallen from the learned judges have been these, and I think they are founded on truth: 'If the wife has already committed the greatest possible offence against the husband by violating his bed, why should she add to it by increasing the expense of the remedy?' 195. Are you not aware that, to a certain degree, the same principle holds with divorce Bills, for that, if the wife does not make any defence, which is the case with a great majority of those Bills, it is reckoned no proof of collusion?—Certainly. 196. And so, if the paramour makes no defence to the action, and lets judgment go by default, it is no proof of collusion?—Certainly." It is, I think, obvious that Dr. Lushington chiefly desired to insist that the mere abstention from defence did not constitute collusion, and that the case was not presented to his mind of an agreement between the parties, providing for the bringing of a suit and for the terms on which it was to be conducted, including a stipulation that there should be no defence, and of the inference to be drawn from such an agreement. The following questions were put to the Lord Advocate for Scotland, and answers given by him, p. 63: "93. Would it be collusion if the party had actually committed adultery without any collusion, and if then the other party and the adulterous party were colluding together to get a divorce?—That is, I believe, an interpretation pretty generally put upon it. My own impression is that such is not the true meaning of collusion. I mean, that if a just cause for a divorce exists without collusion, and, that the party wronged seeks to have the remedy of divorce, and is entitled to it, I doubt whether the circumstance that the other party has no objection, or is well pleased, would be such collusion as to preclude the remedy. 94. So that, if adultery had really been committed, not for the purpose of getting a divorce, but independently of that, it would be no collusion such as to bar the remedy, if the parties entered into a sort of plan for getting a divorce grounded upon that adultery?—I think that, according to the original meaning of collusion, it would not be so; but, if you were to examine them very strictly as to whether they had any collusion in bringing the suit, what would be the effect of the parties admitting that they knew of the suit being intended to be brought, and that they had no objection to it, but that, on the contrary, they had allowed the writ to be served, and dispensed with the time and afforded other facilities, I cannot say." It is clear that the Lord Advocate expressly abstained from pronouncing an opinion on circumstances in some respects similar to those in the present case. It should, however, be added that a little later he expressed the view that the mere circumstance of people going to Scotland to be divorced, as they might go to be married, would not constitute a divorce. It is not necessary to say more on that point than that the mere agreement to do what is necessary to give jurisdiction falls far short of the agreement in this case. Mr. Walton further relied on the expressions used by Lord Chelmsford in *Shaw v. Gould* (18 L. T. Rep. 833; L. Rep. 2 E. & I. App. 55, 77), which are, no doubt, of great weight, though they were not necessary for the decision of the case. They were as follows: "But whatever opinion may be ultimately entertained as to the extent of the power of the Scotch courts to dissolve English marriages, the validity of the divorce of the appellants' mother from Buxton cannot be admitted, if it was obtained by concert or collusion. It was argued for the appellants that the only collusion which can affect the validity of a divorce is where there are concert and connivance in the acts upon which the decree proceeds, and that, if a just cause of divorce exists without collusion, any arrangement to bring

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the facts before a court of competent jurisdiction, however purchased or obtained, is unobjectionable. I quite agree that if the agreement in this case had been that Buxton should bring himself within the reach of the Scotch court, so as to enable his wife to institute a suit for a divorce, to be determined upon the merits, although it was stipulated that he was to receive a sum of money when the divorce was obtained, this would not amount to collusion. But the arrangement between the parties was of a different character. In order to make it possible for the contemplated marriage between the father and mother of the appellants to take place, the previous dissolution of the marriage with Buxton was absolutely necessary. Shaw, therefore, who was intent upon attaining his object, stipulated that Buxton should be paid a sum of money in case he was divorced, and restrained him from attempting to defeat the proceedings by imposing upon him the forfeiture of the money in case he should 'by himself, or by any one through him, give information which should be prejudicial to the divorce.' Such an agreement as this appears to me to come within the very words of the oath *de calumniâ*, which was required to be taken by Mrs. Buxton, by which she swore 'that there had been no concert or collusion between her and the defender, or her friends or agents, in raising the action in order to obtain a divorce against him; nor did she know, believe, or suspect that there had been any concert or agreement between any other person on her behalf and the said defender or any other person on his behalf, with the view or for the purpose of obtaining such divorce.' It is impossible to doubt that the disclosure to the court of the agreement between the parties upon which the action was raised might have been prejudicial to the divorce, and Buxton would have run the risk of forfeiting the money he was to receive if he had given information about it." It would appear, therefore, to have been Lord Chelmsford's opinion —first, that the agreement by a respondent to come within Scotch jurisdiction for the purpose of a divorce being obtained against him, although accompanied by a stipulation that he should receive a certain sum when the divorce was obtained, did not constitute collusion; and, secondly, that the addition of a term that he should forfeit the money if he gave information prejudicial to the divorce did amount to collusion, because the disclosure to the court of the agreement might have been prejudicial to the divorce. Lord Westbury also (*ubi sup.*, p. 87) was of opinion that the decree was collusively obtained, but did not state on what grounds that opinion was based. An agreement to come within the jurisdiction in order that the suit might be brought would, no doubt, not constitute collusion. I venture, with all respect, to think that an agreement that the respondent should be paid if the suit succeeded was at least open to considerable doubt, and this must, it appears to me, have, in truth, been Lord Chelmsford's view, because he thought it collusion to agree, in effect, to conceal those stipulations, as their disclosure might be prejudicial to the divorce. But is not the agreement in this case substantially of the same character as that which Lords Chelmsford and Westbury condemned? Is not an agreement not to defend tantamount in effect to an agreement not to disclose anything prejudicial to the divorce? Although the present petitioner prudently and properly revealed his agreement with the respondent, it is clear that the respondent placed it, by agreement, out of her power to make such a disclosure, and, if so, that agreement became, like the agreement in *Shaw* v. *Gould* (*ubi sup.*), collusion. It was pressed strongly on me that, in the case of *Hunt* v. *Hunt and Wright* (the Queen's Proctor showing cause), (39 L. T. Rep. 45; 47 L. J. N. S. 22, P. & M.) Lord Hannen lent the weight of his authority to the narrower view of collusion. In that case it was alleged that the petitioner had been guilty of conduct conducing to his wife's adultery, and that he induced her to refrain from defending the suit by promising not to press for costs against the co-respondent. It would appear that the jury thought that these allegations were well founded. If so, there was, beyond question, a collusive agreement to conceal facts not only material but conclusive. No doubt, however, the president is reported to have said, in summing up to the jury: "Now, collusion is this—if a party to a suit of this kind, by agreement with the others, procures the withdrawal from the notice of the court of facts which are relevant to the charge which is imputed to him or her, that is collusion." And, later on: "Were these facts that were pertinent and material, and such as ought properly to have been submitted to a court or jury to enable them to determine one or other of the charges against the petitioner—of course that will depend on the answer you give to the first two questions I here put to you—namely, was his conduct such as conduced to his wife's adultery? Did he habitually use foul and indecent language to her?" It should, I think, be added that, in suggesting the cases in which there would, or would not, be collusion, Lord Hannen appears to have put, as the test, whether the husband did, or did not, feel that the motives for the concealment which he stipulated for were relevant to the charge made against him. It would, no doubt, appear from portions of his summing up that Lord Hannen regarded proof that material, nay, even decisive, facts were concealed by agreement, as necessary to make out collusion. But it must be remembered that, being addressed to a jury, it was not necessary, or indeed desirable, for him to do more than state as much law as covered the case in hand; and I think that the view of Lord Hannen, expressed in his summing up, ought not to be put higher than this, that, where the main evidence of collusion is an agreement not to defend, in order to find collusion you must see that it was intended to conceal material facts. It would appear, from the case of *Bacon* v. *Bacon and Ashby* (the Queen's Proctor showing cause) (25 W. R. 560), decided shortly before *Hunt* v. *Hunt* (*ubi sup.*), that Lord Hannen considered that agreement between the parties to withhold relevant evidence was one form only of collusion; and also that the evidence need be relevant only, and not decisive. The latter point is now established by the decision of the Court of Appeal in *Butler* v. *Butler* (62 L. T. Rep. 344; 15 P. Div. 66), which I recently followed in *Rogers* v. *Rogers* (the Queen's Proctor showing cause) (70 L. T. Rep. 699; (1894) P. 161). Giving, therefore, full weight to the case of *Hunt* v. *Hunt* (*ubi sup.*), it does not appear to me to conclude a case such as the present, where, apart from any agreement not to defend, there is so much more. It is now necessary to consider the authorities relied on by

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the Queen's Proctor. They begin with decisions of the House of Lords before the Act of 1857. It was contended before me that these decisions are not binding on this court. I am clear, however, that they are authorities of the greatest weight. In *Shaw* v. *Gould* (*ubi sup.*) Lord Westbury (at p. 84) said: "In England, since the Reformation, marriage, being no longer a sacrament, has always, in theory of law, been dissoluble for adultery in the wife, and for incestuous adultery and other crimes by the husband; but, until the recent Divorce Act, this law was administered by Parliament alone, and although the decision of Parliament was in the form of an Act or *privilegium*, and not of a judicial decree, yet the Act was granted upon evidence proving that the case came within the scope of certain established rules. This proceeding was in spirit a judicial, though in form a legislative, Act. The justice of divorce was recognised, but no forensic tribunal was intrusted with the power of applying the remedy. But the law and practice of Parliament were well known, and, in fact, this House acted as a court of justice." It may be added that those decisions of the House of Lords have been repeatedly recognised as authorities, and, notably so, by this court in a case I shall presently mention. By its Standing Order of the 28th March 1798, No. 142 (Macqueen on the Appellate Jurisdiction of the House of Lords, 528, 791), the House of Lords imposed on itself the duty of inquiring "whether there has or has not been any collusion, directly or indirectly, on his (the petitioner's) part, relative to any act of adultery that may have been committed by his wife; or whether there be any collusion, directly or indirectly, between him and his wife, or any other person or persons, touching the said bill of divorce, or touching any proceedings or sentence of divorce had in the Ecclesiastical Court at his suit; or touching any action at law which may have been brought by such petitioner against any person for criminal conversation with the petitioner's wife . . . ." There can, I think, be no doubt that the provisions as to collusion in the Act of 1857 (20 & 21 Vict. c. 85) were intended to continue the practice of the House of Lords in divorce cases. It is therefore all important to see what the House of Lords considered collusion to be. In *Chisim's* case (Macqueen, p. 582) it appeared that the costs of the plaintiff in the action for *crim. con.* were paid by the respondent's father, and also that in the Ecclesiastical Court no witnesses were called for the wife. The report states (p. 583): "The adultery was clearly proved; but the appearances of collusion were too gross and palpable to admit of being overlooked or explained." Now, it cannot possibly be said that in that case it was shown that any specific material facts were concealed; and it is expressly stated that the adultery was proved. It seems to me, therefore, that no collusion is possible, except that the House of Lords considered collusion to be made out from the fact that the parties in the conduct of the proceedings were acting in concert. No doubt the inference was that where such concert existed it was impossible to be sure that all the truth was presented; but the point is, that proof of concert in the conduct of the proceedings was held sufficient to engender such a doubt. In *Edwards'* case (Macqueen, p. 583) the report states: "The evidence of adultery in this case was clear; but a bond signed by Captain Edwards was produced, dated the 10th Dec. 1778, securing payment of 45*l.* a year to his wife; who, on the other hand, 'conditioned, on her part, that she and all those who were or might become concerned for her in her defence to the said Thomas Edwards obtaining a divorce would not give any unnecessary delay in the proceeding thereof, but in all things conform herself and themselves so as to bring the said suit and proceedings to as speedy an issue as possible; yet, nevertheless, not so as to weaken any real defence that the said Judith might be able to make to the said proceedings or the said Thomas Edwards obtaining his said divorce.'" The Bill, after counsel had been heard as to the effect of this document, was rejected; and it was so treated, therefore, merely as proof that the parties had agreed there should be no defence, and this single fact was considered to establish collusion. In *George's* case (Macqueen, 661) there were circumstances connected with a prior separation between the parties as to which the House was clearly not satisfied; but, besides this, great stress was laid on the fact that there had been a contract between the parties with respect to the verdict in the common law court. Beyond doubt this fact was considered of great weight; but it would have been of no weight had it not, in the judgment of the House, by itself gone far, if not the whole way, to establish collusion. I now turn to the decisions in this court. In the case of *Midgley* (falsely called *Wood*) v. *Wood* (30 L. J. 57, P. & M.), which was a case of nullity by reason of the undue publication of banns, Sir Cresswell Cresswell expressed his opinion that in a suit for dissolution by reason of adultery it would be collusion if the parties were to concur in getting up evidence of the case, though the case were a true one. The learned Judge Ordinary suggested that there might be a distinction in this respect in the case of a suit for nullity, where both parties might institute the suit on the same grounds; and this appears to me to show that the view of Sir Cresswell Cresswell was that collusion existed where one party, contrary to his or her apparent interest, was found acting in concert with the other, in matters material to the suit. The case of *Lloyd* v. *Lloyd and Chichester* (1 L. T. Rep. 335; 30 L. J. 97, P. & M.), decided by the full court, consisting of Cresswell, J.O., Wightman, J., and Byles, J., presents facts bearing very close resemblance to those in the present case. The adultery of the respondent, who had left her husband and was living with the co-respondent, was unquestionable. The court held that it did not find that the husband connived at, or was accessory to, the adultery; nor was any matrimonial misconduct imputed to him. But it was discovered by the court that the petitioner had received money from the wife's father to induce him to proceed with the suit (there being ground to think that he fancied that a dissolution of the marriage would cause him to lose a reversionary interest under a settlement); that his costs in the action for *crim. con.* were provided by the wife's father; that neither costs nor damages were to be demanded against the co-respondent; and that the wife's father and the co-respondent assisted in getting up the evidence. The court, referring to *Chisim's* case (*ubi sup.*), held that the appearance of collusion was too gross and palpable for any court to overlook it. The material elements in that case, namely, that

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the petitioner received consideration to prosecute the suit, and had his costs secured, are present here. It is true that, in that case, the parties acted together to get up the evidence, whereas, in this case, that was not done because it was unnecessary. But the material point is, that, in that case no more than in this, was it suggested that any false facts were put forward, or any material facts concealed. The utmost that can be said is that the court had before it parties, not independent, but acting throughout in concert; and the principle to be gathered from that case appears to be that, under such circumstances, the court is forced to believe that it is being misled, or, at any rate, that it can feel no assurance that it is not. In the face of these two cases, I think it impossible to say that in *Jessop* v. *Jessop* (4 L. T. Rep. 308; 2 Sw. & Tr. 301), decided shortly after, in 1861, Sir Cresswell Cresswell intended to limit collusion to cases in which the agreement was to keep back evidence of a good answer, or to set up a false case; nor do I think that the words he used in his summing-up to the jury bear such a meaning. In *Gethin* v. *Gethin* (the Queen's Proctor intervening) (5 L. T. Rep. 721; 2 Sw. & Tr. 560), decided later in 1861, I am inclined to think that Sir Cresswell Cresswell intended to express an opinion that, if it were shown that a husband who was respondent withdrew charges against his wife and made no defence, not acting independently but in pursuance of an agreement, that would constitute collusion. It is true, however, that in that case there was ground for suggesting that the wife had been guilty of adultery, though the jury found she had not; but it cannot be said that there was any concealment of the case of adultery, because the husband had, in fact, previously filed and abandoned a petition. But I am not sure that the case leads to any clear conclusion; neither do I attach much importance to the case of *Harris* v. *Harris and Lambert* (31 L. J. 160, P. & M.), in which it appeared that the respondent had assisted the petitioner's case by facilitating proof of identification, and Sir Cresswell Cresswell said: "Such communications are always dangerous, and cannot fail to excite some suspicion of collusion. I took time to examine the evidence, and I see no reason to believe that the parties were acting in collusion." I will only say that I do not think that that case in any way militates against the view more fully expressed by Sir Cresswell Cresswell in other cases I have mentioned. Probably the learned judge thought that the concert between the parties was not upon a matter sufficiently material to the suit to amount to collusion. The case of *Barnes* v. *Barnes and Grimwade* (the Queen's Proctor showing cause) (17 L. T. Rep. 268; L. Rep. 1 P. & D. 505), decided in 1867 by Lord Penzance, is not so strong an authority as *Lloyd* v. *Lloyd and Chichester* (*ubi sup.*), because in *Barnes* v. *Barnes and Grimwade* the husband induced his wife, for a consideration, not to oppose; but there were, no doubt, some facts brought to light which, if disclosed to the court, might have induced it to refuse the decree. Still, the words of Lord Penzance appear to me to indicate that his view of collusion did not differ from that of Sir Cresswell Cresswell. His Lordship said (at p. 507): "I am of opinion that, although the petitioner was reckless in his conduct, and careless whether his wife committed adultery or not, the evidence does not go so far as to establish actual connivance. But he certainly exposed his wife to temptation, to which no wife ought to be exposed by her husband, and was guilty of neglect and misconduct conducing to the adultery. With regard to collusion, I agree with the learned counsel that the mere fact of his having given her money, both before and after the institution of the suit, does not prove collusion. I see no impropriety in a husband making his wife a reasonable allowance whilst a suit is pending, in order to save the expense of an application to the court for alimony. If that evidence stood alone I should hold that it is not sufficient to prove the charge of collusion; but the evidence goes much further. It amounted in substance to this—that the petitioner said to the respondent, 'If you do not oppose, I shall get a divorce cheaper than if you do; therefore keep quiet, and I will give you some money when the decree is obtained, and I will do no harm to the co-respondent.' If that is not collusion I do not know what is. It is said that she had no defence to offer, and it certainly seems that she had not, as far as her own adultery is concerned. But if she had brought to the knowledge of the court the facts which have now been proved, as to the petitioner's conduct in exposing her to temptation, it would have been a grave question whether the court would have granted a decree. For these reasons, I think that the Queen's Proctor has proved the allegation that material facts have been suppressed. I think that the charge of collusion is also established. The petition must therefore be dismissed." That judgment, taken as a whole, seems to me to show that from the agreement not to defend, if it had stood alone, he would have inferred collusion. On the whole, it appears to me that the authority of the House of Lords (as shown by its practice) and of Sir Cresswell Cresswell, is decidedly in favour of the position that, if the initiation of a suit be procured, and its conduct (especially if abstention from defence be a term) provided for by agreement, that constitutes collusion, although no one can put his finger on any fact falsely dealt with or withheld; and I do not think that the authority of Lord Stowell, Dr. Lushington, Lord Penzance, or Sir James Hannen can be invoked in favour of a contrary opinion. It must always be remembered that, in matrimonial proceedings, this court has imposed upon it, by its previous practice and by the provisions of the Act of 1857, the peculiar duty of ascertaining for itself, so far as it can, whether in any case there exist bars, absolute or discretionary, to the petitioner's claim. I am not, therefore, prepared to say that the reason underlying what I think is the effect of the decisions of the House of Lords and of the Acts of 1857 and 1860 may not be that, when the parties to a suit are acting in complete concert, the court is deprived of that security for eliciting the whole truth, which is afforded by the contest of opposing interests, and is rendered unable to pronounce a decree of dissolution of marriage with sufficient confidence in its justice. If this be so, the expression in sect. 7 of the Act of 1860, "collusion for obtaining a divorce contrary to the justice of the case," may be understood to indicate that, by such an agreement, justice is imperilled; but, not to require that it must be affirmatively shown that,

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having regard only to the matrimonial conduct of the parties, justice will not be, or has not been, done. No doubt the protection to the court, afforded by the mutual watchfulness of hostile parties, often does not exist, because the petitioner and the respondent may, independently of each other, be of the same mind. Against results of that unanimity no legislation can guard. But it may well be worth while to prevent the parties to a suit from binding themselves by an agreement which, if there be anything to hide, renders it obligatory on both of them to keep the veil drawn. At least, if a petitioner makes the institution of his suit and its proceedings a matter of bargain, stifling defence and recrimination by a covenant of silence, he cannot wonder if the court decline to be satisfied that it has before it all the material facts. Such a petitioner has mistaken his position. *Pacem et duellum miscuit.* He appears before the court in the character of an injured husband asking relief from an intolerable wrong; but if, at the same time, he is acting in concert with the authors of the wrong, and is subjecting his rights to pecuniary stipulations, he raises more than a doubt whether, in the words of Lord Stowell, he has received a real injury and *bonâ fide* seeks relief. In the present case, being of opinion, as I have said, that the initiation of the suit was procured, and its results as to costs and damages were settled, by agreement, I must hold that there was collusion. If it be necessary, in order to constitute collusion, that there should be a compact not to defend, that also was present in this instance. Further, if it be needful that suspicion of the concealment of some facts be entertained, I entertain suspicion (I do not wish to say more) as to the facts in regard to the husband's conduct, from the expressions used by the wife in her letters. But I do not think it has been, nor, in my opinion, need it be shown, that any specific facts of a material character exist which might have been brought before the court. I was much pressed by counsel with the hardship on the petitioner of dismissing his petition and of rendering the agreement of no effect. But I cannot assent to that view. As regards freedom from an adulterous wife, if the petitioner desires that, for its own sake, I see nothing to prevent his filing a petition without agreement with her. As regards the obtaining of pecuniary advantage, for himself or his child, I must say that a divorce suit ought not, in my judgment, to be made the stipulated price of any pecuniary consideration. The intervention of the Queen's Proctor must, therefore, succeed, but there will be no order as to costs. I was pressed to say that the disclosure of the agreement at the trial negatived collusion. I cannot follow that suggestion. Confession is not a defence; nor is disclosure a proof of innocence. But I think that the conduct of the petitioner, in making this disclosure, entitles him to favourable consideration as to costs.

Decree nisi rescinded. No order as to costs.

Solicitors for the petitioner, *King, Wigg, and Co.; The Queen's Proctor.*

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, Dec. 4, 1894.

(Before LINDLEY and SMITH, L.JJ.)

PILLERS AND PERSHOUSE v. EDWARDS. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Married woman—Separate estate—Restraint on anticipation — Arrears of income — Judgment creditors—Application for appointment of receiver—Equitable execution—Married Women's Property Act 1882 (45 & 46 *Vict. c.* 75), *s.* 19.

A married woman was entitled as tenant for life to the income of real estate, with a restraint on anticipation; and on the 29th Sept. 1894 *certain rent became due to her. Creditors who had obtained judgment against the married woman on the 1st Oct., took out a summons on the following day asking for the appointment of a receiver of the rent by way of equitable execution. The rent had not come to the hands of the married woman, being either in the possession of her trustees, or remaining unpaid by the tenants of the property. On the 1st Nov. the summons came before the Divisional Court (Wright and Collins, JJ.), who decided that the restraint on anticipation attached to the overdue rent, and therefore refused to appoint a receiver.*

The judgment creditors appealed.

Held, that the judgment creditors were not entitled to equitable execution over rents of property of which the married woman was tenant for life without power of anticipation, even though such rents were due and payable to her before the date of the judgment sought to be enforced.

Hood-Barrs *v.* Cathcart *No.* 2 (70 *L. T. Rep.* 865; (1894) 2 *Q. B.* 559, 567), *and* Hood-Barrs *v.* Cathcart (*Ct. of App.*, 23*rd July* 1894, *unreported*) *considered and applied.*

Decision of the Divisional Court affirmed.

THE facts of the case sufficiently appear from the head-note.

Robert Wallace, Q.C. for the appellant.—The question raised by this appeal is whether certain arrears of rent in the hands of the trustees of a married woman, or still unpaid by her tenants, not having actually reached the hands of the married woman, can be taken in execution, or whether the arrears are affected by the restraint on anticipation. In *Hood-Barrs* v. *Cathcart* No. 1 (70 L. T. Rep. 862; (1894) 2 Q. B. 559) it was decided that, where a married woman had separate estate restrained from anticipation, the Married Women's Property Act 1882 did not enable a judgment to be enforced against arrears of income, to which the restraint applied, accruing due after the date of the judgment, either by the appointment of a receiver, by sequestration, by a charging order, or by any kind of process. But the point was expressly left open whether the restraint was applicable to arrears of income due and payable before the date of the judgment sought to be enforced. In the judgment in the second case of *Hood-Barrs* v. *Cathcart* (70 L. T. Rep. 865; (1894) 2 Q. B. 567) the point was

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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not touched upon, for it was unnecessary for the decision of the court. The decision was only as regarded arrears of income accruing due after the date of the judgment. There is no reported case in which it has been held that restraint on anticipation remains under such circumstances as the present. On the contrary, there are several cases where it has been expressly decided that the restraint is gone the moment the arrears became due:

Claydon v. *Finch*, 28 L. T. Rep. 101; L. Rep. 15 Eq. 266;
Fitzgibbon v. *Blake*, 3 Ir. Rep. Ch. 328;
Hyde v. *Hyde*, 59 L. T. Rep. 529; 13 Prob. Div. 166, 171;
Cox v. *Bennett*, 64 L. T. Rep. 380; (1891) 1 Ch. 617, 625;
Hulbert and Crowe v. *Cathcart*, unreported.

It is true that in an unreported case of *Hood-Barrs* v. *Cathcart* (Ct. of App., 23rd July 1894) the question was determined the other way, but that case was not argued by counsel. The parties appeared in person, and the decision proceeded on the ground that the court had previously dealt with the question. But Lord Esher, M.R. was under a misapprehension in saying that the point had been previously decided. It never was previously decided; it was a mere *obiter dictum*.

B. Denniss (with him *Barling*), for the respondent, *contrà*.

Wallace, Q.C. replied.

Lindley, L.J.—I confess that, but for the decisions which have been referred to, viz., the unreported case of *Hood-Barrs* v. *Cathcart*, and what Kay, L.J. said in the reported case of *Hood-Barrs* v. *Cathcart* (70 L. T. Rep. 865; (1894) 2 Q. B. 567, 570), I should have thought that the restraint on anticipation was over the moment that the money settled to the married woman's separate use had become due and payable to her. That was my impression, founded upon what one may call tradition. Moreover, on looking into the cases, I think that there is considerable authority in support of that view. There is not only *Claydon* v. *Finch* (28 L. T. Rep. 101; L. Rep. 15 Eq. 266), but there is an Irish case of some importance too, *i.e.*, *Fitzgibbon* v. *Blake* (3 Ir. Rep. Ch. 328). That likewise was the view which was present to the minds of all of us when we decided *Cox* v. *Bennett* (64 L. T. Rep. 380; (1891) 1 Ch. 617, 625). *Hyde* v. *Hyde* (59 L. T. Rep. 529; 13 Prob. Div. 166) is another of the same line of cases, and so also is *Hulbert and Crowe* v. *Cathcart* (unreported). But it will never do for one division of this court to decide one thing one day, and the other division to decide another thing another day. That will not do at all. Nobody would know how to advise his clients, and nobody would know how to act. I think I cannot, having regard to the two decisions to which I at first alluded, do otherwise than follow them; and this case, if it is to be upset, must be upset by the House of Lords. I think, therefore, that the appeal must fail, and fail in the usual way. I hope we shall get some decision that will remove all the clouds and difficulties about this question. The fact is, that when the Married Women's Property Act 1882 was passed, the operation of restraint upon anticipation was not fully considered. It worked very well when the whole thing was under the control of the Court of Chancery, but when it partly is and partly is not, it does not work at all. The appeal will be dismissed with costs, both here and in the court below.

Smith, L.J.—This is an application by certain creditors, who have recovered a judgment against a married woman. I suppose that the judgment was signed and entered in the form in *Scott* v. *Morley* (57 L. T. Rep. 919; 20 Q. B. Div. 120). Assuming that that was so, the creditors got that judgment on the 1st Oct. 1894, and it must be taken, for the purposes of this question, that, at that time certain tenants of the married woman owed her the rents which became due on the 29th Sept. The tenants had not paid her those rents, and the same were still in their hands. The creditors went first to chambers, then to the Divisional Court, and they have now come to this court. They ask that a receiver may be appointed of those rents, because they say that the fetter of anticipation went the moment those rents became due on the 29th Sept., and that, therefore, the moneys were due to the married woman released from the fetter of anticipation at the date of the judgment of the 1st Oct. 1894. Now, is that so? There are several cases of *Hood-Barrs* v. *Cathcart*. First of all there is the case of *Hood-Barrs* v. *Cathcart* (70 L. T. Rep. 862; (1894) 2 Q. B. 559), in which the judgment of the Court of Appeal was delivered by Lord Davey, then Davey, L.J. That case does not touch the present point at all, and there is no statement in that case which is applicable to the question now in hand. But in the second case—or what I may call the second case—of *Hood-Barrs* v. *Cathcart* (70 L. T. Rep. 865; (1894) 2 Q. B. 567), although it is in reality by no means the second case, the judgment of the Court of Appeal was delivered by Kay, L.J. I cannot read the judgment which was then delivered, and to which I was a party, without coming to the conclusion that this court did hold then that where a married woman is restrained from anticipation by a deed in the ordinary form (which is set out by Kay, L.J. in his judgment), until the money comes into the hands of the married woman it is not free money, and it is not unfettered from the restraint on anticipation. That we held that in that case in my judgment is beyond all doubt. Mr. Wallace to-day says it was not necessary to the decision of that case, and I think he is well founded in that. I do not think it was necessary to the decision, but that we actually decided it I cannot have a doubt. Mr. Wallace then says that it was not only not necessary to the decision of that case, but that it was contrary to three cases in the Court of Appeal. The three cases he named are *Cox* v. *Bennett* (64 L. T. Rep. 380; (1891) 1 Ch. 617), *Hyde* v. *Hyde* (59 L. T. Rep. 529; 13 Prob. Div. 166), and *Hulbert and Crowe* v. *Cathcart* (unreported). With regard to *Hulbert and Crowe* v. *Cathcart*, I will dismiss that case at once, because that was a case in which I have been informed there was no argument. Orders had been made in this litigation between Mrs. Cathcart and Mr. Hood-Barrs—I do not know about Messrs. Hulbert and Crowe—without argument, which, when they came to be investigated, were found to have been made by mistake. But when Mr. Wallace says that *Cox* v. *Bennett* (*ubi sup.*) and *Hyde* v. *Hyde* (*ubi sup.*) were decided contrary to what we decided in *Hood-Barrs* v. *Cathcart* (*ubi sup.*), I wish to point this out: Kay, L.J.

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was himself a party to *Cox* v. *Bennett* (*ubi sup.*), and he himself, in his judgment in *Hood-Barrs* v. *Cathcart* (*ubi sup.*), deals with *Cox* v. *Bennett* (*ubi sup.*), and also with *Hyde* v. *Hyde* (*ubi sup.*), and comes to the conclusion—with which all the court agreed—that, until the money got into the actual hands of the married woman, for which she could give a receipt herself, it was not unfettered, and was not free money, This point did come up again on the 23rd July 1894, in another case of *Hood-Barrs* v. *Cathcart* (unreported), which one may call the fourth action of *Hood-Barrs* v. *Cathcart* (*ubi sup.*). There again Kay, L.J. affirmed what I have already been pointing out had been held in the Court of Appeal. It seems to me impossible, therefore, now for us to say that that is bad law, and that the law which was said to have been laid down in the prior cases, and which were dealt with in *Hood-Barrs* v. *Cathcart* (*ubi sup.*), is also bad law. I think we should be stultifying ourselves if we were to say that a receivership order ought to be made in the present case. In my opinion it ought not. I think, therefore, that the appeal fails.

Appeal dismissed.

Solicitors for the appellants, *Indermaur* and *Brown*, agents for *Pillers* and *Pershouse*, Bristol.

Solicitors for the respondent, *Hood-Barrs* and *Co.*

Tuesday, Dec. 4, 1894.

(Before LINDLEY and SMITH, L.JJ.)

NORTON *v.* THE COUNTIES CONSERVATIVE PERMANENT BENEFIT BUILDING SOCIETY. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Building society—Dispute between society and unadvanced shareholder—Arbitration—Appointment of arbitrators after commencement of action by member—Staying proceedings—Jurisdiction—Building Societies Act 1874 (37 *&* 38 *Vict. c.* 42), *s.* 16, *sub-sect.* 9, *s.* 34

Where the rules of a building society, incorporated under the Building Societies Act 1874, *provide for the settlement of disputes between the society and any of its members by reference to arbitration pursuant to sect.* 16, *sub-sect.* 9, *of that statute, the fact that some of the full body of arbitrators are appointed after the commencement of an action by an unadvanced shareholder against the society in respect of a dispute does not give the court jurisdiction to entertain the proceedings.*

Christie *v.* The Northern Counties Permanent Benefit Building Society (61 *L. T. Rep.* 796; 43 *Ch. Div.* 62) *overruled.*

Decision of Day, J. affirmed.

ON the 18th Dec. 1880 the above-named building society was incorporated under the Building Societies Act 1874.

The plaintiff, Mrs. Emily Norton, was entitled to the following shares in the society: (1) Sixteen fully-paid up 50*l.* shares in the capital stock; (2) four shares of 50*l.* each in the capital stock, Class 3; (3) twenty-four certificates of 5*l.* each in the Investment Fund No. 2.

On the 18th Sept. 1894 the plaintiff issued a writ against the society by which she claimed 1120*l.* payable in respect of the above-mentioned shares and certificates, alleging that the necessary notice of withdrawal had been given and had expired.

On the 24th Oct. 1894 the defendant society took out a summons for an order that all proceedings in the action might be stayed and all disputes between the plaintiff and the defendant society be referred to arbitration pursuant to rule 77 of the rules of the society, and that the plaintiff might be ordered to pay to the defendant society the costs of the action and of the application.

Rule 77 of the defendant society was in the following terms:

Disputes shall be settled by reference to arbitration. Five arbitrators shall be elected by the board of directors, but none of the arbitrators shall be beneficially interested directly or indirectly in the funds of the society, and in each case of dispute the names of the arbitrators shall be written on pieces of paper and placed in a box, and the three whose names are first drawn by the complaining party, or by some one appointed by such party, shall be arbitrators to decide the matter in difference, whose decision shall be final and binding on all parties. In case of a vacancy or vacancies in the office of arbitrator, another shall be elected by the board of directors.

Payment had been refused by the defendant society on the ground that there were other members entitled to be paid in priority to the plaintiff, and that there were not funds in hand applicable at present under the rules of the society to discharge the liability to the plaintiff.

The rules of the society relating to withdrawals provided as follows:

67. Any person who shall have been a member of the society for six months, and shall not have received any advance out of the funds of the society, and whose subscriptions and fines are not in arrear, shall be at liberty to withdraw from the society upon giving the society one month's previous notice in writing of his intention. The amounts receivable by members on withdrawal will be those contained in Table A. scheduled to these rules, but subject, nevertheless, to any payments or deductions as may be determined by the directors. Payment of withdrawals shall be made according to the priority of the receipt of the notice of withdrawal by the society.

68. The directors shall have full power from time to time to limit the number of shares that shall be withdrawn in any one month, and to limit the withdrawals so that they shall not exceed one-half of the monthly income from share subscriptions, and all previous applications for advances shall have priority over notices of withdrawal.

Shortly after the incorporation of the society, viz., on the 22nd Jan. 1881, five arbitrators had been duly appointed pursuant to rule 77.

At the date of the issue of the plaintiff's writ the number of arbitrators had, by death and other causes, been reduced to three, and that number had remained until the 29th Nov. 1894, when, at a meeting of the board of directors, it was resolved that, owing to the number of arbitrators having been reduced to three, and as rule 77 required five to be appointed, two additional arbitrators should be appointed.

The master adjourned the defendant society's summons to the judge (Day, J.), and on the 12th Nov. 1894 his Lordship, sitting at chambers, made an order in the terms of the summons.

From that decision the plaintiff by leave now appealed.

E. Morten and *E. Shortt* for the appellant.—At the date of the issue of the writ in this action

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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there were only three arbitrators, and, therefore, no tribunal existed capable of deciding the dispute between the parties as provided by sect. 34 of the Building Societies Act 1874 and the rules of the society. When a dispute has once arisen it is too late for the society, being parties to the dispute, themselves to appoint arbitrators. Consequently, it was not competent for the directors in the present case, after the action was commenced, to appoint arbitrators to be judges in their case; and, as the tribunal provided under the statute failed, the High Court has jurisdiction to entertain these proceedings:

Christie v. *The Northern Counties Permanent Benefit Building Society*, 61 L. T. Rep. 796; 43 Ch. Div. 62.

Tindal Atkinson for the respondent society.—Building societies have been legislated for by several statutes, and the whole course of the legislation with regard to such societies has been to oust the jurisdiction of the High Court in a case of a dispute between an unadvanced shareholder and his society (see 10 Geo. 4, c. 56; 6 & 7 Will. 4, c. 32; 37 & 38 Vict. c. 42). That has been the view taken by the courts in the following cases:

Wright v. *The Monarch Investment Building Society*, 5 Ch. Div. 726;
Hack v. *The London Provident Building Society*, 48 L. T. Rep. 247; 23 Ch. Div. 103;
The Municipal Permanent Investment Building Society v. *Kent*, 51 L. T. Rep. 6; 9 App. Cas. 260.

E. Shortt in reply.—What the Legislature intended was that there should be a full body of arbitrators always in existence. Inasmuch as in the present case there was no competent tribunal at the date of Day, J.'s order, the appellant was entitled to fall back upon her common law rights and to bring her action.

LINDLEY, L.J.—This is an appeal from an order of Day, J., which directs that all proceedings in this action be stayed, and all disputes between the plaintiff and the defendants be referred to arbitration pursuant to rule 77 of the rules of the Counties Conservative Building Society. The action was brought by an unadvanced shareholder who had given notice of withdrawal of her shares, her claim being for 1120*l.* made up of three sums of 800*l.*, 200*l.*, and 120*l.*, as stated in the indorsement on the writ, and all the money claimed from the society was claimed by her as a member of the society. At the date of the writ, which was the 18th Sept. 1894, the society was governed by rules, one of which stated that disputes between the society and its members should be settled by reference to arbitration. According to that rule there should have been five arbitrators, of whom the three whose names were first drawn were to act on each particular occasion, and in case of vacancies the board of directors were to have power to fill up the places. It appears that originally there were five arbitrators appointed, but two of them had died or retired, and at the date of the writ there were only three. It appears also that, while that was so, the defendants took out a summons on the 24th Oct. 1894 asking that all proceedings in the action might be stayed, and all disputes between the plaintiff and the defendants referred to arbitration pursuant to rule 77, and on the 12th Nov. the order which I have read was made. Two new arbitrators were shortly afterwards appointed, making the total number up to five; but that was done after Day, J. had made the order which is appealed from. The appeal is based upon the ground that there was no arbitration tribunal capable of determining the dispute between the parties at the date of the writ, and that it was not competent to the society to appoint arbitrators subsequent to that writ, and reliance was placed on the decision of North, J. in *Christie* v. *The Northern Counties Permanent Benefit Building Society* (61 L. T. Rep. 796; 43 Ch. Div. 62). This society is governed by the provisions of the Building Societies Act 1874, which are familar to most of us. The Act has been judicially construed in several decisions, and I cannot read *Wright* v. *The Monarch Investment Building Society* (5 Ch. Div. 726), *The Municipal Permanent Investment Building Society* v. *Kent* (51 L. T. Rep. 6; 9 App. Cas. 260), and *Hack* v. *The London Provident Building Society* (48 L. T. Rep. 247; 23 Ch. Div. 103), without seeing that the construction which we are asked to put upon the Act would be inconsistent with its general scope, which is that parties under such circumstances as the present should not come to the High Court at all to settle their disputes. There are various modes provided by the Act for settling disputes. Sect. 16, sub-sect. 9, enacts that the rules of every society shall set forth "whether disputes between the society and any of its members, or any person claiming by or through any member, or under the rules, shall be settled by reference to the court"—the court there being the County Court (see sect. 4)—"or to the registrar or to arbitration." Here the rules state that disputes are to be settled by reference to arbitration. The decisions to which I have just referred establish that where the rules do state that there is to be a reference to arbitration, that is the only tribunal capable of settling disputes. The cases above mentioned would be precisely in point here, if at the time the writ was issued there had been five arbitrators. But it is said that, there not being five then, an action in the High Court would lie. North, J. took that view in *Christie* v. *The Northern Counties Permanent Benefit Building Society* (*ubi sup.*) on which the appellant now relies. But I do not find that the learned judge's attention was called to the authorities to which I have referred (*a*), and there seem to me to be two passages in his judgment which are open to criticism. At the bottom of p. 68 of 43 Ch. Div. he says: "At the time when the writ was issued the dispute could not be settled by arbitration, because there were no arbitrators to whom it could be referred, and it is impossible for me to say that it was not open to the plaintiff to issue a writ, for, if that were so, the omission of the society to appoint arbitrators would deprive him of any remedy at all. In my opinion, therefore, the plaintiff was perfectly justified in commencing his action." I confess I cannot see that. I think it is a mistake. The remedy would be by way of *mandamus* to compel the society to appoint arbitrators. Then he goes on to say this: "In my opinion the tribunal

(*a*) Although that appears to be so from the report of the case in 43 Ch. Div. 62, where the arguments seem to have been principally directed to other points, yet in the report in the LAW TIMES it will be found that those authorities were in fact cited: (see 61 L. T. Rep. 796, 797.).—REPORTER.

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contemplated by the rule to decide a dispute between a member and the society is to consist of three persons, to be elected by lot out of the standing body of arbitrators at the time, and it is not open to the society, after the dispute has arisen, to proceed to nominate the persons, three of whom are to be the judges of the dispute." Then he says that he sees no reason for doubting that the persons appointed were honest and impartial men, but that still they may have been selected because of their known views on the subject. North, J. appears to have thought that it was not fair, after the dispute had arisen, for the society to appoint its own tribunal. Let us see how that stands. It is clear, from the correspondence in the present case, that the quarrel had been in existence for some time. We put it to counsel whether any objection could have been made if the two new arbitrators had been appointed just before the writ was issued. What magic is there in the actual date of appointment? As a matter of principle there is nothing in it. It does not matter whether the tribunal is appointed a day or two sooner or later. Of course, if there is anything improper in the appointment, that is another question. When once we get hold of the principle on which the Act is based, namely, that the High Court is not intended to interfere in these disputes, but the tribunal nominated by the society's rules is, then the decision arrived at by North, J. cannot be supported. The proper course was, instead of commencing an action, to apply for a *mandamus* calling upon the society to appoint the necessary arbitrators. In my opinion the appeal fails, and must be dismissed with costs.

SMITH, L.J.—I am entirely of the same opinion. [His Lordship stated the facts and continued:] The first point taken on behalf of the respondents, who have obtained a stay of proceedings in this action, was that by the Building Societies Act 1874—by which the court and the society and its members are bound—it is in effect provided that no action in the High Court shall be brought in a case like the present against the society by a member, and sects. 16 and 34 were referred to on that point. In my opinion it is settled that this is so by the decision of the House of Lords in *The Municipal Permanent Investment Building Society* v. *Kent* (*ubi sup.*), in which it was expressly held that no action could be brought in the High Court against a building society by one of its members in such a case as this. In that case Lord Blackburn and Lord Watson held that *Wright* v. *The Monarch Investment Building Society* (*ubi sup.*), decided by Sir George Jessel, M.R., and *Hack* v. *The London Provident Building Society* (*ubi sup.*), decided by Sir George Jessel and Lindley, L.J., were rightly decided, and they approved both cases, and they held that an action could not be maintained in the High Court by a member like the appellant against a society which is subject to the Building Societies Act 1874. Now, that being the law, the defendants shortly after the writ was issued made an application for a stay of proceedings on that ground. The answer set up by the plaintiff was that, although it had been decided in those cases that the jurisdiction of the High Court was ousted by the substitution of another tribunal, both those cases were always subject to this, that there must be some tribunal, other than the High Court, to which the plaintiff can go; that is to say, a tribunal as provided by the rules of the society. But here the plaintiff had no such tribunal, because at the time when the writ was issued the tribunal provided by the rules of the society did not exist. Now sect. 16, sub-sect. 9, of the Building Societies Act of 1874 requires the rules to state whether disputes shall be settled by the County Court or by the registrar, or by reference to arbitration; and then sect. 34 says that where the rules direct disputes to be referred to arbitration, arbitrators shall be named and elected, of whom a certain number, not less than three, shall be chosen by ballot to act in each case of dispute. The rules of the society in this case require the existence of five; but, at the time of issuing the writ, there were, as a matter of fact, not five, but only three, and one of them, as alleged by counsel, was a very inefficient one. It is said that, there being thus no proper tribunal to which the plaintiff could resort, and the society having no power to fill up the number of arbitrators to five after the writ was issued, the plaintiff was entitled to come to the High Court. The case of *Christie* v. *The Northern Counties Permanent Benefit Building Society* (*ubi sup.*) was relied on, where it was no doubt held that there was no power to fill up the requisite number after the writ was issued. But the point which has been argued before us was apparently not argued before the court in that case, viz., that the intention of the Act was to prevent an action in the High Court at all by an unadvanced member against the society. I do not agree with what North, J. said in that case, and I am not certain that, if the case had been argued before him as it has been argued before us, he would have arrived at the conclusion he did. The main point argued before him was whether or not a member was bound by the new rules of the society. It seems to me, looking at the statute and the decisions culminating in that of the House of Lords in *The Municipal Permanent Investment Building Society* v. *Kent* (*ubi sup.*), that if a sufficient arbitration tribunal was not in existence, the plaintiff's duty was to come to the court for a *mandamus*, to compel the society to have the proper number filled up. It is conceded here, and so also it must have been before North, J., that if the vacancies had been filled up by the society a day before the writ was issued, even though they knew what the question pending between them and the member was, it would have been sufficient, but if a day after the writ it would not. It cannot, however, in my opinion, make any difference whether this was done a day before or a day after the writ was issued. The order of Day, J. must, therefore, stand, and the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: for the appellant, *Smith, Fawdon*, and *Low*, agents for *Becke* and *Green*, Northampton.

Solicitors: for the respondent society, *Ford, Lloyd, Bartlett*, and *Michelmore*.

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Oct. 29, 30, *and Dec.* 10, 1894.

(Before the LORD CHANCELLOR (Herschell), LINDLEY and SMITH, L.JJ.)

THE CORPORATION OF BRADFORD *v.* PICKLES. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

*Water—Subterranean springs—Interference with flow of water—Tunnel for draining mine—*Mala fides*—Indirect motive—Works undertaken for purpose of extorting compensation.*

The plaintiffs were owners of waterworks, purchased by them from a company which had constructed the waterworks under the powers of a special Act authorising the company to take the water from certain specified springs. Sect. 49 *prohibited any person other than the company from diverting, altering, or appropriating, in any other manner than by law they might be legally entitled, any of the waters supplying or flowing from the springs, or from sinking any well or pit, or doing any act, matter, or thing whereby the waters of the springs might be drawn off or diminished in quantity. There was no provision for compensating landowners whose rights might be affected by the section. The company had appropriated the water of the springs, and the plaintiffs continued to do so.*

The defendant, who owned land adjoining the springs, proposed to construct, on his own land, an underground drift or tunnel, the effect of which would be seriously to diminish, if not to cut off entirely, the flow of water at the springs. His professed object was to drain some beds of stone lying under his land, so that he might be able to work them. The evidence showed, however, that he was not acting bonâ fide, *and that his real object was to force the plaintiffs to compensate him.*

Held (*reversing the decision of North, J.* (ante, *p.* 319), *that what the defendant proposed to do would not be in breach of his legal rights, and that therefore no injunction could be granted to restrain him. But held* (*affirming the decision of North, J.*), *that, even if the defendant were actuated by a malicious or improper motive, he could not be interfered with.*

APPEAL by the defendant from a decision of North, J. (*ante*, p. 319).

Everitt, Q.C. and *Tindal Atkinson*, Q.C. (with them *Butcher*) for the appellant.—The private Act of 1854 contains no provision for compensating landowners whose rights may be affected by sect. 49. A private Act of Parliament ought to be construed very strictly where no provision is made for compensating persons injuriously affected by the exercise of its powers. *Primâ facie* such an Act is not intended to affect any rights of property or any other common law right of a landowner whose land is not taken by the undertakers and who is not compensated in any way for the abridgment of his rights. The old authorities are summed up in a case which shows the principle of compensation:

London and North-Western Railway Company v. *Evans*, 67 L. T. Rep. 630; (1893) 1 Ch. 16.

Sect. 234 of the Act of 1842, and sect. 49 of the Act of 1854, only impose penalties for the purpose of protecting the land which the undertakers have acquired and the springs of water upon it. The sections apply only to some act illegally done upon the plaintiffs' own land. They do not affect the rights of outside landowners. Sect. 49 of the Act of 1854 is a re-enactment of sect. 234. If the construction put upon the statutes by the plaintiffs is the right one, then there is a provision in the Acts for every other kind of compensation than that claimed by the defendant in the present case. The construction which the defendant asks the court to put upon the statutes is that which makes them consistent and preserves the rights which exist in every other case where water is concerned. The defendant has some water on his land, and, if the plaintiffs require it, they must pay for it. They have let the time go by for purchasing compulsorily, and now they can only purchase by consent. If the water formerly flowed in a defined channel, it was an artificial channel, not a natural one. In the case of *Grand Junction Canal Company* v. *Shugar* (24 L. T. Rep. 402; L. Rep. 6 Ch. App. 483) the court found that the defendant was drawing off water from a defined channel. There is nothing to prevent a landowner from interfering with underground percolating water on his own land, which afterwards at some distance finds its way to the surface, and then flows in a defined channel through his neighbour's land. As long as the water is merely percolating under the defendant's land he has a right to drain it away. That is all that the defendant is doing, and it occurs at a place more than 200 yards distant from the plaintiffs' watering-place. North, J. found that the defendant was guilty of *mala fides*, but the defendant denies that. The learned judge went out of his way to decide that question of *mala fides*. It was not necessary for the determination of this case. A landowner has a right to dig on his own land, and is entitled to do what he pleases on his own land, provided that he does not interfere with water flowing in a defined natural channel:

Chasemore v. *Richards*, 7 H. of L. Cas. 349, 366, 376, 388.

He has a right to appropriate percolating water before it reaches a defined channel, even though the effect of his so doing may be to diminish the flow of water in that channel.

Cozens-Hardy, Q.C. and *B. Eyre* (with them *C. M. Atkinson*) for the respondents.—We submit that North, J. was right on the construction of these statutes; but, apart from the statutes, we say that what the defendant proposes to do by means of his intended drift or tunnel will be in violation of the plaintiffs' common law right, and that, therefore, the injunction was properly granted. Whatever the rights of a landowner may be to underground water, percolating under his land, but not in any defined channel, he has no right to appropriate it except for his own *bonâ fide* purposes. The defendant's scheme is not a *bonâ fide* one, but it was put forward with the intention of compelling the plaintiffs to purchase the defendant's land or to compensate him. When the Act of 1842 was passed, *Chasemore* v. *Richards* (7 H. of L. Cas. 349) had not been decided. In fact, it was not decided till 1859. Nor was *Acton* v. *Blundell* (12 M. & W. 324) decided until 1843. The law was in an unsettled and uncertain state until the decision in *Acton* v. *Blundell* (*ubi sup.*). Before the passing of the private Act of 1854 the

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Waterworks Clauses Act 1847 came into operation, sect. 14 of which would be meaningless if the defendant's contention is right. That section covers all illegal acts. The right to underground water is limited to this extent, that it can only be taken so long as the taking of it does not arise from malicious motives:

Smith v. *Kenrick*, 7 C. B. 515, 564.

[The LORD CHANCELLOR.—That case must be considered, having regard to *Fletcher* v. *Rylands*, 19 L. T. Rep. 220; L. Rep. 3 E. & I. App. 330]. Yes; no doubt, for the maxim *Sic utere tuo ut alienum non lædas* applies. Subterranean water stands on a peculiar footing. There is no right to it until it is actually appropriated. [The LORD CHANCELLOR.—According to the maxim *Cujus est solum ejus est usque ad cœlum et ad inferos*, all the water under a landowner's soil belongs to him.] He may have a right to appropriate the water for his own legitimate purposes. But there is no property in the water, and the landowner cannot take it maliciously. For instance, a landowner has a right to drain his land for agricultural or other *bonâ fide* purposes, but not for profit:

Rawstron v. *Taylor*, 11 Exch. 369, 378.

A nuisance by noise, if done maliciously, may be restrained. So a reasonable use may be made by a landowner of the water under his land, but not a malicious use:

Gaunt v. *Fynney*, 27 L. T. Rep. 569; L. Rep. 8 Ch. App. 8, 12.

The doctrine established by that authority was acted upon by North, J. in the recent case of

Christie v. *Davey*, (1893) 1 Ch. 316.

A person who sustains injury from the execution of works authorised by a statute is not, generally speaking, entitled to compensation, unless the injury sustained is such as, had the works not been authorised by the statute, would have given the claimant a right of action:

New River Company v. *Johnson*, 2 Ell. & Ell. 435.

Everitt, Q.C. replied. *Cur. adv. vult.*

Dec. 10, 1894.—The following written judgments were delivered:—

The LORD CHANCELLOR (Herschell).—The rights of the parties which are in issue in this action depend mainly upon what is the true construction of sect. 49 of the Bradford Waterworks Act 1854. The acts, or threatened acts, of the defendant on which the plaintiffs base their claim to relief were done by him upon his own land, and it is practically admitted that, apart from one point made by the counsel for the plaintiffs, these were acts in respect of which they would have no legal right to redress, unless such a right be conferred on them by the enactment to which I have alluded. The point I refer to is that, inasmuch as the defendant's intention was (it was alleged) not to benefit himself, but maliciously to injure the plaintiffs, they had at common law a right to relief. I will deal with this point at a later stage, and will assume for the present that the defendant is not infringing any rights of the plaintiffs at common law. The argument on their behalf then necessarily involves the proposition that the defendant's rights in relation to his property have been curtailed by the enactment on which they rely. This being so, it becomes essential to consider the nature of that legislation. By an Act of 1854 the then existing Bradford Waterworks Company was dissolved, and a new company incorporated under the same title, having the same objects, but designed to serve a more extended area. By this Act the rights and powers of the old company were vested in the new one, and the provisions which had been inserted in the earlier Act for their benefit and protection were re-enacted. Sect. 49 of the Act of 1854 was a repetition, with merely verbal alterations, of the provisions of sect. 234 of the Bradford Waterworks Act 1842. That Act incorporated a company to be called the Bradford Waterworks Company. It was a trading company, formed for the purpose of making profit, although the profits were by its Act limited, practically speaking, to 10 per cent. interest on the capital invested. The first half of the Act contains provisions regulating the rights of the company and its members; then follow clauses relating to the compulsory purchase of land and the mode of assessing compensation. Sect. 232 empowers the company to enter upon any lands or waters mentioned in the book of reference, making satisfaction to all persons interested in any land or water used for the purposes of the Act. Sect. 233 makes it lawful for the company to divert and take "the springs and streams of water called 'Many Wells,' arising or flowing in and through a certain farm, lands, and grounds called Trooper, or Many Wells farm." Then follows the section which has to be construed. Having regard to the nature of the Act and its provisions generally, I think there is a strong presumption that the section in question was not intended to interfere with the rights of any person without compensation. The language of the Act is presumably that of those who promoted it, and there would be nothing to bring its provisions to the notice of any person whose lands or rights were not mentioned in the plan and book of reference. It was urged that the Act recites that a supply of pure water would be of advantage to the town of Bradford. This, no doubt, was a justification for conferring the power of taking the property of private persons by compulsion, even though it were on the terms of making compensation. But the undertaking was constituted with the view of making profit, and it would not be in accordance with the ordinary course of legislation to take away without compensation the private rights of individuals for the benefit of the undertakers, or even for the benefit of the inhabitants of Bradford. It was indeed urged that, in view of the situation and character of the defendant's land, it would not interfere with any rights which he could profitably use if he were restrained from any act on his land which could diminish the quantity of water issuing from the Many Wells springs, and that for this reason the Legislature might have been willing to permit a limitation of his legal rights without compensation. I think it would be somewhat extravagant to suppose that any such matter was in the contemplation of the Legislature. There would be nothing to bring before them the facts necessary for forming an opinion on the point, and it is clear that, if the argument of the plaintiffs be well founded, any operation on the defendant's land, or the land of any other proprietor, which sensibly diminished the water flowing from the springs would be prohibited, whatever the nature of the operation,

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and at whatever distance from the plaintiffs' boundary. I am certainly not prepared to say that the plaintiffs' contention, if sustained, could not possibly affect the rights of the defendant or other persons; and the evidence in the present case, with its conflict on both matters of fact and intention, shows at what peril of litigation, dependent largely on expert evidence, the adjoining proprietors would undertake operations which landowners generally may carry out, subject to no control but their own judgment of what would be expedient or advantageous. No doubt, if the language of the enactment reasonably admits only of a construction which would involve the consequence that individuals were deprived of their rights without compensation, effect must be given to it notwithstanding the presumption that there may be against the Legislature so enacting; but if, on the other hand, it is capable of a construction which would avoid such a consequence, I have no hesitation in saying that this is the construction to be adopted. All these observations apply equally to sect. 49 of the later Act, which is now in force. Notwithstanding some suggestions to the contrary, I think it clear that the construction of the two sections must be the same. Before examining the terms of the critical section, I will state very briefly the circumstances which have given rise to the litigation. The Many Wells springs issue from the hillside a short distance within the plaintiffs' boundary, the defendant being the owner of adjoining land higher up the hill. He was proceeding to sink certain shafts upon his land and to make a drift, with the alleged object of unwatering his property, with the view of working the stone which was said to exist at some distance beneath the surface of his property. The plaintiffs alleged that the water which percolated through the surface of the defendant's land was confined within it by faults which ran through his land, at some distance from one another, in a more or less parallel direction, and which thus made the defendant's land a natural reservoir, where the waters were collected which emerged from the hillside upon the plaintiffs' land at Many Wells springs. The plaintiffs maintained that the effect of the defendant's operations would be to collect and divert the water before it found its way to the plaintiffs' land, and thus to diminish seriously the volume of water issuing at the spring; they therefore sought an injunction to restrain the defendant from proceeding with his intended works. I pass now to an examination of the terms of the section in question. I may say at the outset that it is very ill-drawn, and that it is not possible, in my opinion, to put on it any construction which is altogether satisfactory. The main object of the section, as it seems to me, was to impose a special penalty on the illegal diversion of the company's waters, in addition to any relief which the common law would afford for such a wrongful act. That this was the primary object is, I think, indicated by the earlier words of the section, which render it unlawful for any person other than the company to divert, alter, or appropriate in any other manner than by law they may "be legally entitled," any of the waters supplying or flowing from the Many Wells streams and springs. It is obvious that this provision creates no new duty, inasmuch as it reserves any legal title to interfere with the water supplying or flowing from the springs. In my opinion its insertion was merely introductory to the later part of the section, which imposed a special penalty for illegal interference with them. This is, I think, an explanation which removes the difficulty felt by North, J., who said that it made nonsense of the section to suppose that it enacted that a man was not to do certain specified things, except so far as he might lawfully do them. He found a way out of the difficulty which he felt by concluding that the opening provision was intended to preserve as against the waterworks company such rights over the waters in question as an upper riparian proprietor has against a lower riparian proprietor in an open stream. For the reasons I have given I do not feel the difficulty by which the learned judge was pressed, and I cannot find in the language of the section any justification for limiting the operation of the words to the case to which he thought it applied. It seems to me to cover every act which a person was legally entitled to do, the effect of which would be to divert, alter, or appropriate any of the waters supplying the streams. The language is, in my opinion, just as applicable to percolating water as to water flowing in a defined channel above ground. The plaintiffs were not able to rely on this part of the section, inasmuch as they were at once confronted with the difficulty that the defendant alleged that he was legally entitled to deal in any way he pleased on his land with the water percolating therein. They rested their case upon the enactment of the section which follows the one I have quoted, and which provides that it shall not be lawful "to sink any well or pit, or do any act, matter, or thing whereby the waters of the said springs might be drawn off or diminished in quantity." And they pointed out that in this part of the section the right to do all acts which persons were legally entitled to do was not reserved. Upon this two questions arise: (1) Is the reservation of existing legal rights to be regarded as applying to these acts as well as to those to which the earlier part of the section refers? And (2) Does the appropriation or diversion of percolating water, before it reaches the springs, come within the prohibition? It must be admitted that there is great difficulty, as a matter of grammatical construction, in reading the reservation into that part of the section now under consideration, strange as it might seem that the Legislature should have preserved existing rights in the one case and not in the other. But, if effect were given to the contention of the plaintiffs that the waters supplying the springs were included in the words "waters of the said springs," so that the diversion or appropriation of percolating water before it reached the springs would be within the latter part of the enactment, this absurdity is involved—that the reservation of existing legal rights in the earlier part of the section is rendered absolutely nugatory, for diverting or appropriating the percolating water would necessarily be doing an act or thing whereby the waters of the springs might be diminished. It is to be observed that, whereas in the earlier part of the section the words used are "the water supplying or flowing from the springs," in the later part the words used are "the waters of the said springs." Now, it would certainly not be in accordance with sound canons of construction to attribute to the later words a

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different meaning from that borne by the former, inasmuch as it would be difficult to suggest a reason for the change, unless some changed meaning were intended. The springs are described as "arising or flowing in and through Many Wells Farm." It is certainly not unnatural to say that water which is percolating in the adjoining land, and which never reaches the spring thus described as "arising" in the farm, is not "water of the spring," and it seems to me to be a possible construction of the provision under discussion to confine it to water which has formed a part of the spring. Mere interference with water percolating on adjoining lands which prevented that percolating water from forming part of the spring might in that case not improperly be said to be outside the enactment. It may, indeed, be asked why, even on this construction, the Legislature should be supposed to have reserved existing legal rights in the earlier and not in the later part of the section? The answer may be that, at the time when the Act of 1842 was passed, the case of *Acton* v. *Blundell* (12 M. & W. 324) had not been decided, and it may have been thought that, whilst a legal right existed to intercept percolating water before it reached a spring, there was no right by abstracting percolating water to drain off or diminish the quantity of water flowing in a defined channel. And there would certainly be in general no right to divert, alter, or appropriate waters "flowing from" the Many Wells springs so as to diminish its quantity. I freely admit that the construction which I have indicated is not absolutely satisfactory and does not solve all the difficulties. But, in view of the considerations to which I have called attention, it is perhaps the best solution that can be arrived at, and the one most in accordance with the principles which ought to guide in the construction of an Act such as that with which we have to deal. But, if it be not admissible, the only alternative, as it seems to me, is to read the words which reserve existing rights as applicable to both limbs of the section. To prevent the absurdity and inconsistency which would otherwise result, one or other of these alternatives must, I think, be adopted, and for the purposes of this case it matters not which. I notice one argument of the learned counsel for the plaintiffs to show that I have not overlooked it. They urged that, inasmuch as, when the Act of 1854 was passed, the water was carried from the springs in pipes to Bradford, the sinking of a well or pit could not draw off or diminish the "water of the springs," unless those words included the water percolating in the defendant's lands adjoining the springs, and that, therefore, the construction of those words which I have suggested was inadmissible. I have already said that I think it would not be right under the circumstances to attribute to sect. 49 of the Act of 1854 any different meaning from that to be put upon the corresponding section of the Act of 1842. But, besides this, when it is remembered that the clause was inserted at the instance of the promoters of a local and personal Act for their protection, and that they would naturally employ the broadest and most general words, so as to be sure that no case intended to be covered was omitted, I think it would be wrong to admit, as an argument for putting a construction upon the enactment which would prejudice the rights of third parties, that some of the words employed could not in fact otherwise be operative. There remains the point to which I adverted—viz., the argument that, even if the defendant is not otherwise infringing any rights of the plaintiffs, he may be restrained from a malicious exercise of his legal rights, his design being to injure the plaintiffs, and not to benefit himself. There is the high authority of Lord Wensleydale for stating that this principle has not found a place in our law. No case has been cited where relief has been given by the courts on any such ground. It could hardly be asserted that this was because no person had ever thus exercised his legal rights to the prejudice of his neighbour. But it is enough to say on the present occasion that, even if the proposition contended for were established, I do not think the plaintiffs have shown that the present case falls within it. It is suggested that the defendant's object is, by the exercise of his rights, so to affect the supply which the plaintiffs receive of the water percolating through the land as to compel them to purchase the land, or some right which will secure the uninterrupted flow of the water to the springs. If this be his object (which I will assume for the purpose of my judgment), I do not think it can be regarded as malicious. He would say, "The water which at any time is percolating in my land is, so long as it remains in my land, as much mine as any part of the soil, and, if the conformation of my land be such that it acts as a natural reservoir, there is no reason why I should not take advantage of that, so as to secure a benefit to myself, if my neighbours are desirous of reaping the advantage of this natural reservoir in the land which adjoins their own." I think, therefore, that the judgment of North, J. should be reversed and the action be dismissed with costs, and that the appellant should have the costs of the appeal.

Lindley, L.J.—The plaintiffs in this case are (*inter alia*) a waterworks company, and they want water. The defendant is the owner of some land, which is full of water which he does not want. This water supplies some wells which belong to the plaintiffs, and if cut off by the defendant will materially diminish the water which the plaintiffs will be able to pump. The defendant says to the plaintiffs, "If you want me to supply you with water, you must pay me for it; and if you will not pay me what I want, you shall not have water from my land, and I will cut it off." The defendant and the plaintiffs being unable to come to terms, the defendant has begun to construct works which, if completed, will cut off, or at all events greatly diminish, the plaintiffs' supply. The plaintiffs thereupon bring this action, and apply for an injunction, which North, J. has granted. The defendant has appealed, and this court has now to decide whether the injunction can be maintained or not. I entirely concur in the view taken by North, J. of the conduct of the defendant. He does not want the water himself, nor does he want to get rid of it in order the better to work his own land. He simply wants to force the plaintiffs to buy his land, or the water coming from it, at his own price, regardless of the interests of other people who will be seriously inconvenienced if the defendant cuts off the supply. But North, J. held, and in my opinion rightly held, that these circumstances are not enough to justify the court in

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interfering with the defendant. The only question a court of law or equity can consider is, whether the defendant has a right to do what he threatens and intends to do. If he has he cannot be interfered with, however selfish, vexatious, or even malicious, his conduct may be: (see *Chasemore* v. *Richards*, 7 H. of L. Cas. 349.) This is not one of those cases in which an improper object or motive makes an otherwise lawful act actionable. It is not like libel or malicious prosecution, or what are called frauds on powers. Apart from special legislation, the right of the defendant to drain his own land by getting rid of all the water which percolates into and through it underground cannot be denied (see *Chasemore* v. *Richards*, *ubi sup.*, and *Acton* v. *Blundell*, 12 M. &. W. 324), and this is all that he is doing. He is not diverting any defined stream. If, as the plaintiffs say, he is not entitled to do what he intends to do, it must be by reason of some special legislation, and not by reason of the ordinary law of this country. The plaintiffs rely on certain Acts of Parliament, which confer upon them special rights in order to enable them to supply the town of Bradford with water, and the plaintiffs contend that these Acts restrict the ordinary rights of the defendant to drain his own property. It is necessary, therefore, to examine these Acts, and see whether they do or do not go as far as the plaintiffs contend. I have come to the conclusion that they do not. The statute now in force, and on which the case really turns, is the Bradford Corporation Waterworks Act 1854 (17 & 18 Vict. c. cxxiv.), which repealed and replaced an earlier special Act of 1842 (5 Vict. sess. 2, c. vi.). This Act incorporated the Bradford Waterworks Company in order to supply Bradford with water. I have looked in vain through these Acts for any provision for compensating the defendant or his predecessors in title for any interference with their rights where their land is not taken and is not injuriously affected by the execution of the works which the plaintiffs or their predecessors were authorised to construct. The only compensation clauses which I can find are sect. 170 of the Act of 1842, and sect. 68 of the Lands Clauses Consolidation Act 1845 and sect. 12 of the Waterworks Clauses Consolidation Act 1847, both of which are incorporated into the plaintiffs' Act of 1854 (see sect. 3). There are clauses in the Act of 1842 for compensating certain persons therein named (*e.g.* Mrs. Ferrand: see sect. 275 *et seq.*). But I can find no clause either in the Act of 1842, or in the Act of 1854, or in the Acts incorporated with it, for compensating the defendant for any restriction on his common law rights, or for paying him for water drawn from his land into the plaintiffs' wells by the plaintiffs' pumping operations. The absence of all provision for such compensation is very material when we have to construe an obscure clause which is said to curtail the defendant's ordinary rights. The particular section on which the plaintiffs rely is sect. 49 of the Act of 1854, which is in effect a re-enactment of sect. 234 of the Act of 1842. The sect. 49 is ill-drawn, but it is a penal section inflicting a heavy penalty, of not more than 5*l.* a day, on any person who unlawfully interferes with the supply of water to which the company is entitled; but in my opinion it does not restrict the common law rights of persons owning land next to or in the neighbourhood of the plaintiffs' own lands and wells. There are undoubtedly words in the section which might be construed so as to prohibit neighbouring landowners from exercising their common law rights of sinking wells or pits on their own land; but the early part of the section plainly shows that it was not intended to restrict their rights to divert, alter, or appropriate the waters supplying or flowing from the streams and wells; and the language is too obscure to prevent them from doing so by sinking wells or pits, provided only they do no more than by common law they are entitled to do. In the clause commencing "If any person shall illegally divert, &c., or sink, &c., or shall do any such act, &c." the word "illegally" is in my opinion used in the same sense throughout, *i.e.*, illegally having regard to what can be lawfully done irrespectively of that particular section. This is the plain meaning of the word so far as it refers to diverting, altering, or appropriating water, and I see no sufficient ground for holding that the word has a different meaning when referred to sinking wells or pits or doing other acts, &c., whereby the waters referred to are drawn off or diminished in quantity. The section is badly worded; but, in the absence of all provision for compensation, I cannot hold that the section itself prohibits a neighbouring landowner from sinking a pit or well on his own land, although the effect may be to deprive the plaintiffs of a supply of water which they would otherwise have. It was contended that, as the Waterworks Clauses Consolidation Act 1847 (10 &11 Vict. c. 17) is incorporated with the Act of 1854, and as the Waterworks Clauses Consolidation Act 1847 by sect. 14 imposes penalties on wrong-doers, the insertion of sect. 49 of the Act of 1854 shows that something more was meant than to inflict penalties for doing what was wrong at common law. I do not, however, feel convinced by this argument. Sect. 49 of the Act of 1854 is a mere repetition of sect 234 of the Act of 1842, which was prior in point of date to the Waterworks Clauses Consolidation Act. The preservation of this section is probably due to a desire on the part of the corporation to keep the old section in their special Act, so as not to lose any protection it might give beyond that afforded by sect. 14 of the Waterworks Clauses Consolidation Act, which was made applicable to all companies whose special Acts might incorporate its provisions. The fact that sect. 234 of the Act of 1842 is retained in the Act of 1854 is not however, in my opinion, sufficient to justify the inference that Parliament intended to alter the effect of the old section and to give to the Bradford Corporation greater rights as against neighbouring landowners than the old waterworks company had under their Act in which the section first appeared. For these reasons I am reluctantly driven to the conclusion that the defendant is not exceeding his legal rights; and that the appeal must be allowed, and the action against him must be dismissed with costs in the usual way.

SMITH, L.J.—The decision in this case depends principally upon the true construction of sect. 49 of the Act of 1854 (17 & 18 Vict. c. cxxiv.), which Act repealed and by sect. 49 in substance re-enacted sect. 234 of an Act of 1842 (5 Vict. c. vi.), which was an Act for the better supplying with water the town and neighbourhood of Bradford. North, J. arrived at the conclusion that the works which the defendant was executing, and against

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which the injunction has been obtained by the plaintiffs, were deliberately planned by him for the purpose of intercepting the water which had previously issued from the Many Wells springs belonging to the plaintiffs, and that the desired result would be thereby accomplished; and that what the defendant was doing was not in order that he might be enabled to work his stone, as he put forward in evidence, but in order that the plaintiffs might be driven to buy him out at the price he himself might value his interest at. These findings are well warranted by the evidence. It appears that the defendant, to bring this about, is intercepting the subterranean water percolating under his own land before its arrival by natural gravitation at the land of the plaintiffs, where the Many Wells springs are situated. But, in considering the true construction of the section, the motive of the defendant is immaterial, and it must be interpreted as if the defendant was sinking a well upon his own land for his own legitimate purposes. No question of tapping or diverting a defined stream arises upon the facts proved in the present case, and it cannot be now disputed at common law, apart from the point as to the defendant's motive, which I will deal with hereafter; he is within his rights in doing what he is doing, unless sect. 49 forbids it. The law upon this subject was definitively settled in the year 1858 in the House of Lords in the case of *Chasemore* v. *Richards* (*ubi sup.*), where the question arose as to the right of an owner of land to sink a well upon his own premises, and thereby abstract the subterranean water percolating and oozing through his soil, which water, by the natural force of gravity, would have found its way into springs which fed the river Wandle, the flow of which the plaintiff in the action had enjoyed for upwards of sixty years. It was held, first, that the landowner was entitled, upon his own land, to sink a well, and thereby take and appropriate the underground percolating water, even though the result was to diminish the waters of the Wandle, which had been so long enjoyed by the plaintiff; and, secondly, that he could do so, even although he did it not for his own use, but to enable him to supply a whole town with water. Lord Wensleydale, though agreeing that the landowner had a right to sink a well and appropriate the percolating underground water, doubted the legality of his abstracting it for the use of a large district in the neighbourhood unconnected with his own estate, applying the maxim, *Sic utere tuo ut alienum non lædas*, and thought that the landowner could only exercise his right in a reasonable manner. But this view found no favour either with the judges who were called in to advise the House, or with the noble lords who delivered judgment upon the case. No reasons were given why the maxim was inapplicable, and it appears to me that it may have been so held upon the ground that an adjacent landowner had no property in or right to subterranean percolating water until it arrives underneath his soil, and that therefore no property or right of his is injured by the abstraction of the percolating water before it arrives under his land. It is not the case of a natural stream, flowing either above or below the surface in a definite channel, to which an adjacent owner has a right *ex jure naturæ*. The Act of 1842, in its preamble, recites that the inhabitants of the town of Bradford and its neighbourhood were then very inadequately supplied with water, and that a sufficient and constant supply of pure and wholesome water would be of great advantage to the inhabitants, and that it was ascertained that such a supply could be obtained, and that several persons were willing at their own expense to make and maintain the necessary works for affording such supply. And by sect. 1 it was enacted that a company should be established for that purpose, and by subsequent sections powers were given to the persons incorporated to purchase lands, and also the Many Wells springs. It was stated in evidence by Mr. Gott that the Many Wells springs, at the time when the company purchased them and set up its works, constituted the entire supply of water for the town of Bradford. Now, sect. 49 of the Act of 1854 is unquestionably, amongst other things, a penal section, for powers are thereby given to the proposed company to recover penalties not exceeding 5*l.* per diem, against any person contravening the enactments of that section, in addition to any damages the company might sustain by reason of their supply of water being thereby diminished. And the real point in this case is whether, when a person is doing what at common law he is entitled to do upon his own land, he is or is not acting in contravention of the section, for I apprehend, although a penalty is given, that would not of itself be an answer to an application for an injunction to restrain him from acting contrary to the section. There are no provisions in the Act for compensating a person in the position of the defendant if he is, as the plaintiffs now argue, to be deprived of the right of dealing with and using the percolating water as he desires, and which, apart from the section, the law allows him to do. Before I come to the section there appear to me to be two considerations worthy of notice. On the one hand, the object of the Legislature was to procure pure water for Bradford; and on the other, that the Act has not provided any compensation for the rights it is said to have taken away from the defendant. Bearing this in mind, what does this section enact? In the first place, the section does not forbid a person diverting, altering, or appropriating any of the waters supplying or flowing from the Many Wells springs in any manner as by law he was then entitled to do, but, on the contrary, this is expressly permitted by the section. This, as far as it goes, is in derogation of the supply of pure water to Bradford. If the section had stopped here, there would have been no difficulty, and there was no need of providing compensation to anyone, for what a person was entitled by law to do, as to diverting, altering, or appropriating water supplying or flowing from the Many Wells springs before the Act passed, he was entitled to do after. But the section goes further, and enacts that it shall not be lawful for any person (other than the company) "to sink any well or pit, or do any act, matter, or thing whereby the waters of the said springs might be drained off or diminished in quantity." It is said that the reservation in favour of the right to water of individuals existing by law when the Act was passed, though reserved to persons mentioned in the first limb of this section, is not reserved in this second limb, and that the second limb contains an absolute prohibition from doing any act, matter, or thing whereby the waters of the springs might be drawn off or diminished in

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quantity. I agree that, upon first reading this badly-drafted section, it would appear to be so; but, upon consideration, I cannot so read it. I cannot see that the language of the section is such as to compel me to hold (enacting as it undoubtedly does) that a person is entitled after the Act was passed to divert, alter, or appropriate any of the waters supplying or flowing from the Many Wells springs as the law then entitled him to do, no matter to what extent, without being liable to a penalty; that the same section also enacts that he is not entitled after the Act was passed to do any act, matter, or thing, such as sinking any well or pit, whereby the waters of the springs might be drawn off or diminished in quantity, and if he did so was to be liable to a penalty, This reading of the two limbs of the section appears to me to be meaningless, viz., that a person, after the passing of the Act, might divert the waters supplying the springs to any extent if he was then entitled by law to do so, and yet at the same time he was absolutely forbidden from doing any act whereby the waters of the springs might be diminished in quantity. In my opinion the true reading of the section is not this, but is as follows: The parenthesis "in any other manner than by law they may be legally entitled" is to be read after the words "other than the company," and before the words "to divert." This will make the section intelligible, and will prohibit a person doing what the law then did not permit him to do, whereby the company's supply of water is diminished, and render him liable to a penalty if he does so, and also allow him to do what the law then permitted without being liable to a penalty, and this will account for the fact of there being no provision as to compensation in the Act to meet a case like that of the defendant's, for upon the reading none is required. North, J. considered that this made nonsense of the section, for he says it makes the section enact that a man is not to do certain specified things, except so far as he may lawfully do them. But the learned judge omitted, I think, to notice what I take to be the paramount object of the section—viz., the imposition of a penalty in favour of the company. And why is it nonsense to enact that, if a man does certain specified things which the law does not permit, he shall be liable to a penalty? and, what is more, the first limb of the section undoubtedly does enact that he may not do certain specified things except so far as by law he may be legally entitled. For these reasons I think that what the defendant has been doing, and is proposing to do, is not in breach of the section. It was next said, on behalf of the corporation, that, suppose this to be so, yet at common law the defendant was not entitled to take and appropriate water percolating under his land if he did so with the malicious intent of injuring his neighbour, and that the findings of North, J. amounted to such a malicious intent. I do not think that they do, for an intent by one to coerce another to purchase his land, even at his own price, cannot, as it seems to me, be held to be a malicious intent to injure the other; it is in reality an intent to benefit himself. But even if this were otherwise, such a doctrine has no place in the common law of England. The observations of Maule, J. in *Acton* v. *Blundell* (12 M. & W. 324), again repeated in that case in the Exchequer Chamber (at p. 353), were cited in support of the proposition. But it appears to me that, at any rate as far as this court is concerned, the passage in Lord Wensleydale's judgment in the House of Lords in *Chasemore* v. *Richards* (7 H. of L. Cas. 349, at p. 388) is decisive. He says: "The civil law deems an act, otherwise lawful in itself, illegal if done with a malicious intent of injuring a neighbour, *animo vicino nocendi*. The same principle is adopted in the laws of Scotland, where an otherwise lawful act is forbidden, 'if done in *æmulationem vicini*,' but this principle has not found a place in our law." In my judgment, by the common law of England, a man may deal with his own in any way he pleases, irrespective of what his motive may be, so long as he transgresses no statute, no contract, or the maxim above referred to. For these reasons it appears to me that what the defendant is doing is not contrary to either the statute or the common law of England, and, consequently, the plaintiffs are not entitled to an injunction. This appeal must, therefore, be allowed, and the action dismissed with costs here and below.

Appeal allowed.

Solicitors: for the appellant, *Ullithorne, Currey,* and *Villiers*, agents for *W.* and *G. Burr* and *Co.*, Keighley; for the respondents, *Cann* and *Son*, agents for *W. T. McGowen*, Bradford.

Monday, Dec. 17, 1894.

(Before Lord HALSBURY, LINDLEY and SMITH, L.JJ.)

Re SHORTRIDGE (a Person of unsound mind).(*a*)

ORIGINAL APPLICATION TO THE COURT SITTING IN LUNACY.

Lunacy—Practice—Settlement—Lunatic tenant for life—Appointment of new trustees—Exercise of power on behalf of lunatic—Vesting order—Jurisdiction—Lunacy Act 1890 (53 & 54 *Vict. c.* 5), *s.* 116, *sub-sects.* 1, 2, 3, *sects.* 128, 129.

Where a person of unsound mind, but not so found by inquisition, was tenant for life under a settlement of a sum of consols, and as such had power to appoint new trustees of the settlement, and an order was made by a master in lunacy authorising the sister of the tenant for life to exercise on her behalf the power of appointment by appointing two persons named as new trustees, and directing that upon their appointment the right to call for a transfer of the consols should vest in them, the Court held that the order was correct; but that in similar cases arising in the future the Bank of England should have for their guidance some kind of certificate by the master of the execution of the deed of appointment.

Re Bowmer (3 *De G. & J.* 658) *followed.*

BY an indenture, dated the 8th Feb. 1864, being a settlement made prior to the marriage of Louisa Jane Shortridge (then Louisa Jane Stoyle) certain trust funds, including a sum of Three per Cent. Bank Annuities, were assigned to Richard Bowerman Bulley, Isaiah Cann Radford, and John Nicolas Hutchens upon certain trusts under which Mrs. Shortridge took the first life interest; and she was thereby empowered in the usual terms to appoint new trustees in the place of the said trustees.

All the said trustees were now dead, and Mrs. Shortridge, having become of unsound mind, though not so found by inquisition, and her

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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husband being also dead, an application was made in lunacy by Selina Jane Stoyle, the sister of Mrs. Shortridge, on various points concerning the estate of Mrs. Shortridge.

Upon that application an order was made by one of the masters in lunacy on the 19th March 1894, whereby it was (*inter alia*) ordered that Selina Jane Stoyle should be authorised, in the name and on the behalf of Mrs. Shortridge, to exercise the power of appointing new trustees vested in Mrs. Shortridge by her marriage settlement by appointing Ellery Arthur Bennett and Sedley Wolferstan as new trustees of such settlement in the place of the deceased trustees, and to do and execute such acts, deeds, and instruments as might be necessary and proper, and as the masters in lunacy should approve of; and, further, that upon the appointment of the said new trustees, they should be and were thereby appointed to call for a transfer into their joint names of the sum of consols then standing in the books of the Bank of England in the joint names of the deceased trustees, and to receive the dividends accrued and to accrue thereon until such transfer; and that the consols, when transferred, should be held and applied by them upon and according to the subsisting trusts of the settlement.

In pursuance of that order, Selina Jane Stoyle, by an indenture dated the 16th April 1894, appointed the said new trustees in the place of the deceased trustees.

The order of the 19th March 1894 was duly served on the Bank of England, together with the indenture of the 16th April 1894, but the bank refused to act on it, upon the ground (*inter alia*) that the above-stated provisions ought to have been the subject of separate orders, the first authorising Selina Jane Stoyle to appoint the new trustees, and the second vesting in the new trustees by name the right to call for a transfer of the consols, so that the bank might have an order which they could act upon without being obliged themselves to look into the deed of appointment in order to see the effect of it and to ascertain that it had been duly executed. The bank also objected that there was no jurisdiction under the Lunacy Acts to make the order, because the power of appointing new trustees was neither a beneficial nor a fiduciary power, but a ministerial power only.

Selina Jane Stoyle accordingly now applied to this court sitting in lunacy, that the order of the 19th March 1894 as above set forth might stand and be passed and entered, and that the Bank of England might be ordered to act upon it, and give full effect thereto.

A. W. Rowden for the applicant.—The objections of the Bank of England to the order made in this case are not well founded, having regard to the Lunacy Act 1890, sects. 116 (2), 128, 129. In the case of *Re Garrod* (a lunatic) (54 L. T. Rep. 291; 31 Ch. Div. 164) it was held, under circumstances similar to those in the present case, that the only proper application in lunacy was to ask for an order authorising the committee of a lunatic to consent on her behalf to an appointment of new trustees pursuant to a power contained in a will. Sect. 129 of the Lunacy Act 1890 follows exactly sect. 138 of the Lunacy Regulation Act 1853 (16 & 17 Vict. c. 70). Sect. 128 of the Act of 1890 corresponds to sect. 137 of the Act of 1853. Under sect. 138 of the Act of 1853, the case of *Re Bowmer* (3 De G. & J. 658) was decided, and that I submit is an absolute precedent for the order made here. I say that two orders were not necessary, and that the lunatic's estate ought not to be put to the expense of two orders. Inasmuch as the bank have the indemnity given by sect. 333 of the Act of 1890, there can be no doubt that they are perfectly safe. It is only a question of their book-keeping. I submit, therefore, that their objections are unreasonable, and ought not to be allowed to prevail.

Latham, Q.C. for the respondents, the Bank of England.—Ever since the Act of 1853 it has been the practice of the bank to require two orders in such a case as this. Other persons are concerned besides those mentioned in the order, and the court has always commended objections made in the interests of the public. The case of *Re Bowmer* (*ubi sup.*) was a very peculiar one, and I suggest that there must have been some mistake in the order made. It is possible that the beneficiary was also a trustee, but that fact does not appear from the report. [Lindley, L.J.—You will have some difficulty in persuading me that so careful a judge as Turner, L.J. made a mistake. The registrar informs me that the order made in *Re Bowmer* was under sect. 136 of the Act of 1853, not under sect. 137 as stated in the report.] Then I say that the order ought to have been intituled in the matter of the Trustee Act 1893, the case not being provided for by the Lunacy Act 1890, the lunatic not having the power as a trustee, nor yet for her own benefit. [*Rowden.*—In *Re Skeats's Settlement*; *Skeats* v. *Evans* (61 L. T. Rep. 500; 42 Ch. Div. 522). Kay, J. decided that a power of appointing new trustees was a fiduciary power. That case raised the exact point whether the power to appoint new trustees was fiduciary or not.] The Court of Appeal has held that a County Court judge has no jurisdiction to make an order directing that stock standing in the name of a lunatic whose property is of less value than 200*l.*, be transferred to a person appointed by him under sect. 132 of the Lunacy Act 1890:

Re Noyce; *Hilleary* v. *Noyce*, 66 L. T. Rep. 331; (1892) 1 Q. B. 642.

No reply was called for.

Lord Halsbury.—I am of opinion that this order is correct, and that the objections of the Bank of England ought not to prevail. We have the precedent of *Re Bowmer* (*ubi sup.*) in 1859, which, when it is looked into and explained, seems to me entirely to embrace this case, because the somewhat hypercritical objection upon the words of the 128th section of the Lunacy Act 1890, that this power is vested in the lunatic in the character of trustee or guardian, is abundantly satisfied by the decision of Kay, J. in *Re Skeats*; *Skeats* v. *Evans* (*ubi sup.*). That view has also been adopted by the Lords Justices sitting in lunacy in the case of *Re Blake* (1887) W. N. 173). Therefore, I think that the 128th section does apply. When one has the 128th section applying to this case, then it appears to me that the 129th section also applies. The whole scheme of the 129th section was that, instead of having to go, first, to one branch of the court and then to another—or, as I have heard remarked elsewhere, sending the suitor as a sort of shuttlecock between the battledores of different courts—the order should be made by one court,

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and I think that the 129th section was intended to do that. If you construe the words "the order" as meaning not only the order, but the appointment, and what is done under the order, I think that the 129th section was intended in a compendious form to get rid of all the circumlocution and to get the thing done under one piece of parchment, and to give the power to the judge in lunacy to do everything necessary for the benefit of the lunatic, and not to multiply different steps whereby costs and every inconvenience were multiplied. I think that we ought to construe the 129th section as embracing not only the order but everything under it. That is what was intended to be done by this order, and that, I think, is right. One point, and one only, has made an impression on me, and that is this: It does seem unreasonable that, where the deed is brought to the bank, it should be the duty of the bank's clerk to verify the execution of the deed, or the genuineness of the person supposed to execute it. And I think that in future it would be as well that some certificate should be brought with the deed so as to justify the bank, and assist them in keeping the books correctly. That, however, was not the objection made. In future, if it is thought right, I have no doubt some communication will be made by the master. For myself, I am satisfied that the order as drawn up is right, and I think that the objections to it ought not to prevail.

LINDLEY, L.J.—I think that the objection that this order is *ultra vires* is untenable upon the construction of the sections of the Lunacy Act of 1890. No doubt, when sect. 116, which is one of the most beneficial sections, was introduced, it was foreseen that there would be very great difficulty and expense in making orders under that section if parties had to go before both the High Court of Chancery and before the judge under the lunacy jurisdiction. I cannot help thinking that one of the main objects of this section was to invest the judge in lunacy with power to make orders in lunacy, appointing new trustees, and that that was more or less skilfully incorporated in the Act of 1890. I do not know that they are incorporated quite so skilfully as they might have been, but I am satisfied that, under sect. 116, sub-sect. 2, and sects. 128 and 129, there is ample power to make the order which is said to be *ultra vires*. That a person who has a power of appointing trustees is within sect. 128 has been decided more than once. As I understand it, that decision was arrived at in 1859 in the case of *Re Bowmer* (*ubi sup.*) by one of the most cautious and experienced judges who ever sat, who we know looked after the accuracy of these orders most vigilantly. That has been followed more or less ever since. We are asked to say that that is all wrong. I decline to do so. Moreover, Cotton, L.J., in *Re Blake* (1887) W. N. 173), referred to in an anonymous case of *Re X.* (71 L. T. Rep. 139; (1894) 2 Ch. 415), held that such a person did come within the Lunacy Regulation Act 1853. Then there is the decision of Kay, L.J. (then Kay, J.) in the case of *Re Skeats* (*ubi sup.*), to the effect that the power of appointing new trustees is a fiduciary power. I have no doubt about it myself, and when we put that to Mr. Latham, and suggested that such a person must come within the terms of the section, he suggested that the power was vested in the trustee in some ministerial character. I decline to accept that suggestion. Then it is said that, apart from that, the order is wrong because it is not in two parts. That appears to me not to be supported by any sound reason. Nothing is more common than for orders to be made that upon such a thing happening such a thing shall follow. So far as that objection goes, I think it is untenable. No doubt it is desirable for the Bank of England to have what they call "clean orders," and there is some sense in it, and it is desirable that our orders should not trammel the business of the bank, who have enormous duties to discharge. If they had suggested that they were not satisfied that the particular deed had been executed, if they had raised that point, I cannot help thinking that there would have been good sense in it. But, instead of that, they say, "Your order is all wrong," and they want to force the court to draw up its orders in a way that suits them. I protest against that. I thank them for pointing out any slip which makes the order wrong, but when the order is right it is for the bank to obey it. I will speak to the master and get what I think will be convenient, namely, that there should be something put in the order, or some kind of certificate, which will be better than the letter of the solicitor, to show that that is the deed on which the bank have to act. I think that they are entitled to that, but that is not what they wanted. They wanted to put the lunatic's estate to the expense and trouble of getting what they call a clean order. I protest altogether against that. It is the bank's business to obey the order.

SMITH, L.J.—I am of opinion that this order is a valid order, and that the objections to it on the ground that it is *ultra vires* are ill-founded, for the reasons given by Lord Halsbury and Lindley, L.J. I only want to say one word about that case of *Re Noyce; Hilleary* v. *Noyce* (66 L. T. Rep. 331; (1892) 1 Q. B. 642), to the decision in which I was a party. That case has nothing to do with the point argued to-day. All that case decided was, that Mr. Prentice, sitting as a County Court judge, having made a vesting order, purporting to act under sect. 133 of the Lunacy Act 1890, that order was wrong. The Bank of England objected to that order, and said that the County Court judge had no power to make a vesting order at all, because the power of the County Court judge was prescribed by sect. 132, and anything outside it the County Court judge had no jurisdiction to deal with in lunacy. We decided that, and the Court of Appeal upheld us. No point was taken in that case as to the jurisdiction of the judge in lunacy under sects. 128 and 129 of the Lunacy Act 1890. Therefore, it seems to me, though that case was cited as being a binding authority on this court, it has nothing to do with the case we are now deciding.

Solicitors for the applicant, *Surr, Gribble, Bunton*, and *Co.*

Solicitors for the respondents, *Freshfields* and *Williams.*

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Tuesday, Nov. 13, 1894.

(Before Lord ESHER, M.R., LOPES and SMITH, L.JJ.)

GRAINGER AND SON *v.* GOUGH. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Revenue—Income tax—Trade exercised in England by foreigner resident abroad — Chargeable in name of agent—Liability of agent—Income Tax Act 1842 (5 *&* 6 *Vict. c.* 35), *ss.* 41 *and* 44—*Income Tax Act* 1853 (16 *&* 17 *Vict. c.* 34), *s.* 2, *sched. D.*

The Income Tax Act 1853, *sect.* 2, *sched. D., imposes the tax upon "profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident in the United Kingdom, from any profession, trade, vocation, or employment exercised in the United Kingdom;" and the Income Tax Act* 1842 *provides by sect.* 41, *that "any person not resident in Great Britain, whether a subject of Her Majesty or not, shall be chargeable in the name of any factor, agent, or receiver having the receipt of any profits or gains in the like manner and to the like amount as would be charged if such person were resident in Great Britain, and in the actual receipt thereof."*

The appellants acted as agents in England for R., a foreign wine merchant resident and carrying on business abroad, and it was held that R. exercised his trade in England. Payments were collected by the appellants for R., and they gave receipts for and on his behalf; customers often made payments direct to R.; the appellants sent R., all cheques and bills made payable to him; in cash they received just sufficient to pay their commission and expenses. An assessment to the income tax, of 3000*l.*, *was made thus; "L. Roederer . . . in the name of Grainger and Son (the appellants), agents."*

Held (affirming the decision of the Queen's Bench Division), that a foreigner exercising his trade within the United Kingdom can be assessed, under sect. 41 *of the Income Tax Act* 1842, *in the name of his agent whether such agent does or does not receive the profits or gains, and that the assessment was properly made.*

THIS was an appeal by Grainger and Son from the decision of the Queen's Bench Division (Mathew and Cave, JJ.) upon a case stated by the Income Tax Commissioners.

SPECIAL CASE.

At a meeting of the Commissioners for the General Purposes of the Income Tax Acts for the City of London, held at the Guildhall-buildings in the said city, on Thursday, the 17th Feb. 1887, Messrs. Grainger and Son appealed on their own behalf against assessments for each of the years 1884, 1885, and 1886 of 3000*l.* made as follows: "Louis Roederer of Rheims, champagne shipper, in the name of Grainger and Son, agents, 108, Fenchurch-street," under the circumstances following:

Mr. Louis Roederer is a wine merchant and champagne shipper, whose chief place of business is at Rheims, in the Republic of France, and who has for many years shipped large quantities of champagne to England in the course of his business.

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

The appellants, Messrs. Grainger and Son, are wine merchants carrying on business at No. 108, Fenchurch-street, in the city of London, and are the London agents of the said Louis Roederer. They also carry on there an extensive business of their own as wine merchants.

The appellants are agents in Great Britain for the sale of L. Roederer's wine, and they appoint other persons in towns other than London as sub-agents. The business transacted by Messrs. Grainger on behalf of Mr. Roederer has been carried on in England for many years, and is very extensive. The orders are sought in the name of Louis Roederer, and when received are transmitted by the appellants to Louis Roederer at Rheims, and he exercises his discretion as to executing the said orders. In every instance he forwards the wine direct to the customer in England free on board at Rheims, and at the latter's risk and expense. The wine is invoiced by Louis Roederer to the customer in Louis Roederer's name as vendor. No other wines are sent to this country except those ordered through the appellants as aforesaid. The amounts due in respect of the wine so sold are collected by Messrs. Grainger and Son at 108, Fenchurch-street aforesaid on behalf of L. Roederer, and receipts are given for and on his behalf; but the customers frequently remit the amount of their invoices direct to L. Roederer, as hereinafter mentioned. The appellants are entitled to a commission upon all orders received from Great Britain, if executed, and have no other interest in the sale. L. Roederer has registered a series of trade marks in Great Britain, as appears by a print of the *Trade Marks Journal* annexed to and forming part of this case. L. Roederer keeps a large stock of wine at Rheims especially for sale in Great Britain, and known as "reserve" for Great Britain; but neither he nor the appellants for his account keep any of this stock in England.

In case of default in payment by any customer, proceedings are taken in the English courts in the name of L. Roederer, and proof in bankruptcy is made in L. Roederer's name against any bankrupt debtor.

The appellants, Messrs. Grainger and Son, receive money—that is to say, cash from the purchasers of wine here on account of the said L. Roederer—but the money so received sometimes, but rarely, exceeds the commission due to the said appellants, and then only to a comparatively small amount. They, on his behalf, occasionally incur and pay for him other charges which absorb such excess. The said L. Roederer usually draws on his customers in England direct.

In addition to the said cash the said appellants, Messrs. Grainger and Son, receive English and foreign drafts and cheques on English banks and on French houses payable to the said L. Roederer in respect of orders fulfilled by the said L. Roederer, and forward the same to their principal, who sends receipts to his customers therefor.

It appeared from the course of business that the said Messrs. Grainger and Son are paid their commission by a *per contra* account in their ledger, in which the amounts received by them on account of the said L. Roederer are set off against the amount due to them for commission. The

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appellants had paid the income tax on the said commission.

The appellants, Messrs. Grainger and Son, on their own behalf and not on behalf of the said L. Roederer, contended upon the above-mentioned facts: That Louis Roederer was not a person exercising a trade within the United Kingdom either in the terms of schedule D. of 16 & 17 Vict. c. 34 alone, or read with sect. 41 of 5 & 6 Vict. c. 35. That the appellants were not agents within the terms of sect. 41 of 5 & 6 Vict. c. 35, and they claimed that the assessment should be discharged, or that their names should be erased therefrom.

The Commissioners of Taxes were of opinion that the said assessment was rightly made and confirmed the same accordingly.

The said appellants, Messrs. Grainger and Son thereupon, on their own behalf, expressed their dissatisfaction with the determination of the commissioners as being erroneous in point of law, and duly requested them to state and sign a case for the opinion of the High Court of Justice thereon, which we have stated and do now sign accordingly.

When the matter came before the Queen's Bench Division the case was sent back to the commissioners to state further facts, and the following additional facts were found and stated.

AMENDMENTS OF SPECIAL CASE.

That the said L. Roederer exercises and carries on the trade or business of a wine merchant in Great Britain, except so far as the facts stated in the case, and in this amendment, prove a different conclusion in point of law.

That offers and proposals for the purchase of wine are not only received by Messrs. Grainger and Son in England, but orders are sought by them as agents on behalf of L. Roederer as their principal.

That such orders are given by customers to Messrs. Grainger and Son and received by them, but the appellants allege that the said L. Roederer, in his arrangements with them as his agents, had reserved a right to reject any particular order. In the opinion of the commissioners, this right is in fact intended to protect the said L. Roederer in cases where there is doubt as to the pecuniary position of the customer giving the order. No special notice is given to the customers of the above-mentioned right reserved,

In the Post Office London Directory, under the head "Trades," is inserted the following:—"Roederer, Louis, Rheims, champagne merchant (Grainger and Son agents), 21 Mincing-lane, E.C.:"—which has been inserted by the authority and with the knowledge of the appellants. The appellants admitted that it was well known that Roederer's English agents were the appellants, at whose office orders would always be received, and that Roederer does an extensive trade in the United Kingdom, and has done so for many years, and has habitually made contracts in the manner described in the original case.

The commissioners find that the wine is sold to the customers as it lies "in Rheims cellar" or "Pris en Cave." Where wine is sold, the customer pays the cost of packing and carriage from the cellars and takes all risk. The packing and arranging for transit is, however, actually performed by persons employed by L. Roederer, and the customer is charged by L. Roederer with a sum in respect of such work under the designation "Pour emballage, &c.,"

The invoices of the wine are made out and sent by L. Roederer to the appellants, who in their turn forward same to the customer. A form of the invoice is hereto annexed.

The commissioners find that the direct payments to L. Roederer, by cheques or drafts to his order, are more frequent than payments made through Messrs. Grainger and Son, and that in addition to cash, some cheques on behalf of L. Roederer are paid to and cashed by Messrs. Grainger and Son. The receipts for all money paid either to L. Roederer, or through Messrs. Grainger and Son, are sent by L. Roederer to the customers direct, and a form of receipt is hereto annexed and forms part of this case.

The appellants, Messrs. Grainger and Son, produced the circulars and documents hereto annexed as specimens indicative of the manner and style of business transacted by them on behalf of their principal L. Roederer.

Except so far as any statement made in the original case herein is modified or added to by the amendments herein, we confirm the said case and find further as stated herein.

The Income Tax Act 1842 (5 & 6 Vict. c. 35) provides:

Sect. 41. And be it enacted, that the trustee, guardian, tutor, curator, or committee of any person, being an infant, or married woman, lunatic, idiot, or insane, and having the direction, control, or management of the property or concern of such infant, married woman, lunatic, idiot, or insane person, whether such infant, married woman, lunatic, idiot, or insane person shall reside in Great Britain or not, shall be chargeable to the said duties in like manner and to the same amount as would be charged if such infant were of full age, or such married woman were sole, or such lunatic, idiot, or insane person were capable of acting for himself; and any person not resident in Great Britain, whether a subject of Her Majesty or not, shall be chargeable in the name of such trustee, guardian, tutor, curator, or committee, or of any factor, agent, or receiver having the receipt of any profits or gains arising as herein mentioned, and belonging to such person in the like manner and to the like amount as would be charged if such person were resident in Great Britain, and in the actual receipt thereof; and every such trustee, guardian, tutor, curator, committee, agent or receiver, shall be answerable for the doing of all such acts, matters and things as shall be required to be done by virtue of this Act in order to the assessing of any such person to the duties granted by this Act, and paying the same.

Sect. 44. And be it enacted, that where any person being trustee, agent, factor or receiver, guardian, tutor, curator, or committee of or for any person, shall be assessed under this Act in respect of such person, or where any chamberlain, treasurer, clerk, or other officer of any corporation, company, fraternity, or society shall be so assessed in respect of such corporation, company, fraternity, or society as aforesaid, it shall be lawful for every such person who shall be so assessed, by and out of the money which shall come to his hands as such trustee, agent, factor or receiver, guardian, tutor, committee, or curator as aforesaid, or as such chamberlain, treasurer, clerk, or other officer, to retain so much and such part thereof from time to time as shall be sufficient to pay such assessment; and every such trustee, agent, factor, or receiver, guardian, tutor, committee, or curator, chamberlain, treasurer, clerk, or other officer, shall be and is hereby indemnified against every person, corporation, company, fraternity, or society whatsoever, for all

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payments which he shall make in pursuance and by virtue of this Act.

The Income Tax Act 1853 (16 & 17 Vict. c. 34) provides:

Sect. 2, Sched. D. And for and in respect of the annual profits or gains arising or accruing to any person whatever, whether a subject of Her Majesty or not, although not resident within the United Kingdom, from any property whatever in the United Kingdom, or any profession, trade, employment, or vocation exercised within the United Kingdom, and to be charged for every twenty shillings of the annual amount of such profits and gains.

The Divisional Court (Mathew and Cave, JJ.) confirmed the assessment and dismissed the appeal.

Grainger and Son appealed.

Pyke, Q.C. and *R. Bray* for the appellants.—Roederer, a person not resident in the United Kingdom, and not a subject of Her Majesty, was not exercising a trade or employment within the meaning of sect. 2, sched. D., of the Income Tax Act 1853 (16 & 17 Vict. c. 34). This assessment upon him, in the name of his agents, could not, therefore, be made under sect. 41 of the Income Tax Act 1842 (5 & 6 Vict. c. 35). It appears that the course of business was that all contracts were really made in France by Roederer himself; Grainger and Son only obtained orders which Roederer might, or might not, accept; all goods were sent direct by Roederer from France to the customers at their risk and expense. The business, therefore, was entirely carried on in France. Upon these facts this case is distinguishable from

Werle v. *Colquhoun*, 58 L. T. Rep. 756; 20 Q. B. Div. 753;

The London Bank of Mexico and South America v. *Apthorpe*, 65 L. T. Rep. 601; (1891) 2 Q. B. Div. 378.

In *Grant* v. *Anderson and Co.* (66 L. T. Rep. 79; (1892) 1 Q. B. Div. 108) it was held that manufacturers in Glasgow, who only employed an agent in England to obtain orders on commission, did not carry on business in England. That decision applies precisely to the present case. If Roederer was exercising a trade within the United Kingdom, Grainger and Son were not his agents, within the meaning of sect. 41 of the Income Tax Act 1842, and the assessment was wrongly made upon them. The words of sect. 41 are "shall be chargeable in the name of . . . any factor, agent, or receiver having the receipt of any profits or gains." That means that such an agent must be a person who is entitled, by the terms of his agency, to receive the profits and gains in this country. The provisions of sect. 44 make this clear, for by that section the agent is authorised to deduct any tax, which he may be obliged to pay for his principal, from the profits and gains which he receives. It would be a great hardship to make the agent liable to pay if he had not a right to receive the profits and gains. At any rate the agent must be one who does in fact receive the profits, and in this case the appellants received only enough to pay their commission and expenses, receiving, therefore, no profits for their principal out of which the tax could be paid.

Sir *R. T. Reid*, A.-G. and *Danckwerts* for the respondent. [They were called upon to argue only the second point, whether the assessment could be made upon the appellants.] Roederer being liable to the tax, he himself could be made to pay if he could be got at. Sect. 41 of the Act of 1842 was passed for the purpose of meeting cases where such persons could not be got at personally, and merely provides a machinery for collecting the revenue through persons other than those primarily liable. Under that section the agent of any foreigner is liable to be assessed and to have to pay the tax for which his principal is liable. All the tax due from the principal can be recovered from the agent and not a part only. If any person chooses to become agent for a foreigner he must either secure that he will be reimbursed any tax he may have to pay, or he must take the risk. The words, in sect. 41, "having the receipt of any profits or gains," apply only to the word "receiver," immediately preceding, and not to the words "factor, agent." An agent is liable whether he receives profits or not. Sect. 41 does not alter the incidence of taxation, but only enables the Crown to compel an agent to pay the tax due from his principal:

Tischler v. *Apthorpe*, 52 L. T. Rep. 814.

R. Bray replied.

Lord Esher, M.R.—I am of opinion that this appeal must be dismissed. There are two questions which arise for determination. M. Roederer is one of the greatest champagne growers in Europe; he has an enormous business, a great part of which is undoubtedly carried on in France, at Rheims, but he also sells a very large quantity of champagne in England. How does he deal with England? He appoints an agent in England. What is that agent appointed for? It is suggested that M. Roederer does not carry on any business in England, but that he appoints an agent to carry on his business. That does not seem to me to be a business-like view of the matter. One would think that the agent is appointed to carry on the business of M. Roederer, and that business is the selling of his champagne in England. That champagne is not casually sold in England, but the sale is a regular organised part of his business. The appellants, Messrs. Grainger and Son, are appointed as his agents to look after that business. What they have to do is to manage the sale of M. Roederer's champagne in England, and they are the only agents here responsible to him, but have authority to appoint sub-agents. All that is in order that they may advertise his champagne, and get orders to be transmitted to him in France. Is not that the real substantial basis of the business which he carries on in England? The customers are in England; the wine is sent to England, and sold in England, to be drunk there. Now, we have held already that the question whether, under this Act of Parliament, a person resident abroad is exercising his trade or business in England is a question of fact depending on the circumstances of each particular case, the meaning of which is that it cannot be said that because a person is carrying on one business in England, therefore whatever he does in England is a business. We have also said that it is not possible to give an exhaustive definition of what is, and what is not, the carrying on of a business in this country. As to the first question, therefore, whether M. Roederer does carry on or exercise a business in this country, it must be determined upon the

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facts of this case. There can be no doubt but that he does carry on a business, *i.e.*, the business of a wine merchant, whose business it is to sell wine. Then, does he exercise that trade or business of selling wine in England? I think that he does, though it is not necessary that anything should be sold in England for a foreigner to exercise his trade in England. A manufacturer might exercise his trade here without selling a single thing. The only definition which I can give is that, in such cases, it must be considered whether England is made a substantial basis of the business, so that the business could not be carried on, in the way in which it is carried on, without England. Here, this business of selling champagne in England has become a business by reason of its magnitude, and it cannot be carried on without making England its basis. This country is the basis of the business, because the people who live here want to drink the wine here, and M. Roederer would not be carrying on this business if England did not exist. I have no doubt, therefore, but that M. Roederer carries on the business of a wine merchant in England. That being so, it is admitted that M. Roederer can be assessed to the income tax in England, and the amount of profits which he makes here, and upon which he must pay income tax, is to be settled by the Income Tax Commissioners. Then comes the next question, as to the position of Messrs. Grainger and Son. They do not carry on the business of wine merchants in England in respect of M. Roederer's champagne, but they are agents of M. Roederer. M. Roederer carries on the business of a wine merchant in this country, and Messrs. Grainger and Son are appointed his agents in respect of that business. It is argued that, though they are appointed his agents for the purpose of helping him to carry on that business in England, and to make his profits in England, yet they are not agents chargeable under sect. 41 of the Income Tax Act 1842. That depends upon the terms of the Act. It is intended to get the tax from the person primarily liable to be assessed, and, in such a case as this, to get it from him through his agent. M. Roederer is assessed and made liable to pay under sect. 2, sched. D, of the Act of 1853, and sect. 41 of the Act of 1842 is mere machinery to enable the tax collector to get payment. Now, how far has the Legislature gone in making the agent liable to pay? The agent is not the person making the profit, and yet, according to sect. 44 of the Act of 1842, he can be assessed. When it appears, by sect. 44, that any person being an agent can be assessed, it is obvious that he is to be assessed in order that he may be made to pay, and one would expect to find that, being assessed, he would be bound to pay. Then what kind of an agent can be assessed under sect. 44? That we find provided in sect. 41. The beginning of sect. 41 seems to me to indicate the person who would be ultimately liable, but the latter part of the section provides that "any person not resident in the United Kingdom, whether a subject of Her Majesty or not, shall be chargeable in the name of any factor, agent, or receiver." I will pause there and observe that such person is to be chargeable at all events, and is to be chargeable in the name of his agent, and the meaning of that is, looking at sect. 44, that he is to be charged by assessing his agent. I think that he is assessed himself, but that, when not resident in this country, he is made liable by assessing his agent. What kind of agent? The words of sect. 41 are: "Any factor, agent, or receiver having the receipt of any profits or gains." With regard to the word "factor," I think it is used in its legal sense, that is, an agent of a particular kind who is possessed of the goods of his principal so that they appear to be his own. In such a case the words "having the receipt of any profits or gains" are not wanted in the sense suggested by the appellants, viz., having a right to receive, as he has a right to receive by reason of his employment. If those words are not wanted for the word "factor," why should they be carried beyond the word "receiver" and be applied to the word "agent?" If those words are not carried back to the word "factor," it seems to me to be impossible to construe them otherwise than as applying only to the last word "factor." The word "receiver" implies that the person may not be an agent of a principal at all. A receiver appointed by the court is not the agent of any person, but of the court, and it is in order to exclude that class of receiver, and to include only a receiver appointed by a principal, that the words "having the receipt of any profits or gains" are used. The Legislature, therefore, is dealing, not only with an agent who is called a factor, or with an agent who is well known by that designation, but also with another kind of agent who is not ordinarily called an agent, that is, a person appointed by a foreigner to receive the profits or gains of the business carried on in England. Therefore, it is not necessary, in order to make the agent liable under sects 41 and 44, that he should be more than an agent of the foreigner to conduct the business which the foreigner carries on in England. Now, if that be so, for what is that agent liable? Sect. 41 says that "every such agent shall be answerable for the doing of all such acts, matters, and things as shall be required to be done by virtue of this Act in order to the assessing of any such person to the duties granted by this Act and paying the same." Those words mean that the agent shall be answerable for the doing of the things to complete the assessment and for paying the amount, and make him liable to pay the amount for which his principal is properly assessed and for which he also, in order to get at his principal, is, according to sect. 44, to be assessed. The result is that the person really and ultimately assessed is the foreigner, but that the agent, for the purpose of collecting the tax, is to be treated as if he were assessed. That makes all the sections consistent one with another, and none of the cases which have been cited are in the least contrary to what I have said. If Messrs. Grainger and Son are agents to conduct the business carried on in England, they are to be treated as liable to be assessed, and they are so treated by being assessed, so to speak, together with their principal in the form stated in the special case; and when they are so assessed they are answerable to the Crown for the amount properly assessed in respect of the business carried on by their principal in England. The appeal fails and must be dismissed.

LOPES, L.J.—I have not much to add upon these two questions, because the matter has been

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gone into so fully by the Master of the Rolls. The first question which is raised is whether M. Roederer exercises a trade within the United Kingdom. Now it seems to me perfectly clear that he does. He has appointed Messrs. Grainger and Son as his head agents in England. If they are not appointed for the purpose of carrying on the trade of L. Roederer, I scarcely know how it can be said that they are appointed for any good and substantial reason. Not only that, but there are also a number of sub-agents, appointed in different parts of the country. The head-agent, and all these sub-agents, canvass and seek for orders. Orders are obtained; some are sent to Messrs. Grainger and Son in London, and some are sent direct to M. Roederer at Rheims: and in the result the goods are supplied in answer to those orders, and to a very large amount. In such circumstances to say that M. Roederer was not exercising his trade in England seems to me to be impossible. I know no better definition of what carrying on a trade in this country is, than that which was given by the Master of the Rolls (then Brett, L.J.) in the case of *Erischsen* v. *Last* (45 L. T. Rep. 703; 8 Q. B. Div. 414), where he says this: "The only thing which we have to decide is whether, upon the facts of this case, this company carry on a profit-earning trade in this country. I should say that, wherever profitable contracts are habitually made in England, by or for foreigners, with persons in England because they are in England, to do something for or supply something to those persons, such foreigners are exercising a profitable trade in England, even though everything to be done by them in order to fulfil the contracts is done abroad." Now I think that, in this case, every word of that description is answered. A profitable trade is carried on in this country; contracts are habitually made in this country, and they are made for a foreigner; the contracts are made with persons in this country, and goods are supplied to the persons by whom the orders are given. I say, therefore, that beyond all question M. Roederer is exercising a trade within the United Kingdom. Then there is another question. It is said that, even if M. Roederer is exercising a trade in with the United Kingdom, Messrs. Grainger and Son are not agents within the meaning of sect. 41 of the Income Tax Act 1842. In my opinion they clearly are such agents. My view of sects. 41 and 44, is that the object the Legislature had in view was to enable the commissioners to recover the tax. In this case M. Roederer is a foreigner living abroad, though he exercises a trade in this country. There is no way in which the commissioners can reach him personally. It is necessary, therefore, that some means should be devised of getting the tax upon his profits, and that is done in these sections. In these sections the agent is made assessable and chargeable, and the income tax is to be paid by him. It is argued, however, that, looking at the latter part of sect. 41, Messrs. Grainger and Son are not agents within the meaning of the section, because they are not in receipt of profits or gains. Now I do not read the words "in receipt of any profits or gains" as applying to the words "factor or agent," and I think that they apply only to the word immediately before them, viz., "receiver." A factor or agent would, in the ordinary course, receive the profits or gains, but a receiver might not do so. I think that those words are introduced for the purpose of bringing within the ambit of sect. 41 a case which might not be brought within it by the words "factor or agent." I come, therefore, to the conclusion that M. Roederer did exercise a trade within the United Kingdom, and that his agents, Messrs. Grainger and Son, are properly assessed. It is true that M. Roederer is assessed, but he is assessed in the name of Messrs. Grainger and Son, and I come to the conclusion that the income tax is properly recoverable from them. It is urged that that would be very hard, because it may be that they would have to pay the tax out of their own money. I do not see that there is much danger of that hardship arising; as a rule agents are well able to take care of themselves. There is also a provision in sect. 44 that, if the agent has in his hands money belonging to the principal, he may set that off against any income tax which he has paid. Again, if an agent thinks that there is any chance of his not being repaid any money he may pay in respect of income tax, it is always open to him to take an indemnity from his principals. All that, however, has nothing to do with our decision as to the law. I may add, with regard to the words "in receipt of any profits or gains," that, even if those words apply to "any factor or agent," they would not afford any answer in the present case, because beyond all question there were, in this case, profits which came to the hands of Messrs. Grainger and Son. It may well be that there was an amount due to them for commission, which more than covered any money which came to their hands on behalf of their principal; but that fact would not in any way prevent large profits being made by M. Roederer. I think, therefore, that this appeal must be dismissed.

Smith, L.J.—In this case an assessment has been made upon "L. Roederer of Rheims, champagne shipper, in the name of Grainger and Son, agents, 108, Fenchurch-street," and the question is whether, on the facts of this case, that is a good assessment or not. The first point taken is that M. Roederer does not exercise a trade within the United Kingdom. Schedule D. of sect. 2 of the Income Tax Act 1853, as I read it, imposes the tax on persons whether resident in the United Kingdom or not because it says the duty shall be charged for and in respect of the annual profits or gains arising or accruing to any person whatever whether a subject of Her Majesty or not, although not resident within the United Kingdom from any profession, trade, employment, or vocation exercised within the United Kingdom. Now, though M. Roederer resides abroad, if he exercises a trade within the United Kingdom, it seems to me perfectly manifest that he comes within schedule D. of sect. 2 of the Income Tax Act 1853. The first point is, does M. Roederer exercise a trade within the United Kingdom? Now I quite agree with what has been said in the cases to which we have been referred by the learned judges who decided those cases, that when you are considering whether or not a person exercises a trade within the United Kingdom, that is a question of fact, and must depend on the different circumstances which arise in the different cases. For instance, in the case of *Werle* v. *Colquhoun* (*ubi sup.*), the facts were held there to constitute the exercising of a trade within the

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United Kingdom by Messrs. Werle. Other cases were cited by Mr. Pyke, among them the *London Bank of Mexico* v. *Apthorpe* (*ubi sup.*), and then said Mr. Pyke, because in this case there are not all the facts found in those cases, therefore in this case M. Roederer does not exercise his trade within the United Kingdom. I do not adopt that argument at all. The question is, upon the facts of this case, does M. Roederer, or does he not, exercise his trade within the United Kingdom. Now I will read two or three paragraphs in this special case, and then ask a question. It is found here "that the appellants (that is Messrs. Grainger) are agents in Great Britain for the sale of L. Roederer's wine." It seems to me that *qui facit per alium facit per se*; and that M. Roederer is carrying on the trade of wine merchant in this country. Messrs. Grainger are agents in Great Britain for the sale of M. Roederer's wine, and they appoint (that is Messrs. Grainger appoint) other persons in towns other than London as sub-agents. What is the business transacted by Messrs. Grainger on behalf of M. Roederer? It is the business of wine merchants in this country (carried on by the agents) which has been carried on in England for many years, and is very extensive. It is no isolated business carried on through an agent in this country, but a business which has been carried on for many years by an agent in this country and in a very extensive way. The only other paragraph which I will read, and which seems to me of importance is this, That in the Post Office London Directory, and which it was held had been inserted by the authority and with the knowledge of Messrs. Grainger, there was this entry, "Roederer, Louis, champagne shipper, Grainger and Sons agents, 21, Mincing-lane, E.C." In the face of these facts, I have to ask myself this question, does or does not M. Roederer carry on the business of a wine merchant—exercise the trade of wine merchant—in the United Kingdom? I say that, apart from what has been said in any other case, I have no difficulty in holding that in the present case. But it is said you ought not to hold that in the present case, because this court, in the case of *Grant* v. *Anderson* (*ubi sup.*) have held, under some of the rules and orders, that, looking to the facts of that case, the man in that case did not carry on business in this country, but carried on business in Scotland. I wish to say that that case was not decided on this Income Tax Act at all. I would adopt what was said by Cotton, L.J. in the case of *Erichsen* v. *Last* (*ubi sup.*) where this very argument was pressed on the court. In that case the learned judge said: "However true that may be as regards the meaning of the words 'carry on or exercise business' in some Acts of Parliament, it is not the true interpretation of those words in this Act of Parliament, where the object is not to see where a company is to be sued, but what duty it is to pay in this country." I am clearly of opinion upon the facts of this case that M. Roederer has exercised his trade as a wine merchant by an agent in this country. Now we come to the other section, which has been referred to, sect. 41. What is the meaning of sect. 41 of the Act of 1842, and the group of sections which follow it? In my judgment, having had our attention called to those sections, the meaning of those sections is this: We have got in sched. D. of sect. 2 of the Act of 1853, a power to tax M. Roederer, who is resident outside the jurisdiction, for a trade carried on within the jurisdiction. The Legislature provides that, there not being any effective remedy against M. Roederer who is residing abroad, by sects. 41-44 of the Act of 1842, if he has an agent in this country, then, as in the present case, M. Roederer can be assessed in the name of the agent, and the agent is to pay for M. Roederer so that the Crown shall not go without the duty. That is the meaning, I think, of those sections. But it is said that, although that may be the meaning of those sections and they may be the machinery, still the second part of sect 41 is confined to an agent having the receipt of profits or gains. At one time I was rather impressed with that idea, but I am quite certain now that I was wrong in the first instance. I will read the last paragraph of this section, "Any person not resident in the United Kingdom, whether a subject of Her Majesty or not, shall be chargeable in the name of any factor, agent, or receiver having the receipt of any profits or gains." In my view, when we read those words *reddendo singula singulis*, the words "having the receipt of any profits or gains" are applicable only to any "receiver" and not to any "factor" or "agent" of the person resident abroad. So this point, even if the facts sustained it, could not avail the appellants in the present case; but, as has already been pointed out, the facts would not support it because the facts in this case clearly show that some moneys have been received by Messrs. Grainger in this country, and therefore that contention cannot prevail. I think that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Irvine, Hodges,* and *Borrowman.*

Solicitor for the respondent, *The Solicitor of Inland Revenue.*

Nov. 13 *and* 15, 1894.

(Before Lord ESHER, M.R., LOPES and SMITH, L.JJ.)

THE ATTORNEY-GENERAL *v.* WORRALL. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Revenue — Duties on personal estate — Gift — Reservation of benefit to donor — Customs and Inland Revenue Act 1881 (44 *&* 45 *Vict. c.* 12), *s.* 38 — *Customs and Inland Revenue Act* 1889 (52 *&* 53 *Vict. c.* 7), *s.* 11.

The Customs and Inland Revenue Act 1881, *by sect.* 38, *imposes a duty upon the personal property therein described, and the Customs and Inland Revenue Act* 1889, *by sect.* 11, *sub-sect.* 1, *includes within the description of property in the earlier Act "property taken under any gift, whenever made, of which property* bonâ fide *possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise."*

The sum of 23,000*l. was due to A. upon a mortgage of land, and he had obtained a decree for foreclosure which had not become absolute. A deed was executed, by which the mortgagors conveyed*

(*a*) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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the equity of redemption to A.'s son in consideration of 500l., and A. conveyed the legal estate to his son and released the mortgage debt, and his son covenanted to pay A. an annuity of 750l. The annuity was paid for some years until the death of A.

Held (affirming the decision of the Queen's Bench Division), that this was a gift of personal property within sect. 11, sub-sect. 1, of the Customs and Inland Revenue Act 1889, and that, upon the death of A., his son was liable to pay the duty imposed by the Act of 1881.

THIS was an appeal by the defendant from the judgment of the Divisional Court (Mathew and Cave, JJ.) upon the trial of an English information.

The information contained the following statement of facts:—

By an indenture made in 1886, between James Worrall, the father of the defendant, of the first part, Mary Shield, of the second part, Robert Shield, of the third part, and the defendant, of the fourth part, reciting that the hereditaments mentioned in the indenture had been mortgaged to James Worrall for 26,150l., of which sum 23,925l. remained due and owing, and that the defendant had agreed to purchase from Robert Shield the said hereditaments for 24,500l., and that James Worrall had agreed to join in the conveyance for the purpose of releasing the premises from the mortgage debt in consideration of the covenant on the part of the defendant thereinafter contained, in consideration of 525l. paid by the defendant to Mary Shield, and in further consideration of the covenant on the part of the defendant thereinafter contained, such covenant being accepted by James Worrall in satisfaction of his mortgage debt of 23,925l., from which he thereby released Mary and Robert Shield and the defendant, the hereditaments were conveyed to the defendant in fee simple discharged from the mortgage. The defendant covenanted with James Worrall to pay to him during his life or to his assigns the yearly sum of 735l. half-yearly.

The transaction carried out by the indenture, between James Worrall and the defendant, was one of gift and not of purchase, and James Worrall thereby gave to the defendant the mortgage debt belonging to him, reserving a benefit by way of contract to the extent of the annuity of 735l. during his life, and the defendant acquired and retained possession of the subject-matter of such gift accordingly.

James Worrall died in 1890, and a claim was made against the defendant for account stamp duty on the above sum of 23,925l., under the provisions of the Customs and Inland Revenue Act 1881 (44 Vict. c. 12), s. 38, sub-sect. 2 (*a*), as extended by the Customs and Inland Revenue Act 1889 (52 Vict. c. 7), s. 11, sub-sect. 1. A claim was also made for estate duty under the provisions of sect. 5, sub-sects. 2, 4, 5 of the Act of 1889.

The defendant refused to pay either the account duty or the estate duty, and also refused to pay succession duty if account duty was not payable, under 16 & 17 Vict. c. 51, s. 7, on a succession equal in annual value to the said sum of 735l.

The answer of the defendant admitted the indenture. He alleged that the transaction was one of purchase and not of gift. He said that he had taken possession of the hereditaments, and had paid the annuity during his father's life. He admitted that he refused to pay account duty or estate duty, but denied that he refused, on the assumption that account duty was not payable, to pay succession duty, under sect. 7 of 16 & 17 Vict. c. 51, on a succession equal in annual value to the sum of 735l.; and said that, although denying liability, he was willing to pay such succession duty if the claims for account duty and estate duty were waived.

Before this transaction was carried out, James Worrall had obtained a decree for foreclosure, which had not yet become absolute.

The Customs and Inland Revenue Act 1881 (44 Vict. c. 12) provides:

Sect. 38 (1.). Stamp duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or moveable property to be included therein according to the value thereof.

(2.) The personal or moveable property to be included in an account shall be property of the following descriptions, viz.:—

(*a*.) Any property taken as a *donatio mortis causâ* made by any person dying on or after the first day of June one thousand eight hundred and eighty-one, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift *inter vivos*, whether by way of transfer, delivery, declaration of trust, or otherwise, which shall not have been *bonâ fide* made three months before the death of the deceased.

(*c*.) Any property passing under any past or future voluntary settlement made by any person dying on or after such day by deed or any other settlement not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved, either expressly or by implication, to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in such property.

The Customs and Inland Revenue Act 1889 (52 Vict. c. 7) provides:

Sect. 11 (1). Sub-section two of section thirty-eight of the Customs and Inland Revenue Act 1881 is hereby amended, as follows:

The description of property marked (*a*) shall be read as if the word twelve were substituted for the word three therein, and the said description of property shall include property taken under any gift, whenever made, of which property *bonâ fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him, by contract or otherwise.

The Divisional Court (Mathew and Cave, JJ.) gave judgment, in favour of the Crown, that the defendant was liable to pay account duty.

The defendant appealed.

E. W. Byrne, Q.C. and *Willes Chitty* for the appellant.—If this was a gift at all, it was a gift of real property and not a gift of personal property, and is, therefore, not within the Customs and Inland Revenue Act 1881, which applies to personal property only. The only thing which passed from the father to the son, and can be said to have been given, was the land itself. That is the transaction carried out by the deed, whereby the land is conveyed to the son. Secondly, this was not a gift at all. If the father

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gave the mortgage debt to the son, the son gave an annuity in exchange for it, and that was a substantial consideration. That cannot be called a gift for which a substantial consideration is given. Thirdly, this was not a gift within the meaning of the Acts, which are aimed at gifts which are not really gifts because the donor retains a part for himself. Here the covenant to pay the annuity was a wholly independent covenant, though contained in the same deed, and was not a charge upon, or a reservation out of, the property given. The words at the end of sect. 11, sub-sect. 1 of the Act of 1889 relate only to a benefit arising out of the subject-matter of the gift, and mean that the donor must be excluded from any benefit arising out of the property in question. If this case is within the Acts, then every sale by an alleged donor at an under-value is within the Acts, and so is any case where the donee gives any consideration. They referred to

Attorney-General v. *Smith*, 68 L. T. Rep. 6; (1893) 1 Q. B. 239.

Sir *R. T. Reid* (A.-G.) and *Vaughan Hawkins* for the respondent.—The two Acts were passed for the purpose of fortifying the laws which impose duty upon succession to personal estate, and to prevent evasions of probate duty. They ought to be so construed as to effect that object. The meaning of the words at the end of sect. 11, sub-sect. 1 of the Act of 1889 is that the donor must have been entirely excluded from any benefit at all from the transaction, and not necessarily from any benefit out of the property given. The substance of this transaction was, that the son bought the equity of redemption from the mortgagors, and the father gave him the mortgage debt in exchange for the annuity. There was a gift of personal property, and a benefit reserved to the donor in the transaction.

Byrne, Q.C. replied.

Lord ESHER, M.R.—The first question which we have to determine is, what was in truth and substance the real transaction in this case. In my opinion the best way to find that out is to consider the matter as if there were no deeds at all. Looking, then, at the facts of the case, the transaction appears to have been as follows: The father had lent a sum of 23,900*l.* upon a mortgage of land. The mortgagors retained the equity of redemption, and the mortgagee had only the security of the land. The mortgagee had a right to claim foreclosure if he were not repaid, and so to get the land absolutely as his own. He had a son, and either wished to benefit him or to get rid of the burden of the land by transferring it to him. He, therefore, resolved to give to his son that debt of 23,900*l.* He could not give the money because he had not got it. As to the land, he had only a right to a foreclosure absolute if he were not paid. His rights, therefore, were personal property. It was arranged that he should give the money to his son, and that his son should buy the equity of redemption. The father, however, wanted to have an annuity equal to about three per cent. on the money, and the son agreed to give him an annuity of 735*l.* The whole of that arrangement was carried out by a deed. The equity of redemption was conveyed by the mortgagors to the son, and the father conveyed the legal estate to the son and released the mortgage debt; the son covenanted to pay his father an annuity of 735*l.* Now the law is that we are to look at the truth and substance of the transaction. That being so, does this case come within sect. 11 of the Customs and Inland Revenue Act 1881? Personal property only is within the earlier Act of 1881. Then sect. 11 of the later Act provides that "property taken under any gift, whenever made, of which property *bonâ fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise," shall be liable to duty under the Act of 1881. There was then in this case a gift of personal property from the father to the son; and, in my opinion, there was not an exclusion of the father from all "benefit to him by contract or otherwise." There was this contract by which the son was to pay the annuity of 735*l.* to the father. This case, therefore, is within the statute, and this property is liable to probate duty. The appeal fails and must be dismissed.

LOPES, L.J.—I am of the same opinion. It is perfectly clear that in questions of this kind the court must look at the substance and not at the form of the transaction. In this case I think that, whether we look at the substance or at the form of the transaction, the Crown must succeed. Three questions have been raised. The first question is whether this was a gift at all. It is said that it was not, because of the covenant to pay the annuity. It appears to me to be none the less a gift because there was this covenant to pay an annuity. It was still a gift. The second question is whether this was a gift of personal property. The appellant contends that, if this was a gift at all, it was a gift of real property. It is essential to consider the facts as they existed at the date of the deed, in order to determine whether this was a gift of personal property or not. Under the circumstances of the case it is impossible to say that the father gave the land to his son. The land was not his to give. He gave the mortgage debt to his son, and the gift was, therefore, one of personal property. If the father had not made this deed, and had died before the foreclosure was made absolute, his executors would have been entitled to this money, and that shows that this was personal property. The third question is whether this was a gift within the terms of sect. 38 of the Act of 1881 and sect. 11 of the Act of 1889. Sect. 38 of the earlier Act provides that duty shall be payable on personal property, which shall include "any property under any past or future voluntary settlement made . . . and not taking effect as a will, whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself or to reclaim the absolute interest in such property." That was passed to prevent evasions of probate duty. Under that section the reservation to the donor must have been a reservation out of the property given. Then sect. 11 of the later Act was passed to remedy that defect, and it provides that sect. 38 of the Act of 1881 shall be amended so as to include "property taken under any gift, whenever made, of which property *bonâ fide* possession and enjoyment shall not have been assumed by the donee

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immediately upon the gift and thenceforward retained, to the entire exclusion of the donor or of any benefit to him by contract or otherwise." Under sect. 11, therefore, it is no longer necessary that the reservation or benefit to the donor should be out of the property given. In the present case is it possible to say that no benefit has been reserved to the donor? It is clear to me that there is reserved such a benefit as is contemplated by sect. 11. The judgment of the Divisional Court was right and must be affirmed.

Smith, L.J.—This appeal must be dismissed. The question raised is, whether the appellant is liable to pay probate duty upon certain property. The answer to that question depends, first, upon whether this property is personalty or realty. I am satisfied that the Divisional Court rightly decided that it was personalty. The transaction was as follows: The father had lent 23,900*l.* upon the security of a mortgage of land, and had obtained a foreclosure decree which had not become absolute. Then the land was conveyed to the son by the deed which has been considered. I am of opinion, therefore, that that which passed from the father to the son was personal property. Then it was contended that this was not a gift at all within the meaning of the Act, because consideration was given, and there cannot be a gift if consideration is given. I think, however, that sect. 11 of the Act of 1889 contemplates gifts for which a consideration may have been given. Then it is said that, even if this were a gift of personal property, yet no benefit was reserved to the donor out of the property itself, and that, therefore, this gift was not within sect. 11. I do not so read sect. 11. The words of the section are, "Property taken under any gift, whenever made, of which property *bonâ fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him by contract or otherwise." These words were, I think, expressly intended to enlarge the effect of sect. 38 of the Act of 1881, and to include the reservation of a benefit of this kind. The appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellant, *Byrne* and *Blakiston*.

Solicitor for the respondent, *The Solicitor of Inland Revenue*.

Monday, Dec. 3, 1894.

(Before Lord Esher, M.R., Lopes and Rigby, L.JJ.)

Burt and others v. Bull and another. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Receiver and manager—Receiver and manager appointed by court—Liability upon contracts.

A receiver and manager of a business, appointed by the court, is personally liable upon contracts made in the course of carrying on the business, unless such contracts were made upon the terms that he should not be personally liable.

This was an appeal by the defendants from the judgment of Mathew, J., at the trial without a jury in Middlesex.

This was an action by the plaintiffs to recover from the defendants the price of goods sold and delivered.

A company, called Joseph Bull and Co. Limited, carried on business as builders and contractors. In an action in the Chancery Division, brought against the company by the debenture-holders of the company, the defendants, Bull and Ward, were appointed by the court to be receivers and managers, to carry on the business of the company. Part of the business of the company consisted of two uncompleted contracts for building schools.

For the purpose of completing these contracts the defendants ordered from the plaintiffs the goods for the price of which this action was brought. The order was in writing and purported to be given "For Joseph Bull and Co. Limited," and was signed "E. C. Bull—R. J. Ward, receivers and managers."

At the trial before Mathew, J., without a jury, the defendants contended that they were not personally liable, and that the plaintiffs could look only to the assets of the company for payment. The learned judge gave judgment for the plaintiffs.

The defendants appealed.

Farwell, Q.C. and *Beven* for the appellant Bull.—It is a question of fact in each case whether the receiver and manager has made himself personally liable upon contracts made in carrying on the business. If he simply contracts as receiver and manager of the business, he is not personally liable any more than any other agent who contracts for a principal. Here the defendants are clearly not liable, because the order was given "for Joseph Bull and Co. Limited," and was signed by them as "receivers and managers." The business was carried on by the defendants for and on behalf of the company for the benefit of the debenture-holders, and they cannot be made personally liable unless they have contracted so to be. In *Redpath* v. *Wigg* (11 L. T. Rep. 764; L. Rep. 1 Ex. 335) it was held that an inspector under a creditors' deed, who signed an order for goods "for C. J. M. and Co." (the debtors), was not personally liable. The case of executors or trustees who carry on a business is quite different, for the estate is vested in them, and they are the owners of the business which they carry on. In Story on Agency, s. 287, it is stated thus: "Other cases may exist, in which it is well known to both of the contracting parties that there exists no authority in the agent to bind other persons for whom he is acting, or that there is no other responsible principal; and yet the other contracting party may be content to deal with the agent, not upon his personal credit or personal responsibility, but in the perfect faith and confidence that such contracting party will be repaid and indemnified by the persons who feel the same interest in the subject-matter of the contract." There is no authority expressly in point, but in *Owen* v. *Cronk* (not yet reported) a receiver and manager appointed by trustees under a debenture trust deed was held not to be personally liable. [Lopes, L.J. referred to *Sargant* v. *Read* (1 Ch. Div. 600) and *Taylor* v. *Neale*, 60 L. T. Rep. 179; 39 Ch. Div. 538.]

Upjohn for the appellant Ward.

Lawson Walton, Q.C. and *C. A. Russell* for the respondents.

(a) Reported by J. H. Williams, Esq., Barrister-at-Law.

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Lord ESHER, M.R.—This action was tried by Mathew, J. without a jury, and was brought to recover the price of goods sold and delivered. The goods were timber supplied for the business of a builder. The building business had passed out of the hands of Joseph Bull and Co. Limited to this extent: the Chancery Division had appointed managers and receivers of the business at the suit of debenture-holders. What is the meaning and effect of such an appointment? The Chancery Division has taken the management of the business into its own hands, and has appointed managers of the business. What then, is the position of such managers? Are they agents of the company? If they are, they must obtain and act under the directions of the court. They are not the agents of the company, which cannot control or dismiss them. Neither the company nor the debenture-holders can control or dismiss them or give them orders as to the carrying on of the business. They can only make suggestions to the court that the managers are not doing the best that can be done in their interests, and ask the court to discharge them. When one person is in such a relation as that to another person, he is the agent of that other person. The manager, therefore, is the agent of the court. That being so, would the court make itself responsible? that is impossible. What then, must the court do? It is inevitable that it should so appoint its agent, that he shall carry on the business on his own responsibility. One would therefore expect, and be almost certain, that the rule of the court would be that, if a manager is appointed, the court is not to be liable. The court cannot be liable. In such circumstances the manager must order goods, &c., upon his own responsibility, if he does give any orders. Whether he is bound to give any orders at all, is a question which it is not now necessary to determine. It seems to me, therefore, to follow, as an inevitable consequence from the position, that the manager must make himself personally liable. What Jessel, M.R. said in *Sargant* v. *Read* (*ubi sup.*) shows that he was of that opinion, and that the rule was well known and did not require to be proved. So also what Chitty, J. said in *Taylor* v. *Neate* (*ubi sup.*) is to the same effect, that when a court appoints a manager, it knows that he must make subcontracts which can pledge no credit but his own. That, in my opinion, is the position of a manager appointed by the Chancery Division. When the question has to be determined as to the liability of the manager under a contract with another person, if that person has contracted upon other terms, he cannot then, of course, turn round and say that the manager is personally liable. If the manager tells the person with whom he is contracting that he is a manager, and gives his order expressly upon terms which are not the ordinary terms, but upon the terms that such person is to be paid only out of the funds if there are any, then such person cannot say that the manager is personally liable. There may be, therefore, cases in which orders are accepted not upon the personal credit of the manager. If, however, no such special stipulations are made, and orders are given by the manager simply as manager, then the inference is that the manager is personally liable. If that were not so, the consequences would be most serious; no tradesman could deal with a manager without making inquiry as to the existence and extent of the fund and the number of creditors; so also in the case of workmen and servants in respect of their wages. Those considerations show that the contention is absurd. That being so, in this case we have to look at the order which was given, and at what took place, and not to consider the use of the words "receivers and managers." The defendants could not be the agents of the company, because they were not appointed by the company. They signed as "receivers and managers," but that is only a legal term showing the persons who dealt with them what their position was, namely, that of receivers and managers appointed by the court, and that they were dealing on the credit of the receivers and managers. The question is one of fact in every case, because special circumstances may take any particular case out of the general rule. In this case it has been found that the transaction came within the ordinary rule. That decision was right, and the appeal must be dismissed.

LOPES, L.J.—The learned judge at the trial found that the defendants, who were receivers and managers appointed by the court, were personally liable. The question is one of fact, and must always be so in every case. The question is, upon whose credit were the goods supplied? It is said that the defendants were only agents. Whose agents were they? It is suggested that they were the agents of the company, but that could not be. In my opinion, it is impossible to contend that the defendants were the agents of anybody. The sole control of the business, subject to the jurisdiction of the court, was vested in the defendants. In my opinion, the goods were supplied upon the credit of the defendants. They gave the orders, as receivers and managers, to the plaintiffs, who knew what the position was. It is said that it is hard upon the defendants to make them personally liable. They can, however, protect themselves. If there are not sufficient assets, they need not give orders at all, or they may give orders in such express terms as to avoid any personal liability at all. I am of opinion that they intended to incur personal liability. The judgment of Mathew, J. was right, and must be affirmed.

RIGBY, L.J.—This was an action to recover the price of goods sold and delivered. The order given for the goods was in the following form, which is probably the form usually used by a receiver and manager: "For Joseph Bull and Co. Limited." (Signed) "E. C. Bull, R. J. Ward, receivers and managers." It appears to me that the use of the words "receivers and managers," if this had been a transaction between strangers, was enough to put persons upon inquiry as to the real position of the party ordering the goods. In the case cited, it appeared that the person giving the order acted on behalf of a principal. In this case they were not agents of any person or company, but had been appointed by a judge of the Chancery Division, in an action by debenture-holders, in order to do what was supposed to be for their benefit, that is, to carry on the existing business of Joseph Bull and Co. Limited. It was promised that a fund would be provided, and the defendants undertook the office of receivers and

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managers. When a receiver and manager is appointed by the court, it is not intended to put forward an officer of the court to carry on a business, involving the making of contracts, in such a way as to deceive the public into a belief that someone else is personally liable. There may be special cases, which must be very special cases, in which a receiver and manager appointed by the court might be ordered not to deal with third persons without telling them that he would not be personally liable. I am not, however, aware of any such case having occurred. In the ordinary course of the business of the court, when a manager is appointed to carry on a business, it is always intended that the manager shall be so appointed as to appear to carry on the business as a person who is personally responsible, except when he clearly stipulates to the contrary with the persons with whom he deals, and that he shall look to the assets for indemnity. It is impossible for the public to know for whose benefit the business is being carried on, and they must look to the manager as being liable. I do not say that it is the duty of such an officer of the court to incur heavy expenses, but it must be his duty to undertake the ordinary responsibilities of such a business as he has been appointed to carry on. I do not say that he may not, in any case, come to the court and ask to be relieved from such duties. He cannot, however, get rid of such liabilities by simply stating that he is a receiver and manager. I think that, as soon as it appears that he has no principal, it is to be implied that when he makes a contract it binds him personally. I am not surprised that there is not much authority upon this question. Receivers and managers have often been held to be personally liable, and this has been looked upon as well settled law. I am of opinion that such a receiver and manager is not appointed upon the model of an agent who has no principal, but upon the model of individuals in a fiduciary capacity who carry on a business for the benefit of others, such as executors and trustees, who are *primâ facie* responsible to the outside world. That being the model, I think that the court, when it appoints a receiver and manager, intends that he shall be in the position of being personally responsible. The court never intended to create a position where their officer would carry on a business for the liabilities of which no one would be personally responsible. In the cases which have been cited the learned judges recognised the well-established rule that receivers and managers are personally liable.

Appeal dismissed.

Solicitor for the appellant Bull, *W. J. Hastings Bull.*

Solicitors for the appellant Ward, *Ward, Perks,* and *McKay.*

Solicitors for the respondents, *Trinder* and *Capron.*

Friday, Dec. 7, 1894.

(Before Lord ESHER, M.R., LOPES and RIGBY, L.JJ.)

Re ISAACSON; *Ex parte* MASON. (a)

APPEAL IN BANKRUPTCY.

Bill of sale—Assignment of chattel—Assignment of hiring agreement of the chattel in same deed—Assignment of chattel void—Validity of assignment of hiring agreement—Bills of Sale Acts 1878 (41 & 42 *Vict. c.* 31), *and* 1882 (45 & 46 *Vict. c.* 43).

The debtor had let a piano under a hire-purchase agreement; subsequently, by way of security for the payment of money, he assigned by deed "all that piano and also an agreement for hire dated . . . and made between . . . relating to the said piano, and the full benefit and advantage thereof." This deed was not registered under the Bills of Sale Acts, and the trustee in bankruptcy moved for a declaration that it was null and void.

Held (affirming the decision of the Queen's Bench Division), that the deed was not void, inasmuch as it contained a valid assignment of a chose in action, *which was distinct and separate from the assignment of the piano.*

APPEAL of the trustee in bankruptcy from the judgment of the Divisional Court (Williams and Kennedy, JJ.) affirming the judgment of the County Court judge (71 L. T. Rep. 583).

The debtor was a dealer in musical instruments, and he let out pianos upon hire-purchase agreements, which were in the following form:

This agreement made the . . . between Bertram Isaacson of . . . (hereinafter called the owner) of the one part and . . . (hereinafter called the hirer) of the other part. Witnesseth that the owner agrees at the request of the hirer to let on hire to the hirer a pianoforte, No. . . . , and in consideration thereof the hirer agrees as follows:

To pay to the owner on the . . . a rent or hire instalment of 5*l.* and 1*l.* on the 5th of each succeeding month.

To keep and preserve the said instrument from injury (damage by fire included).

To keep the said instrument in the hirer's own custody at the above-named address, and not to remove the same (or permit or suffer the same to be removed) without the owner's previous consent in writing.

That if the hirer do not duly perform this agreement the owner may (without prejudice to his rights under this agreement) terminate the hiring and retake possession of the said instrument; and for that purpose leave and licence is given to the owner (or agent and servant or any other person employed by the owner) to enter any premises occupied by the hirer or of which the hirer is tenant, to retake possession of the said instrument without being liable to any suit, action, indictment, or other proceeding by the hirer or anyone claiming under the said hirer.

That if the hiring should be terminated by the hirer (under clause A. below), and the said instrument be returned to the owner, the hirer shall remain liable to the owner for arrears of hire, up to the date of such return, and shall not upon any grounds whatever be entitled to any allowance, credit, return, or set-off for payments previously made.

The owner agrees:

That the hirer may terminate the hiring by delivering up to the owner the said instrument.

(a) Reported by J. H. WILLIAMS, Esq., Barrister-at-Law.

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If the hirer shall punctually pay the full sum of 63*l.* by 5*l.* at date of signing and by monthly instalments of 1*l.* in advance as aforesaid, the said instrument shall become the sole and absolute property of the hirer.

Unless and until the full sum of 63*l.* be paid the said instrument shall be and continue to be the sole property of the owner.

By way of security for the payment of money he assigned a piano, so let out, and the benefit of the agreement, by a deed in the following terms:

This indenture made the . . . between B. Isaacson of . . . of the one part, and Edward Bishop of . . . of the other part, witnesseth that, in consideration of 21*l.* (the receipt whereof the said B. Isaacson doth hereby acknowledge), he, the said B. Isaacson, as beneficial owner, doth hereby assign unto the said Edward Bishop, his executors, administrators, and assigns, all that the piano numbered . . . and also an agreement for hire, dated the . . , and made between . . . of the one part, and the said B. Isaacson of the other part, relating to the said piano, and the full benefit and advantage thereof, to hold the same unto the said Edward Bishop, his executors, administrators, and assigns absolutely. And the said B. Isaacson doth hereby covenant with the said Edward Bishop that he, the said B. Isaacson, will not do or knowingly suffer anything whereby the said E. Bishop, his executors, administrators, or assigns, may be prevented from receiving all moneys payable under the said agreement, and the said B. Isaacson hereby covenants with the said E. Bishop that the sum of 27*l.* 13*s.* remains owing under the within written agreement.

This document was not registered as a bill of sale.

The trustee in bankruptcy applied, by motion in the County Court, for a declaration that the deed of assignment was null and void, under the Bills of Sale Acts 1878 and 1882, because it was not registered, and was not in the prescribed form.

The County Court judge refused to make the declaration which was asked for, upon the ground that the deed of assignment was not void under the Acts so far as it was an assignment of the "hire-purchase" agreement.

Upon appeal this decision was affirmed by the Queen's Bench Division (Williams and Kennedy, JJ.) sitting in Bankruptcy (71 L. T. Rep. 583).

The trustee appealed.

Moulton, Q.C. and *F. Cooper Willis* for the appellant.—This assignment is the assignment of a chattel, and is therefore void under the Bills of Sale Acts, because it is not in the statutory form and is not registered. It must be wholly void, because that part which purports to be an assignment of the hire-purchase agreement is inseparable from the assignment of the piano. This was in substance and reality only an assignment of the piano burdened by the hire-purchase agreement and subject to it. The assignment of the agreement, if it can operate at all, passes rights of property in the piano which are the same rights as pass by the assignment of the piano itself. The two things are so mixed up together, that the rights of property and the rights under the agreement cannot be separated. Apart from the assignment of the piano, it is impossible to say what rights can pass to the assignee of the agreement. The right to enter and seize the piano upon default in payment of the instalments cannot pass to the assignee:

Re Davis; Ex parte Rawlings, 60 L. T. Rep. 157; 22 Q. B. Div. 193.

If, upon the face of the deed, it is impossible to clearly separate the part which is admitted to be void from that which is said to be valid, then the whole deed is void. Upon that ground the present case is distinguishable from

Re Burdett; Ex parte Byrne, 58 L. T. Rep. 708; 20 Q. B. Div. 310;

Cochrane v. *Entwistle*, 62 L. T. Rep. 852; 25 Q. B. Div. 116.

Herbert Reed, Q.C. and *Johnston Watson* for the respondent.—The two cases of *Re Burdett; Ex parte Byrne* (*ubi sup.*) and *Cochrane* v. *Entwistle* (*ubi sup.*) decide clearly that a deed, which assigns personal chattels which are within the Bills of Sale Acts, and also other property which is not within those Acts, if it is void as a bill of sale, is void only as to the personal chattels comprised therein, and is not void so far as it is an assignment of other property. In this case the County Court judge only decided that the deed was not wholly void, and left undecided all questions as to the rights of the trustee in respect of the piano. This deed assigns the piano, and also assigns a *chose in action*, that is, the hire-purchase agreement. In fact, the main thing assigned is the *chose in action*. If this deed assigns a *chose in action* as well as a personal chattel, which is within the Bills of Sale Acts, it cannot be declared wholly void. If the part which assigns the piano is struck out, the rest of the deed will be good and valid. [They were stopped by the Court.]

Moulton, Q.C. replied.

Lord Esher, M.R.—In this indenture of assignment, which is called a bill of sale, there is an assignment of a piano. What is meant by assigning a piano? It is an assignment of the property in the piano—that is, of all the proprietary rights in the piano. In this indenture there is also included an agreement of hire. If that agreement related only to proprietary rights, the assignment of it would pass nothing more; but if the agreement contains stipulations, which are not proprietary rights but contractual rights, then the assignment of the agreement passes something more. If, therefore, the agreement includes not merely proprietary rights, but other and further contractual rights, this assignment is not a mere assignment of property. Then arises the question whether the provisions of the Bills of Sale Acts can be applied to the proprietary rights and not to the contract containing other rights. If the contract had been assigned by a separate deed, it is clear that it would not have been void under the Bills of Sale Acts. That being so, are there not, in fact, separate assignments? Can it be said that two things, which are quite different, are inseparable? I do not think so. Here there are assignments of different rights, with different remedies, and the Bills of Sale Acts do not apply to one. I think that the case of *Cochrane* v. *Entwistle* (*ubi sup.*) is decisive of the point. It was held in that case that if a document assigns property, and also something else, the two things can be separated. That is the effect of the judgment of Fry and Lopes, L.JJ. in that case. Fry, L.J., speaking of a bill of sale which comprised chattels personal and chattels real, said: "The one applies to personal chattels only; the other applies to personal chattels and also to chattels real. Consequently, the bill of sale is . . . void as

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regards the personal chattels." That is conclusive of this case, and the appeal must be dismissed.

LOPES, L.J.—In order to determine whether there is one thing to which the Bills of Sale Acts do apply, and another thing to which those Acts do not apply, we must look at the indenture itself. I think that two distinct things are dealt with in this indenture: the one is the piano and right of property in it, and the other is the contractual rights, that is a chose in action. The best test to show that that is so, is that the piano might have been assigned to A. upon one day, and the agreement might have been assigned to B. upon another day by another deed. It is, therefore, clear that these are matters which may be separated in such a way that the Bills of Sale Acts will apply to the one but not to the other. It has been held that a document which is bad as to part, but good as to another part, is not entirely void by the Acts; but in such case the one part must be so described as to be separable from the other. I agree that this appeal must fail.

RIGBY, L.J.—In this case no question is raised as to the hiring agreement being a bill of sale. The real question is as to the validity of the assignment of the hiring agreement. By reason of the Bills of Sale Acts, the indenture is not an effectual assignment of the property in the piano. We have to say whether, the instrument being null and void as to the assignment of the piano, we can separate that part which relates to the hiring agreement from the other part which is void. I think that we can, in the same way as was done in *Cochrane* v. *Entwistle* (*ubi sup.*), by striking out that part which assigns the piano. There is a clear and distinct severance between the two parts of the deed.

Appeal dismissed.

Solicitor for the appellant, *Sugden*.
Solicitor for the respondent, *Maskell*.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Nov. 19, 20, *and Dec.* 3, 1894.

(Before ROMER, J.)

SMITH *v.* WALLACE. (*a*)

Vendor and purchaser—Specific performance—Rescission of contract—Condition empowering vendor to rescind if purchaser insists on requisition or objection—Purchaser kept in suspense as to rescission while vendor negotiating with alternative purchaser.

A vendor is in every case bound to exert himself in good faith and with due diligence, so that the contract may, so far as he is concerned, be carried out at the date fixed for completion, and if he has shown want of good faith and of due diligence, he cannot properly say that at the date fixed for completion he was able, ready, and willing to carry out the contract on his part. The purchaser is entitled to say that the vendor cannot play fast and loose with the contract and yet hold the purchaser bound; for, even where time cannot be said strictly to be of the essence of the contract, a vendor cannot be allowed wilfully and for his own purposes outside the contract, to prevent completion on the day fixed, and then to say that the delay was not essential, and that he ought to be allowed to complete at such later time as may be convenient to him.

In Jan. 1894 *the defendant had agreed to sell and the plaintiff to purchase certain hereditaments, the 24th March being the date fixed for completion, the purchaser paying a deposit, and the agreement providing that, if the purchaser should take any objection or make any requisition which the vendor should be unable or unwilling to remove or comply with, and the purchaser should not withdraw the same within seven days after being required so to do, the vendor might by notice in writing, and notwithstanding any intermediate negotiations, rescind the agreement. The purchaser having made certain requisitions, the vendor wrote giving him formal notice that the vendor was unwilling to comply therewith, and requiring the purchaser to withdraw them. The purchaser refused to withdraw the requisitions, and the vendor did not thereupon at once rescind the contract as he might have done, but kept the purchaser in suspense while negotiating with an alternative purchaser, and more than once asking the first purchaser for further delay. On the 19th March the latter wrote rescinding the contract, and asking for the return of his deposit. He had previously written asking if the vendor was going to rescind or not, and, if not, requiring him to proceed. The vendor still tried to temporise; but, the day fixed for completion having passed, the purchaser commenced this action for the return of his deposit, the defendant counterclaiming for specific performance:*

Held, that the vendor was bound to exercise his right of rescission fairly, and was not entitled to keep the purchaser in ignorance whether such right was to be exercised or not, especially when the time fixed for completion was close at hand, and that accordingly the purchaser was entitled, at the time he commenced the action, to treat the contract as rescinded, that the deposit must be returned with interest from the date of the writ, and the counter-claim must be dismissed, the defendant paying the costs of both action and counter-claim.

THE plaintiff was William Somervail Smith, and the defendant John Martin Wallace.

The action was brought for the return of the deposit money which the plaintiff had paid to the defendant as the vendor of certain property, on an agreement for sale, and for other relief, under the following circumstances:

By an agreement dated the 19th Jan. 1894, between the defendant as vendor and the plaintiff as purchaser, it was agreed that the vendor should sell and the purchaser should purchase at the price of 13,500*l.*, the land, buildings, rights, easements, and property specified in the first schedule thereto, as the same were held under the indenture of lease and the other indentures therein also specified, and together with the fixed plant and machinery specified in the second schedule thereto, and the loose chattels and effects specified in the third schedule thereto.

It was provided that a deposit of 1350*l.* was to be paid by the purchaser.

Clause 3 provided that, if the purchaser should take any objection or make any requisition, whether in respect of the matters aforesaid (being

(*a*) Reported by R. H. DRANE, Esq., Barrister-at-Law.

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matters of title) or in respect of the conveyance or otherwise, which the vendor should be unable or unwilling to remove or comply with, and should not withdraw the same within seven days after being required so to do, the vendor might by notice in writing delivered to the purchaser or his solicitor, and notwithstanding any intermediate representation, negotiation, or litigation, rescind this agreement, and the purchaser shall thereupon return all abstracts and papers which might have been delivered to him or to his solicitor by or on behalf of the vendor, and should not make any claim on the vendor for costs or otherwise.

Clause 7 provided that,

Should it appear that any of the plant or machinery mentioned in the second schedule did not pass to and are not vested in the vendor by reason of the same not being fixtures, and not passing by virtue of the conveyance of the land, this shall not annul the sale; but, unless the vendor shall forthwith on demand replace the plant or machinery in the said schedule which did not pass to him, with plant or machinery of a similar character and not less value, and if need be fix the same, an allowance or compensation shall be made to the purchaser in his purchase money, equal to the amount of the cost (less 10 per cent. for wear and tear) of replacing such plant or machinery with new plant or machinery of a similar character, together with the cost (if any) of fixing such new plant or machinery, and any dispute or difference between the vendor and the purchaser as to the amount of such cost or the character of the plant or machinery supplied by the vendor, or to be supplied under this clause, shall be referred to the arbitration of a surveyor to be agreed on between the parties, or in default of agreement, to be nominated by the President of the Institute of Surveyors. Provided, nevertheless, that if the amount of the allowance or compensation to be made hereunder by the vendor as aforesaid, or the cost of applying machinery or plant pursuant to this clause shall exceed 500*l*., then and in such case the vendor shall be entitled to rescind the sale upon the like terms as if the purchaser had insisted upon a requisition with which the vendor was unable or unwilling to comply.

By clause 13 the balance of the purchase money was to be paid, and the purchase to be completed, on the 24th March following.

The property to be sold consisted of certain leasehold hereditaments and buildings, known as the Artillery Cement Works, situate in the parish of Dartford, Kent, and the right of using certain tram lines. The machinery and plant comprised in the second schedule was trade machinery, and the chattels and effects in the third schedule consisted of certain loose plant upon the leasehold works.

It appeared that the lease under which the hereditaments were held was of a somewhat onerous nature, and contained a covenant by the lessee to take from the lessors 300 tons of chalk every week.

Upon the execution of the agreement the plaintiff paid the defendant the sum of 1350*l*. as a deposit, and, having received the abstract of title, made certain requisitions on it, and particularly as to the title to the trade machinery, as to which he had, shortly after the execution of the agreement, been served with a formal notice on behalf of the legal personal representative of one J. H. East that the whole of such machinery had been assigned to him, and that he was about to bring an action to recover it.

After some correspondence between the parties on this subject, the plaintiff on the 20th Feb., and again on the 5th March 1874, asked the defendant to give him an indemnity in the event of the purchase being completed.

In reply the defendant's solicitors wrote:

As the day for completion is fast approaching, we regret that we cannot allow this matter to remain in its present position, and have, therefore, to give you notice that the vendor is unwilling to remove or comply with, and calls upon you to withdraw your requisitions or objections.

The requisitions or objections referred to included those respecting the title to the trade machinery.

On the 9th March following the plaintiff's solicitors wrote in reply to the defendant's solicitors:

We claim under clause 7 of the contract that your clients should replace such machinery, or allow compensation in respect of it. We are assured that to do this would cost considerably more than 500*l*., and we therefore see no advantage in withdrawing other requisitions unless your client is prepared to replace or make full compensation for the machinery and plant to which he has no title.

It appeared that at this time the defendant's solicitors were negotiating with Messrs. Emanuel and Simmonds for the sale of the property to a client of theirs in case the contract with the plaintiff should be rescinded.

On the 15th March the plaintiff's solicitors wrote to the defendant's solicitors:

Having regard to the formal notice sent by you to us dated the 7th March, in which you called upon us to withdraw certain requisitions therein mentioned, and which requisitions have not been withdrawn, we shall feel obliged by your informing us whether in consequence of such non-withdrawal it is your client's intention to rescind the contract. If not, we have to ask you forthwith to proceed to arrange with us as to our client's claim under clause 7, so that we may proceed to get ready for completion, which it is of course useless for us to do, while we are in doubt as to your client's intentions as to the rescission of the contract. We have to-day received a formal notice from Mr. East's solicitors, Messrs. Wilkins, Blyth, and Co., giving us notice of their client's claim to the machinery specified in schedule 2. Your reply in the course of the day would greatly oblige.

The defendant's solicitors replied on the 15th March as follows:

We have received your letters of the 9th inst. and of to-day, and the questions you raise are of considerable moment. Until we have considered the matter a little more fully we cannot write you definitely; but I hope to do so before the end of the week.

On the 16th March the plaintiff's solicitors wrote:

We are in receipt of your letter of yesterday's date, and rely on hearing from you definitely on or before to-morrow as promised. The course pursued by the vendor has placed our client in a very awkward position. The purchaser could of course only infer from your letter of the 7th inst. that if the requisitions therein referred to were not withdrawn within seven days, the contract would be rescinded. The requisitions have not been withdrawn, but you now appear doubtful whether your notice to withdraw them was ever intended to be acted upon, and necessarily our client is in the dark on the matter. He has naturally assumed until receipt of your letter this morning, that your clients did intend to rescind if the requisitions were not withdrawn, and that in short your letter of the 7th inst. was serious. We,

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too, have acted on the same assumption. If, however, this was a mistake, and completion is to take place, there is the question of our client's claim under clause 7 of the contract to be dealt with before we can prepare conveyance, and, in addition to this, all our outstanding requisitions remain to be satisfied. Under these circumstances, and with a view to terminate the present intolerable condition of affairs, and to put our client in a proper position and prevent the possibility of further delay, we now call upon you, as solicitors for the vendor, either to give us notice of rescission of the contract, and repay deposit, or forthwith to satisfy all our outstanding requisitions, and inform us whether your client proposes to deal with our client's claim under clause 7 by replacing with fresh machinery and plant the machinery and plant to which no title has been shown, or to have the same valued, and to pay or allow the amount of such valuation in accordance with the terms of the contract, and, in the latter alternative, who you propose should act as surveyor. Failing compliance with our requirements our client will take prompt action in the matter. In the event of your satisfying our requirements, our client will of course object to pay interest and outgoings in respect of the purchase money and property respectively during the period of delay in completion which must necessarily take place, being the result, as our client will insist, of the wilful default of yours.

On the 17th March the defendant's solicitors replied:

We have your letter of yesterday, and regret its tone. Your clients have raised very great difficulties in this case, and during the last few days we have been seeking the means of avoiding any litigation on the matter. We are fully aware of what has prompted you to take your present course, but cannot advise our clients to accept the statement of law upon which your requisitions and final objection are placed. Our clients have now to decide whether they will hold the purchaser to his bargain or not, and we hoped to have been able to give you their decision to-day. We regret, however, that we shall not be able to write you finally until Monday or Tuesday next, which is not unreasonable when the large sum involved, and the importance of the issues between us are taken into consideration. If the bank ultimately decide to go on with the sale, we are sure you will not find us unreasonable with regard to the other matters you mention in your letter. . . . We regret the awkward position in which your client finds himself placed, and can assure you that ours is in a no less unfortunate position. We have every hope, however, of finally settling the matter within the time named.

On the 19th March the plaintiff's solicitors again wrote:

Not having heard from you definitely as promised by Saturday last, the 17th inst., our client considers the contract at an end, and he has accordingly made other arrangements. Kindly forward us cheque for the deposit 1350*l*.

On the 21st they again wrote:

We are surprised to have received no answer to our letter of the 19th inst., and not to have heard from you finally as promised by your letter of the 17th inst. Under these circumstances we must ask you to let us have the deposit to-morrow; otherwise our instructions are to issue writ.

On the 21st March the defendant's solicitors wrote:

We are sorry that we are not yet able to write you finally on this matter. The directors of the bank meet to-morrow, and a decision will doubtless be come to. We hope afterwards to be in a position either to write to you, or to call upon you.

On the 22nd March the defendant's solicitors wrote again:

We have your letter of yesterday, and have been instructed by the bank to see you with a view to coming to some arrangement if possible.

An interview took place, but nothing came of it.

On the 29th March (the date for completion being then passed) the plaintiff's solicitors wrote:

As your clients have not thought fit to repay to our client the deposit herein, or to give any definite statement whatever as to the course they intend to pursue, our client has determined not to wait any longer before taking steps to recover the amount of the deposit of 1350*l*.

The plaintiff commenced this action on the 29th March 1894. He alleged in his statement of claim that he had entered into the agreement to purchase the above-mentioned premises for the purpose of selling them with the plant and machinery to certain persons who were desirous of purchasing the same, that they might be worked by a limited company which such persons were about to register, and that in furtherance of such objects the plaintiff had entered into divers subsidiary agreements for registering the said company at once, and otherwise in connection therewith, including an agreement with a guarantee society for guaranteeing the principal and interest on certain mortgage debentures to be issued by the company when formed, and that for these reasons it was of great importance to the plaintiff to have the purchase completed upon the day fixed therefor. He further alleged that the defendant was well aware of the aforesaid position of affairs, and consequently time was in fact of the essence of the contract.

The plaintiff claimed: (1) repayment of the 1350*l*. and interest; (2) payment of his expenses of investigating the title; (3) a lien, and other relief.

The defendant denied most of the plaintiff's allegations, and said that the claim of East's representatives to the trade machinery was an unsustainable and unreal claim. He also alleged that the plaintiff entered into the agreement for sale with full knowledge and after disclosure by the defendant of the objections to title relied on by the plaintiff.

The defendant counter-claimed for specific performance of the agreement without compensation, or, in the alternative, with compensation, and for other relief.

The case was argued before Romer, J. on the 19th and 20th Nov. 1894.

Neville, Q.C. and *R. F. Norton* for the plaintiff.—A vendor has no right to keep a purchaser in suspense while the vendor is negotiating with another purchaser.

Hopkinson, Q.C. and *Sargant* for the defendant.—The correspondence, which went on after the expiration of seven days from the defendant's letter of the 7th March, shows that neither party regarded the contract as rescinded. The defendant was anxious to avoid litigation, and, with that view, was endeavouring to find a purchaser who would relieve the plaintiff, the original purchaser, of his bargain. No injury was done to the plaintiff by such endeavours. Time was not of the essence of the contract here:

Patrick v. *Milner*, 36 L. T. Rep. 738; 2 C. P. Div. 342.

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Upon the authorities, in order to entitle the purchaser to rescission, there must be either an absolute refusal by the vendor to complete, or else an act done which puts it out of his power to complete. The contract here was not put an end to unless there was either an absolute refusal by the vendor to complete, or a binding contract with someone else.

Neville, Q.C. in reply.

Cur. adv. vult.

Dec. 3.—ROMER, J.—In this case I think the plaintiff is entitled to relief, having regard to the conduct on the side of the defendant in relation to the contract which I am about to describe; and this renders it unnecessary for me to consider the other points raised by the plaintiff. That conduct, in my opinion, was not proper or fair, and entitled the plaintiff, when he issued his writ, to treat the contract as rescinded, and to have the deposit returned to him. At the beginning of the correspondence, to which I shall refer, the plaintiff as purchaser had made certain requisitions on title, which I need not go into beyond saying that they raised serious and substantial questions, and the time fixed for completion (the 24th March) was fast approaching. On the 7th March the defendant's solicitors wrote to the plaintiff's solicitors, and gave formal notice, under clause 3 of the contract, that the vendor was unwilling to remove or comply with, and calling upon the purchaser to withdraw, the requisitions in question. On the 9th a reply is sent, in substance refusing to withdraw the requisitions, and at the expiration of the seven days mentioned in clause 3, the vendor was in the position of being able by giving formal notice to determine the contract. The purchaser under the circumstances naturally supposed that such a notice would be promptly sent, and the vendor's power to rescind be speedily exercised. That power was a formidable weapon in the vendor's hands, and he was bound to exercise the rights given to him by clause 3 fairly, and to determine promptly whether he would exercise the power or not. He was not entitled to take advantage of his position, and to leave the purchaser in ignorance whether the contract was to be treated as rescinded or not. He certainly was not entitled intentionally to delay deciding whether the contract was to be gone on with or not, and still less was he entitled to use that delay for his own purposes in trying to effect another and more beneficial contract with a third person for sale of the property to that third person. I need not point out the hardship upon the purchaser of allowing the vendor to play fast and loose with him in such a matter. The purchaser would not know whether he was to get ready for completion or not—whether his requisitions would be further answered, or how they were to be dealt with, or what step he should take, and this at a time when the day fixed for completion was close at hand, and he might be held liable under the contract to pay interest on his purchase money if the contract was not completed on the day fixed. Now, what did the vendor do in this case? The correspondence speaks for itself, and I need only specially refer to the most important of the letters. Substantially, what he did was this (and of course in speaking of the vendor I am referring to what he did by the solicitor who attended to this matter on behalf of the firm who acted as the defendant's solicitors and agents): the vendor intentionally delayed informing the purchaser whether the contract was to go on or not, and he used the delay to try and effect a more or equally beneficial contract with a client of Messrs. Emanuel and Simmonds for sale of the property to that client. I infer that it was intended on behalf of the vendor, if he could effect such new contract, to exercise his power and rescind the contract with the plaintiff. And I fear it was also intended on his behalf, if such new contract could not be finally made, to turn round and say to the plaintiff that the vendor always contemplated carrying out the contract, and that therefore the old contract was still binding. In fact, he tried to play fast and loose with the plaintiff. The plaintiff was not made aware of what the defendant was doing with respect to the client of Messrs. Emanuel and Simmonds; but the defendant cannot obtain any advantage because he concealed what he was doing from the plaintiff. The plaintiff, fortunately for him, notwithstanding the concealment, apparently could see he was being trifled with, and the seven days having expired, he, on the 15th, wrote a very proper letter asking the vendor whether he was going to rescind the contract or not, and if he was not, then to proceed with the plaintiff's requisitions. Now, even before the expiration of the seven days, namely, as early as the 9th, the defendant's solicitor had been negotiating with Messrs. Emanuel and Simmonds for a sale of the property to their client, and on the 15th he had sent to them a draft form of contract for their client to accept, and stated in his letter of that date that on certain terms the vendor would be willing to sell the property to the client in the event of the vendor being entitled to determine the existing contract, an event which of course happened at the end of the seven days; and on the same day (the 15th), as the negotiations were still proceeding with Emanuel and Simmonds, the vendor's solicitor replied to the letter of the purchaser's solicitors of the 9th, by asking for a delay to the end of the week, as if for the purpose of further considering the purchaser's requisitions; but, in reality (as I conclude) for the purpose of arranging a binding contract with Emanuel and Simmonds' client. The purchaser's solicitors write again on the 16th, pointing out the embarrassing position in which their client was placed, and stating that they relied on hearing from the vendor's solicitor definitely by the following day, as promised. On the 17th the vendor's solicitor urges Emanuel and Simmonds to complete the agreement with their client the following Monday or Tuesday, and on the same day he writes to the purchaser's solicitors, asking for time, and stating he will write finally on the following Monday or Tuesday whether the contract is to go on or not—clearly a letter written for the purpose of getting time to arrange with Emanuel and Simmonds. The new contract with Emanuel and Simmonds' client cannot, however, be finally arranged as soon as expected by the vendor's solicitor, and on the 19th the purchaser's solicitors, tired of being longer trifled with, write to rescind the contract and demand back the deposit. Now, I need not pause to consider what would have been the position if even then the vendor had promptly replied by saying the contract was to go on; for the matter does not rest there. The vendor still

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delays giving a decision while he prosecutes the negotiations with Emanuel and Simmonds, and on the 21st the purchaser's solicitors write saying that, as they have not heard finally from the vendor as promised by the letter of the 17th, they must issue a writ. Still only dilatory letters are sent to the purchaser by the vendor's solicitors, and the day fixed for completion comes and goes, and the vendor is not on that day determined or prepared to regard the contract as one that is to be carried out, and is not ready to complete. On the 29th the writ in this action is issued, and then, as the negotiations with Emanuel and Simmonds had not resulted in a binding contract with their client, on the 30th March the vendor's solicitor writes a letter suggesting an arrangement with the purchaser, and trying to treat the contract as still in force—a position which the purchaser naturally refuses to accept. It appears to me that, under these circumstances, at the date of the writ the defendant was not entitled to treat his contract with the plaintiff as still in force, and that to allow him to do so would be to lend the sanction of the court to tricky dealing on his part. How can he be heard to say that he regarded his contract with the plaintiff as binding at the time when he was offering and endeavouring behind the back of the plaintiff to sell the same property to another person? Moreover, through the wilful default of the vendor, the contract could not be completed at the time fixed for completion; and, though in this case time could not be said within the authorities strictly to be of the essence of the contract, yet I think even in such a case a vendor cannot be allowed wilfully and for his own purposes outside the contract to prevent completion on the day fixed, and then to say that the delay was not essential, and that he ought to be allowed to complete at such later time as might be convenient to him. I think a vendor is in every case bound to exert himself in good faith and with due diligence, so that the contract may so far as he is concerned be carried out at the day fixed for completion. And if he has shown (as I think the vendor has shown here) want of good faith and of due diligence, he cannot properly say that at the date fixed for completion he was able, ready, and willing to carry out the contract on his part. It is said that in this case what the plaintiff was entitled to do when the defendant refused or neglected to say whether he would determine the contract or go on with it, was to wait a reasonable time and then say that the contract could not be rescinded. No doubt the plaintiff had that right; but, under the circumstances of this case, was that his only right? For the reasons herein stated, I think not. I think he was also entitled to say that the defendant could not on his side play fast and loose with the contract, and yet hold the plaintiff bound on his part. If the plaintiff had been informed (and he is not in a worse position than he would have been had he been informed) of what was going on—of the defendant offering the property for sale elsewhere, and intending to send the formal notice to rescind, if such other sale could be effected, then he would, in my opinion, also be entitled to say (as he did) that the contract was no longer binding on him, and the deposit must be returned. The defendant could not be in a better position than if he had promptly sent the notice to rescind which in fairness he ought to have sent when he began to try and sell the property away from the plaintiff. I think, therefore, that the deposit must be returned to the plaintiff, and the counter-claim dismissed, and the defendant must pay the costs of the action and counter-claim. But I do not think the defendant ought to be put in a worse position than if he had sent the notice to rescind; and I therefore only order the defendant to pay interest on the deposit at 4 per cent. as from the date of the writ, and I make no further order in favour of the plaintiff as to payment of his expenses, or as to a lien on the property; and the plaintiff must return to the vendor all abstracts and papers delivered to him or his solicitors by, or on behalf of, the vendor.

Solicitors for the plaintiff, *Wilkinson, Howlett*, and *Wilkinson*.

Solicitors for the defendant, *Paines, Blyth*, and *Huxtable*.

House of Lords.

Nov. 19, 20, 22, *and Dec.* 17, 1894.

(Before the LORD CHANCELLOR (Herschell), Lords MACNAGHTEN and DAVEY.)

ASSESSMENT COMMITTEE OF HOLYWELL UNION AND CHURCHWARDENS, &C., OF NORTHOP v. HALKYN DISTRICT MINES DRAINAGE COMPANY.

ASSESSMENT COMMITTEE OF HOLYWELL UNION AND CHURCHWARDENS, &C., OF HALKYN v. HALKYN DISTRICT MINES DRAINAGE COMPANY. (a)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Poor rate — Liability to rate — Tunnels and drainage works—Exclusive occupation—Easement—Halkyn District Mines Drainage Act 1875 (38 *Vict. c. lviii.*).

Land may be occupied for the purpose of and in connection with the enjoyment of an easement in such a manner as to make the occupier liable to be rated.

Exclusive occupation for the purpose of rating does not mean that no other person has any right on the property, if such joint occupation is subordinate and subject to the regulation and control of the person rated.

By a private Act the respondents were empowered to purchase or lease a tunnel and an open cut or watercourse, which a landowner had made for the purpose of draining mines on his land, or an easement or right of drainage through the same.

By a subsequent deed the landowner conveyed to the respondents the right to use the tunnels and watercourse, and to extend them, reserving the minerals, and the right to use the tunnels in searching for minerals, and the use of certain shafts, with a covenant to permit him to go down and measure the tunnels and shafts. The respondents put iron tubbing and brick arches in part of the tunnel, and allowed a tramway to be laid down in it.

Held (reversing the judgment of the court below), that the respondents had such an occupation of the tunnel and watercourse as to make them liable to be rated in respect thereof.

(a) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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THESE were two consolidated appeals from a judgment of the Court of Appeal (Lord Esher, M.R., Lopes and Kay, L.JJ.). reported in 69 L. T. Rep. 705, who had reversed a decision of the Queen's Bench Division (Mathew and Collins, JJ.), reported in 69 L. T. Rep. 112, upon a case stated by the Court of Quarter Sessions for the county of Flint.

The respondents were the occupiers of a tunnel called the Halkyn Deep Level, in the county of Flint, formed for the purpose of draining certain mines, the owners of which paid them royalties in respect of such drainage, and the question raised by the appeals, was whether the respondents were liable to be rated in respect of the tunnel in proportion to the net profits they derived from it.

The facts and the sections of the respondents' private Act (38 Vict. c. lviii.), and the material parts of a deed made between them and the Duke of Westminster, in 1882, upon which the case turned, are set out in the report in the court below, where the special case is printed at length, and in the judgment of their Lordships.

Sir *H. James*, Q.C., *Balfour Browne*, Q.C., and *Honoratus Lloyd*, for the appellants, argued that, under the deed of Dec. 1882, the respondents had an exclusive occupation which made them liable to be rated. It is said on the other side that they only have an easement, but the language of the deed goes further than a mere grant of an easement. [The LORD CHANCELLOR referred to *Attorney-General* v. *Emerson* (65 L. T. Rep. 564; (1891) A. C. 649) as to the effect of permanent erections on the soil as evidence of ownership rather than of an easement.] In the case of an easement there must be a dominant tenement, which does not exist here. They cited

Pimlico Tramway Company v. *Greenwich*, 29 L. T. Rep. 605; L. Rep. 9 Q. B. 9;
Lancashire Telephone Company v. *Overseers of Manchester*, 52 L. T. Rep. 793; 14 Q. B. Div. 267;
R. v. *Chelsea Waterworks Company*, 5 B. & Ad. 156;
Talargoch Lead Mining Company v. *St. Asaph Union*, 18 L. T. Rep. 711; L. Rep. 3 Q. B. 478;
Cory v. *Bristow*, 36 L. T. Rep. 594; 2 App. Cas. 262;
Doncaster Union v. *Manchester, Sheffield, and Lincolnshire Railway Company*, 71 L. T. Rep. 585;
Badger v. *South Yorkshire Railway Company*, 1 E. & E. 347;
Mayor of Southport v. *Ormskirk Union*, 69 L. T. Rep. 852; (1894) 1 Q. B. 196;
Metropolitan Railway Company v. *Fowler*, 69 L. T. Rep. 390; (1893) A. C. 416.

Sir *R. Webster*, Q.C., *Bosanquet*, Q.C., and *F. Marshall*, Q.C., for the respondents, contended that they had, on the wording of the deed, only an easement, and no exclusive occupation. See

Roads v. *Overseers of Trumpington*, 23 L. T. Rep. 821; L. Rep. 6 Q. B. 56,

The Duke of Westminster has not parted with the occupation, so as to be able to say that he is not rateable in respect of it. He has only granted a right to the passage of water through the drain. The cases relied upon on the other side are distinguishable upon the facts. The respondents here are not *de facto* in possession. See

London and North-Western Railway Company v. *Buckmaster*, 31 L. T. Rep. 835; L. Rep. 10 Q. B. 70; on appeal, 33 L. T. Rep. 329; L. Rep. 10 Q. B. 444;
Watkins v. *Milton-next-Gravesend*, 18 L. T. Rep. 601; L. Rep. 3 Q. B. 350;
Electric Telegraph Company v. *Overseers of Salford*, 11 Ex. 181; 24 L. J. 146, M. C.

[Lord DAVEY referred to *Rochdale Canal Company* v. *Brewster*, 71 L. T. Rep. 243; (1894) 2 Q. B. 852.]

Balfour Browne, Q.C. in reply.—The duke has parted with everything except a right to minerals, and the respondents have an occupation of the ground for all purposes. An exclusive occupation is not necessary. *Watkins* v. *Milton-next-Gravesend* was overruled by *Cory* v. *Bristow* (*ubi sup.*).

At the conclusion of the arguments their Lordships took time to consider their judgment.

Dec. 17.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell).—My Lords: By an Act passed in the year 1875 the Halkyn District Mines Drainage Company was incorporated. By sect. 6 they were empowered to make and maintain certain tunnels described in the deposited plans and sections, and to enter upon, take, and use, or at their option to purchase, and take an easement in, through, over, or under, or right of using such of the lands described as might be required for that purpose. By sect. 7 the company were empowered to purchase or lease a tunnel—known as the Halkyn Deep Level—and also an existing open cut or watercourse, or an easement, in, through, or over, or right of drainage through, or other right of using the same. In the event of the company acquiring the Halkyn Deep Level and existing cut, or any such easement or right, power was given to cleanse, deepen, widen, straighten, enlarge, divert, or improve the same. On the 14th Dec. 1882 a deed of grant was made by the Duke of Westminster to the Halkyn District Mines Drainage Company, with the view of carrying out the object of the Act. I shall have presently to examine carefully the terms of this grant, as I think the decision of this case turns almost entirely upon what was its nature and effect. Whilst the negotiations for the deed were proceeding, the respondent company had constructed a portion of the tunnel or level, and since the execution of the deed they have continued the tunnel or level for some distance further. They have also deepened the open cut, and built up the sides of it to prevent the loose ground of the hillside from slipping into it. They have also substantially and permanently repaired the tunnel. In carrying out the works they placed in the tunnel a quantity of iron tubbing of oval shape about five feet high, and, as to part thereof, arched the same over with fire bricks, and in other ways supported the roof. Under these circumstances, the question arose whether the respondent company were liable to be rated as occupiers of the tunnels and open cut to which I have referred. The Court of Quarter Sessions held that they were so liable, subject to a case which they stated for the opinion of the Queen's Bench Division. Mathew and Collins,

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JJ. were of opinion that the decision of the sessions was right. On appeal this decision was reversed. The Court of Appeal were of opinion that the effect of the deed was to convey to the respondent company an easement only. If this view be correct, I think there can be no doubt that the conclusion that the respondent company are not rateable necessarily followed. In the Court of Appeal it was, I gather, argued on behalf of the present appellants that the ownership of the tunnel was by the deed of grant conveyed to them. In consequence, probably, of the line of argument adopted, the case appears to have been treated by the learned judges as one in which the only alternative views were ownership or easement. I do not think that this is so. No doubt, if it could be shown that the respondent company were the owners of the tunnel, this would negative the idea of their being entitled merely to an easement, and being owners they would, *primâ facie*, be the occupiers; they would be so regarded unless the occupation were shown to be in some one else. But even if it be established that on the true construction of the deed they are not owners, it does not follow that they were possessed of an easement only and were not occupiers. There may be occupation without even the existence of the relation of tenant towards the owner of the property. And I think land may be occupied for the purpose of and in connection with the enjoyment of an easement in such a manner as to make the person so occupying liable to be rated. I will refer later on to the authorities which appear to me to support this view. I turn now to a consideration of the terms of the grant. It grants, first, "all such easements in and through and right of drainage through and other and exclusive rights of using (but subject nevertheless and except and reserving as hereinafter mentioned) the Halkyn Deep Level hereinbefore described and shown on the said plan by the colours black and pink as may be necessary or convenient for the purposes of the said Act or of the said company's undertaking or any of such purposes together with power from time to time to uphold, maintain, cleanse, repair, scour, deepen, widen, straighten, alter, enlarge, divert, and improve the said Halkyn Deep Level, when and to such extent as may be necessary or convenient for the purposes of the said Act or of the said company's undertaking." It further grants "full right and liberty at any time and from time to time hereafter to make, form, construct, maintain, and exclusively use (but subject nevertheless and except and reserving as hereinafter mentioned) under or through any land within the said area No. 1, of which the said duke is legal tenant for his own life, or of or to which he is seised or entitled for any greater estate, tunnels in continuation of or in connection with the said Halkyn Deep Level as now existing and shown on the said plan by the colours black and pink, the limit of which land towards the south is shown by a line on the said plan, and to make, construct, execute, and do all such works and things as shall be necessary or convenient for that purpose." Then follow the words, "and such easements," &c., in precisely the same terms as in the first grant. It will be seen that both these grants are made subject to, and there is excepted and reserved from them, what is afterwards mentioned. These exceptions and reservations seem to me to throw much light upon the effect of the grant, and upon the question whether all that passed by it to the drainage company was a mere easement. In the first place, there is excepted and reserved to the duke "all lead and lead ore which in making or extending the tunnels and works shall be found discovered or gotten." Next, there is reserved to the duke and his assigns "the right to use the Halkyn Deep Level and the tunnels to be made by the drainage company to be made as aforesaid for searching for and working the mines and beds of lead, lead ore and blende which can conveniently be sought for, obtained, and gotten by communications with or otherwise by means of the said Halkyn Deep Level and tunnels, or any of them respectively, or any part or parts thereof respectively, and for removing through or by means of the said Halkyn Deep Level and tunnels, or any of them respectively, or any part or parts thereof respectively, and through or by means of any shafts, levels, and drifts, in use by the said company, all lead, lead ore, and blende, which may be so obtained and gotten, and all débris and waste materials necessary or convenient to be removed in searching for, obtaining, and getting such lead, lead ore, and blende." If all that was intended to be granted was an easement to allow the drainage water to pass along the tunnels, and the possession of the tunnels remained in the duke (which is the hypothesis contended for by the respondents), it is difficult to understand how these rights, which the duke was to have in relation to the tunnels, were treated as exceptions and reservations out of and from the grant to the drainage company, and were conferred upon the duke in the manner in which they have been by the deed. And the matter does not stop there, because in a subsequent part of the deed there is a covenant by the drainage company, in the following terms:—"And also will from time to time and at all reasonable times permit and suffer the said duke and his assigns or the owner or owners for the time being of the lands shown on the said plan of which the said duke is legal tenant for his own life, or of or to which he is seised or entitled for any greater estate, and his and their agents and surveyors, to go down, dial, and measure all and every or any of the said Halkyn Deep Level and tunnels, and shafts and other works of the said company at all convenient times, and for that purpose to make use of all machinery in and about such works, he or they not unnecessarily obstructing or interfering with the user of the said level, tunnels, shafts, and works, for the purpose of the said company's undertaking, or obstructing or hindering further than need shall absolutely require the said company, their successors or assigns, or their servants, in the prosecution of any of their works or operations." If the company were to have an easement only, and were not to be in possession of the tunnels and works which they constructed, and the duke was to remain in possession of them, it is difficult to understand why a covenant should be taken to "permit and suffer the duke to go down dial and measure the tunnels and shafts." It is true that the first grant confers such exclusive rights of using the level as may be necessary or convenient for the purposes of the Act, but they have power to enlarge and divert the level, and for that purpose to enter upon the duke's lands which

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adjoin or are near to the level. With regard to the new tunnel, as I have already shown, in addition to the grant of easements and exclusive rights, full right is given to make and exclusively use the tunnels, subject only to the exception or reservation in the duke's favour. The exceptions are followed by a proviso "that the rights under the exceptions and reservations hereinbefore contained shall not be used or exercised so as to obstruct, hinder, delay, or interfere with the prosecution by the said company of any works or operations of the said company under the authority of these presents, or for the purposes of the said Act, or of the said company's undertaking, or to the damage, injury, or prejudice of the said level, tunnels, and shafts, or any other works of the said company, or so as to obstruct or interfere with the free flow of water through the said level or any of the tunnels and levels of the said company, or with the user for the purposes of the said Act, or of the said company's undertaking of the said level, or any of the tunnels, levels, and works of the said company." And this is not all. It is also provided that the rights under the exceptions and reservations contained in the deed shall not be exercised or exercisable except subject to the provisions of the Act and such byelaws allowed in manner provided by the Act as shall for the time being be in force. The Act, by sect. 45, makes it unlawful for any person without the written consent of the company first had and obtained, and then only subject to such conditions and regulations as should be prescribed by the company "to make or form any communication to or with the tunnels and levels or other works of the company." So that it is clear that the duke can have no rights in respect of the tunnels except those expressly reserved to him by agreement in the deed of grant. By sect. 46 of the Act the company are authorised to make bye-laws for the protection of their works, and "for preventing the flow, escape, or percolation of water by any means inconsistent with those prescribed or provided by the company." It seems to me clear, therefore, that with regard to these tunnels the rights of the respondents are paramount, and those of the duke are subordinate to them. Upon a careful consideration of the terms of the deed of grant I am unable to adopt the conclusion that it conferred upon the respondents an easement or rights in the nature of an easement only. I think that it gave them the possession of the tunnels of which they thus have the exclusive use for purposes of drainage, and that such rights as remained in the duke were only those expressly reserved to him, and which were subordinate to those possessed by the company. If the possession thus became theirs it is quite immaterial to my mind for the present purpose whether they became the owners or not. Along the tunnel for a considerable distance the company have placed iron tubbing; in parts they have placed brick arches; it seems to me that in these parts they occupy land precisely in the same sense as a water company does by its pipes, or a tramway company by its rails, or a telephone company by the supports for its wires. As to those parts of the tunnel which are so occupied, I can see no substantial distinction between the present case and those in which it has been held that water companies, tramway companies, and telephone companies, are rateable. But even as to the part where there is no tubbing or arches, I think the respondents are in possession. They may at any time place such works in any parts of the tunnel that they please, and, as I have already pointed out, it rests with them not only in the first instance to determine the direction of the tunnel, but at any time they please to divert it and alter its direction. The question whether a person is an occupier or not within the rating law is a question of fact, and does not depend upon legal title. The person legally possessed may not occupy. On the other hand, a person may be occupier either with or without the consent of the owner. In *Rex* v. *The Chelsea Waterworks Company* (5 B. & Ad. 156), a water company to whom the Crown granted the right to lay down their pipes were held by the Court of King's Bench to be occupiers of land, and liable to be rated. In the case of *The Pimlico, &c., Tramway Company* v. *The Assessment Committee of the Greenwich Union* (29 L. T. Rep. 605; L. Rep. 9 Q. B. 9), a tramway company was held liable in respect of the occupation of the road by their tramways. They were certainly not the owners of any part of the road; they were merely authorised to lay down the rails thereon. The only right which they possessed was an exclusive right of using those rails by carriages with flanged wheels; the public retained the right to pass over them, and use them in any other way; the company were, nevertheless, held liable to be rated. In the case of *The Lancashire, and Cheshire Telephone Exchange Company* v. *The Overseers of Manchester* (52 L. T. Rep. 793; 14 Q. B. Div. 267), a telephone company were held liable to be rated in respect of their wires and poles where the poles were attached to the roofs or walls of houses by the permission of the occupier, who, nevertheless, retained complete control of the building so that the company could only obtain access to the roof by his permission. Lindley, L.J. said, "The distinction between an easement of support and the occupation of that which affords support is often very fine. I think the telephone company occupy land in the same sense as many other persons who have been grantees of easements, and have been held rateable." In the present case, for the reasons I have given, I think that the respondents, and not the duke, were the occupiers of the tunnels and works for rating purposes. It was strongly contended, on behalf of the respondents, that they could not be liable to be rated, inasmuch as they were not in exclusive occupation. There are many cases where two persons may without impropriety, be said to occupy the same land, and the question has sometimes arisen which of them is rateable. Where a person already in possession has given to another possession of a part of his premises, if that posession be not exclusive he does not cease to be liable to the rate, nor does the other become so. A familiar illustration of this occurs in the case of a landlord and his lodger. Both are in a sense in occupation, but the occupation of the landlord is paramount—that of the lodger, subordinate. In the present case, in my opinion, on the true construction of the deed, the possession of the respondents is paramount, and any rights which the duke has are subordinate. The respondents alone have the right of using the tunnels for the primary purpose for which they have been constructed. The duke has no such right, and in my opinion, the respondents are in occupation of the

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tunnels and works. A question was raised with regard to a tramway, which has been laid down along a part of the tunnel for the purpose of carrying minerals and other materials. It is not necessary to consider whether the occupiers of this tramway could be separately rated in respect of it. The fact that its construction and use is permitted does not in my judgment prevent the respondents being in occupation of the land. I arrive at the conclusion I have indicated, differing as it does from the Court of Appeal, with the less hesitation, inasmuch as the contention before them appears to have been on the one side, that an easement only was granted; on the other, that the respondents were owners of the tunnels and works. The view which was presented to your Lordships that the respondents might be in occupation of the land, even though the purpose for which it was to be used was in the nature of an easement, does not appear to have been before them. No reference was made to the works they had actually constructed in the tunnels, or to the cases which I have cited which seem to me to have so direct a bearing upon the question to be determined. I think the judgment of the Court of Appeal should be reversed, and the judgment of the Queen's Bench Division restored, and that the respondents should pay the costs here and in the courts below.

Lord MACNAGHTEN.—My Lords: If it had not been common ground that the possession of the Halkyn District Mines Drainage Company was in comformity with their documentary title, it would, I think, have been more than doubtful whether the Court of Appeal were right in treating the question before them as a question of construction. Liability to rates is not a question of title. The question in each case must be whether there is, in fact, such an occupation as according to the Statute of Elizabeth and a course of decisions which have been recognised and established as law carries with it liability for rating purposes. In the present case, however, it is not suggested on the one hand that the possession of the company is greater, or on the other hand that it is in any respect less, than the possession authorised by the combined operation of the Act of Parliament and the deed of grant. And therefore, I think, it is sufficient, as it certainly is convenient, to limit the inquiry to the consideration of the question what were the rights conferred upon the company, taking for granted that whatever was intended to be conferred has been actually enjoyed. But then it is necessary to consider both the Act of Parliament and the deed. And the Act is, I think, the more important of the two. The learned judges of the Court of Appeal, confining their attention to the deed and scarcely noticing the Act of Parliament, have held that nothing passed but a mere easement. If that be the true view there is no liability to rates. But I cannot help thinking that the company acquired much more than a mere easement or a mere right of passage for the water which it was their object and their statutory duty to clear off. The Halkyn District Mines Drainage Act 1875 incorporates the company "for the purpose of making and maintaining the tunnels or adit levels and other works therein mentioned," and it expressly authorises the company to make use and maintain the said tunnels or adit levels, with all proper shafts, works, and conveniences connected therewith, and to enter upon, take and use, or (at their option) to purchase and take an easement in, through, over or under, or right of using such of the lands delineated on the deposited plans, and described in the books of reference as might be required for that purpose. The Act proceeds to describe the authorised tunnels, one of which was to join an existing tunnel called the Halkyn Deep Level, which communicated with an open cut or watercourse, running into Nant-y-Flint brook. The Act then authorises the company for the purposes of the Act to purchase, lease or otherwise acquire by compulsion or agreement, the Halkyn Deep Level and the said open cut or watercourse, "or an easement in, through, or over, or right of drainage through, or other right of using the same." Then follows a section which seems to me to have some bearing on the question before your Lordships. It is sect. 8. It authorises the company in the event of their acquiring the Halkyn Deep Level and the said open cut or watercourse, "or any such easement or right as aforesaid," from time to time to deepen, widen, alter, divert, and improve the same. It will be observed that the statutory powers of the company in this respect are precisely the same, whether they do or do not acquire any proprietary right in the soil. The same observation applies to other provisions of the Act. Sect. 45 provides that without the written consent of the company, and then only subject to such conditions and regulations as shall be prescribed by the company, no communication shall be made to or with the tunnels and levels, or other works of the company. Sect. 46 empowers the company to make bye-laws for the protection of their works, for the protection of their rights under the Act, and for preventing the flow of water by any means inconsistent with those prescribed or provided by the company. These provisions are general and wholly independent of any question as to the acquisition by the company of any proprietary rights in the soil. It is only necessary to add that the Act empowers the company to make extensions to their works on acquiring by agreement such land or such right in, through, or over such land as may be required for the purpose, and that in consideration of their services the company are authorised to levy tolls within the drainage district. The position of the company was therefore assured by the Act subject to their acquiring either such interest in the land, or such rights in, through, or over the land, as might be required for the construction of their works. For all practical purposes the position of the company in regard to their authorised works would be precisely the same, whichever of the two alternatives might be adopted. Such being the effect of the Act—the company having made some progress with the proposed works—the Duke of Westminster, who was the statutory owner of the land within the drainage area, made a grant to the company on the 14th Dec. 1882. So far as the present question is concerned the company did not acquire any proprietary interest in any part of the land which they were authorised to take. Subject to certain reservations, the effect of which will be considered presently, the duke granted to the company all such easements in and through, and right of drainage through, and other and exclusive rights of using the Halkyn Deep Level, the open cut or watercourse, and any tunnels that might

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be constructed within the drainage area in continuation of, or in connection with the Halkyn Deep Level as might be necessary or convenient for the purposes of the Act, or of the company's undertaking, or any of such purposes. Now, putting aside for a moment the reservations contained in the deed of grant, can there be any doubt as to the position of the company for rating purposes as regards their authorised works? The numerous cases relating to gas companies, water companies, and tramways, put the matter beyond question. To borrow the language of Wightman, J. in the case of *Reg.* v. *The West Middlesex Waterworks Company* (1 E. & E. 720), the company are *de facto* in possession of the space in the soil which their drainage works fill for a purpose beneficial to themselves, and it is immaterial here, as it was there, and the company have no proprietary interest in the soil. I now come to the reservations contained in the deed of grant. They are three in all. First there is a reservation of certain mineral substances which might be found in the course of making or extending the works. That reservation cannot affect the present question. Then there is a reservation of the use of the drainage works for the purpose of searching for, and working mines and carrying away ore and waste materials. Lastly, there is a reservation of the use of two specified shafts, the use of which had been granted to the company, and any other shafts which might be made or used by the company. The material reservation is the second. That reservation, if it were unqualified and unlimited as regards the use of it, might no doubt interfere with the operations of the company. But then we find an express proviso and declaration to the effect that the rights under the reservations contained in the deed of grant, shall not be used so as to interfere with the operations of the company under the authority of the deed, or for the purposes of the Act or of the company's undertaking, or with the user for the purposes of the Act. or of the company's undertaking of the drainage works of the company, and that the rights under the reservations contained in the deed shall not be exercised or exercisable except subject to the provisions of the Act and the company's bye-laws for the time being in force. It is, therefore, pertectly clear that the rights reserved by the duke were intended to be, and in fact are, secondary, inferior, and subordinate to the rights of the company under their Act. If there is any likelihood of a conflict, the right reserved by the duke must give way. The rights of the company are paramount. They have the sole and exclusive right of using their drainage works so far as those works may be required for the purposes of their undertaking. The deed of grant was not, I think, meant in the slightest degree to derogate from the statutory rights of the company, but simply to enable the company to avail themselves of those rights, and at the same time to reserve for the use of the duke certain rights and facilities quailfied and limited in such a manner as to prevent the possibility of their ever coming into competition with the statutory rights of the company. It appears to me that, under the circumstances, such rights of user as are reserved by the duke no more negative the occupation of the company for rating purposes, than the presence of a lodger interferes with the rateability of the householder. I am consequently of opinion that the company are liable to be rated in respect of their occupation for their drainage works, and that the judgment of the Court of Appeal ought to be reversed.

Lord DAVEY.—My Lords: It would appear from the judgments delivered by the learned judges in the Court of Appeal, that the point to which their attention was directed was whether the drainage company had any right of ownership in the tunnels and watercourse in question in the case, or had only an easement or incorporeal right over them, and their decision was against the overseers, the present appellants, on the ground that the company were not owners, but had a mere easement. It may be, as Sir Richard Webster suggested, that the course which the argument had taken before the Court of Appeal is the explanation of the reasons for the judgment taking that form. I agree with the learned judges in the Court of Appeal that the drainage company are not owners of the soil of the tunnels or watercourse. But that does not seem to me conclusive on the question of their rateability in respect of their occupation. The right of the company may be an easement or incorporeal right, but the easement may be of such a character as requires the occupation of land for its exercise, and confers upon the company a right to occupy land during its continuance. According to a long course of authority, the occupation of land under such circumstances is sufficient for rating purposes, though unaccompanied by ownership of any portion of the soil. The law was thus stated by Wightman, J. in *Reg.* v. *West Middlesex Waterworks* (1 E. & E. 720). "In this case," says the learned judge, "the first question is whether the company are rateable for their mains which are laid under the surface of the highway without any freehold or leasehold interest in the soil thereof being vested in the company; we think they are. The mains are fixed capital vested in land. The company is in possession of the mains buried in the soil, and so is *de facto* in possession of that space in the soil which the mains fill for a purpose beneficial to itself. The decisions are uniform in holding gas companies to be rateable in respect of their mains although the occupation of such mains may be *de facto* merely, and without any legal or equitable estate in the land where the mains lie by force of some statute." In one of the earliest cases, *Rex* v. *The Chelsea Waterworks* (5 B. & Ad. 156) the waterworks company were held rateable in respect not only of pipes laid underground, but of a reservoir in the Green Park which had formerly been a pond, and was used by the company as part of their works under a revocable license from the Crown. The same principle has been applied in *Cory* v. *Bristow* in this House (36 L. T. Rep. 594; 2 App. Cas. 262), to moorings in the river Thames maintained there under licence from the conservators, and in the recent cases of *Pimlico Tramways Company* v. *Greenwich Union* (29 L. T. Rep. 605; L. Rep. 9 Q. B. 9), and *Lancashire and Cheshire Telephone Company* v. *Manchester Union* (52 L. T. Rep. 793; 14 Q. B. Div. 267), to a tramway laid on a public road, and telephone wires suspended on the chimneys of buildings in a town. The question whether the company sought to be rated are owners of the soil may be very material in some cases in determining whether they are in occupation or are merely enjoying the same rights as

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the general public, or a number of other persons, as was held in *Rex* v. *The Mersey and Irwell Navigation Company* (9 B. & C. 95), and recently in this House in the *Doncaster Canal Company's case* (71 L. T. Rep. 585). But, after all, the real question is not whether their rights are corporeal or incorporeal, but whether the company is *de facto* in occupation of some portion of the soil. I need not state again the facts of this case, but, looking at the description of the works in the special case, I cannot doubt that the company occupy with their tunnel the portion of ground in which the tunnel is constructed, and also those portions which are inclosed within the tunnel, and used by the company for the purpose of their undertaking. And I also think with Collins, J. that they have a similar occupation of that portion of their works which consists of an open cut or watercourse. I am further of opinion, looking at the provisions of the company's Act of Parliament, that such occupation and right of user was necessary for the execution by the company of the purposes of the Act, and I think it was conferred on the company by the deed of grant from the Duke of Westminster. But then it is said that the occupation is not exclusive inasmuch as the Duke of Westminster has reserved certain rights to himself and his licensees over the tunnels and watercourses, and in pursuance of such reserved rights the Halkyn Mining Company have laid a tramway along one of the tunnels, and have placed ventilating pipes there. Two questions arise: What is meant by exclusive occupation when used in connection with the subject of rating? And what are the conditions subject to which the duke exercises his reserved rights? It is clear that exclusive occupation does not mean that nobody else has any rights in the premises. The familiar case of landlord and lodger is an illustration. The cases show that if a person has only a subordinate occupation, subject at all times to the control and regulation of another, then that person has not occupation in the strict sense for the purpose of rating, but the rateable occupation remains in the other, who has the right of regulation and control. This was so held in *Smith* v. *St. Michael, Cambridge* (3 E. & E. 383), in *North-Western Railway Company* v. *Buckmaster* (31 L. T. Rep. 835; 33 L. T. Rep. 329; L. Rep. 10 Q. B. 70, 444), and in the recent case of *Rochdale Canal Company* v. *Brewster* (71 L. T. Rep. 243; (1894) 2 Q. B. 852). As I took part in the decision of the latter case in the Court of Appeal I will not repeat what was said in the judgments. See also the judgment of Lord Blackburn in *Cory* v. *Bristow*, in the Court of Appeal (33 L. T. Rep. 624; 1 C. P. Div. 54). It is necessary in cases of apparent joint occupation to consider what degree of right each party may have in the premises. In the present case your Lordships will find on reference to the deed of grant of the 14th Dec. 1882, that it purports to grant such exclusive rights of using as may be necessary for the company's statutory purposes, but subject and except and reserving as thereinafter mentioned. The reservation to the duke is (1) of all lead, ore, or blende; (2) the right to use the Halkyn Deep Level and other tunnels for working and removing the reserved minerals; (3) a right of user (which is expressed to be subsidiary to the right of user by the company) of any shafts made by the company on payment of a contribution to maintenance and repair; and the reservation is subject to a proviso that the reserved rights shall not be used so as to interfere with the company's operations, and shall not be exercised except subject to the provisions of the Act, and such bye-laws allowed in manner provided by the Act as shall for the time being be in force. If your Lordships now turn to the Act you will find that by sect. 45 it is made unlawful for any person without the written consent of the company, and then only subject to such conditions and regulations as shall be made by the company to make any communication with the tunnels or levels or other works of the company. And by sect. 40 the company is empowered to make bye-laws for the protection of the works of the company and other purposes. In these circumstances, I have no difficulty in coming to the conclusion that the exercise by the duke and his tenants and licensees of the rights reserved to them is subordinate to the occupation of the company for the purposes of their undertaking, and does not confer on the duke's tenants or licensees, such an occupation as prevents the occupation of the company being exclusive in the sense in which I have used that expression. Consequently, I am of opinion that the company has a rateable occupation, and that the order of the Court of Appeal should be discharged, and the order of the Divisional Court restored.

Order appealed from reversed. Order of the Queen's Bench Division restored; respondents to pay the costs here, and in the court below.

Solicitors for the appellants, *Chappell, Griffith*, and *Broadbridge*, for *H. G. Roberts*, Mold.

Solicitors for the respondents, *Chester, Mayhew, Broome*, and *Griffithes*, for *Walker, Smith*, and *Way*, Chester.

ERRATUM.—*Lemmon* v. *Webb*.—*Ante*, p. 648, col. 1, line 36, for "reported" read "supported."

Supreme Court of Judicature.

COURT OF APPEAL.

Saturday, Nov. 3, 1894.

(Before LINDLEY and SMITH, L.JJ.)

LEE v. COHEN. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Action commenced in Mayor's Court—Writ of prohibition—Want of jurisdiction—Appearance by defendant—Waiver of objection.

Where an action has been commenced in the Mayor's Court the defendant does not, by entering appearance, not under protest, and taking other steps, waive his right to object to the jurisdiction so soon as he ascertains exactly what the nature of the plaintiff's claim against him is.

Decision of the Lord Chief Justice (Lord Russell) reversed.

ON the 14th Sept. 1894 the defendant, Joseph F. Cohen, was served with a plaint out of the Mayor's Court, London, which claimed against him 475*l.* for moneys alleged to have been paid by the

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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plaintiff, John W. R. Lee, for and on his behalf, between the 12th Aug. 1893 and the 27th Sept. 1893.

The claim related to certain bills of exchange and other transactions between the parties.

The defendant, for the purpose of ascertaining the nature of the claim against him, which he repudiated, caused an appearance to be entered to the plaint in the Mayor's Court; but such appearance was not entered under protest, and more than a fortnight after such appearance the defendant applied for further and better particulars of the plaintiff's claim. Moreover, on the 13th Oct. 1894 the defendant made a further application with respect to the plaintiff's right of discovery.

The defendant had not yet pleaded in the action in the Mayor's Court.

The defendant objected to the jurisdiction of the Mayor's Court, on the ground that the whole of the alleged cause of action had not on the plaintiff's own showing arisen within that jurisdiction, and the claim being for over 50*l.*, he submitted that he was entitled to a writ of prohibition to prevent the Mayor's Court proceeding with the action.

The plaintiff, on the other hand, not only contended that the Mayor's Court had jurisdiction to try the action, but also that the defendant, by taking the above-mentioned steps, had waived his right to object to the jurisdiction of the Mayor's Court, he being fully aware of the nature of the plaintiff's claim before and at the service of the plaint.

An application by the defendant for a writ of prohibition was refused by the Lord Chief Justice (Lord Russell) sitting as vacation judge.

The defendant appealed.

J. A. Hamilton, for the appellant, stated the facts of the case and the question raised. [He was stopped by the Court.]

W. H. Stevenson for the respondent.—Apart from the question whether or not, on the facts of the case, the Mayor's Court has jurisdiction to try this action, I say that it was too late for the defendant to take the objection that he did. He has waived his right to object to the jurisdiction, as he has entered appearance in the Mayor's Court and has taken steps there:

Moore v. *Gamgee*, 25 Q. B. Div. 244.

In no reported case has the defendant appeared, not under protest, in the Mayor's Court, and yet been treated as not having waived his right to object to the jurisdiction. I submit that the defendant here has waived any right he might have had to object. The granting of a writ of prohibition is always discretionary. [SMITH, L.J.—In *Farquharson* v. *Morgan* (70 L. T. Rep. 152; (1894) 1 Q. B. 552) it was held by the Court of Appeal that where total absence of jurisdiction appears on the face of the proceedings in an inferior court, the court is bound to issue a prohibition, although the applicant for the writ has consented to or acquiesced in the exercise of jurisdiction by the inferior court.] If the court decides that a writ of prohibition should be granted, it should, at any rate, only go to the cause of action that the court thinks did arise out of the jurisdiction.

No reply was called for.

LINDLEY, L.J. (after stating the facts of the case, and holding that the whole cause of action did not arise in the city of London, and that, therefore, the Mayor's Court had no jurisdiction to try it, continued as follows):—Then as to the point whether the defendant has waived his right to object to the jurisdiction of the Mayor's Court by the steps he has taken, when one looks at it it comes to this: So soon as the defendant's legal advisers ascertained exactly what the nature of the plaintiff's claim was, the defendant objected to the jurisdiction, and applied for the writ of prohibition. That being so, he has not, in my opinion, waived his right to object by having entered appearance and taken the other steps that he did. I think, therefore, that the prohibition must go, and that the appeal must be allowed with costs in the usual way.

SMITH, L.J. delivered judgment to the same effect.

Appeal allowed.

Solicitor for the appellant, *Edward Le Voi.*

Solicitors for the respondent, *Faithfull* and *Son.*

Dec. 11 *and* 12, 1894.

(Before Lord HALSBURY, LINDLEY and SMITH, L.JJ.)

THE TRUSTEE IN BANKRUPTCY OF JOHN BURNS-BURNS *v.* BROWN. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Bankruptcy—Execution—Goods held by sheriff for twenty-one days—Act of bankruptcy—Rights of execution creditor—Bankruptcy Act 1883 (46 *&* 47 *Vict. c.* 52), *s.* 45—*Bankruptcy Act* 1890 (53 *&* 54 *Vict. c.* 71), *ss.* 1, 11.

A creditor who has issued execution against the goods of a debtor must, in order "to be entitled to retain the benefit of the execution against the trustee in bankruptcy of the debtor," under sect. 45 *of the Bankruptcy Act* 1883, *have completed the execution by seizure and sale, before the goods have been held by the sheriff for twenty-one days. For by sect.* 1 *of the Bankruptcy Act* 1890 *such possession by the sheriff for twenty-one days is an available act of bankruptcy, of which the execution creditor will be taken to have notice, and will defeat the rights of the execution creditor under an execution not completed until after the date of such act of bankruptcy.*

Figg *v.* Moore Brothers (71 *L. T. Rep.* 232; (1894) 2 *Q. B.* 690) *approved and followed.*

Ex parte Villars; *Re* Rogers (30 *L. T. Rep.* 104; *L. Rep.* 9 *Ch. App.* 432) *distinguished.*

Decision of Williams, J. affirmed.

CREDITORS having recovered judgment in an action against the Thrapston Foundry Company (which was alleged to be the trade name of John Burns-Burns) the sheriff of Northamptonshire levied on certain goods in the possession of the company under a *fi. fa.*

The sheriff, however, withdrew, on the instructions of the creditors, on the 8th April 1893, power being reserved to him to re-enter.

The sheriff re-entered on the 11th Sept. 1893, and again seized the goods, and with the knowledge of the creditors held them for more than twenty-one days.

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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On the 10th Nov. 1893 the sheriff sold the goods.

On the 11th Nov. 1893 a bankruptcy petition was presented against Burns, notice of which was served on the sheriff.

On the 29th Nov. 1893 a receiving order in bankruptcy was made against Burns upon his own petition, notice of which had been served on the sheriff, and the first petition was by consent withdrawn.

On the 2nd Feb. 1894 Burns was adjudicated bankrupt, and on the 5th Feb. 1894 a trustee in his bankruptcy was appointed.

In pursuance of an order of a master, made on the 14th March 1894, the proceeds of sale were paid into court to await the decision on an interpleader issue as to who was entitled to the money, the question being raised whether the business of the company really belonged to Burns alone, or whether the true owner of the business was another person.

Sect. 45 of the Bankruptcy Act 1883 enacts that:

(1.) Where a creditor has issued execution against the goods or lands of a debtor . . . he shall not be entitled to retain the benefit of the execution . . . against the trustee in bankruptcy of the debtor, unless he has completed the execution . . . before the date of the receiving order and before notice of the presentation of any bankruptcy petition by or against the debtor, or of the commission of any available act of bankruptcy by the debtor. (2.) For the purposes of this Act, an execution against goods is completed by seizure and sale.

Sect. 1 of the Bankruptcy Act 1890 enacts that:

A debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days.

Williams, J., before whom the interpleader issue came on to be heard, decided upon the evidence that the business was exclusively that of Burns; that the goods which had been seized were his property; and that, following a decision of his own in *Figg* v. *Moore Brothers* (71 L. T. Rep. 232; (1894) 2 Q. B. 690), the trustee in bankruptcy was entitled to the proceeds of sale.

The creditors now appealed from that decision.

Herbert Reed, Q.C. and *Gore Browne* for the appellants.—We submit that the learned judge in the court below came to a wrong conclusion on the evidence, and also that, even if the business and the goods belonged to Burns alone, the execution creditors were nevertheless entitled to the proceeds of sale. Though the holding of the goods by the sheriff for more than twenty-one days is by sect. 1 of the Bankruptcy Act 1890 made an act of bankruptcy, yet sect. 45 of the Bankruptcy Act 1883 has not the effect of rendering the execution void as regards the execution creditor himself:

Ex parte Villars; Re Rogers, 30 L. T. Rep. 104; L. Rep. 9 Ch. 432.

We say that the decision of Williams, J., in *Figg* v. *Moore Brothers* (71 L. T. Rep. 232; (1894) 2 Q. B. 690) was erroneous, and that his Lordship was wrong in following that decision in the present case. This question has never previously come before the Court of Appeal.

Lawson Walton, Q.C. and *Edward Clayton*, for the respondent, the plaintiff, were not called upon to argue.

Lord Halsbury.—I am of opinion that this appeal altogether fails. The terms of the agreement, or what is called the agreement, are very obscure, so that it is difficult for any court to give proper effect to it. But the main purpose of it is tolerably clear. [His Lordship stated the facts of the case and continued:] That being the condition of things the conclusion at which I have arrived is, that Williams, J. was right in holding upon the evidence that the business of the company belonged to John Burns-Burns alone. With reference to the other point, it seems to me too clear for argument. I think it is expressly determined by sect. 45 of the Bankruptcy Act 1883, which provides that an execution creditor shall not be entitled to retain the benefit of his execution against the trustee in bankruptcy of the debtor unless he has completed the execution (that is by seizure and sale) before the date of the receiving order, and before notice of the commission of any available act of bankruptcy by the debtor. If while the sheriff has the goods in his possession an available act of bankruptcy comes to his knowledge, it is his duty to hold the goods for the creditors generally, and not for the execution creditor. The present question could not have arisen under the Bankruptcy Act 1883 itself, for the reasons given in the decision in *Figg* v. *Moore Brothers* (71 L. T. Rep. 232; (1894) 2 Q. B. 690). But the Bankruptcy Act 1890, s. 1, has created a new act of bankruptcy, viz., the holding of the goods by the sheriff under an execution for twenty-one days. I cannot read in the Act anything which exempts the execution creditor himself from the operation of that section. In the present case the sheriff had possession of the goods in question for more than twenty-one days. To my mind it is clear that an act of bankruptcy was thus committed to the knowledge of the execution creditor, and that the sheriff had notice of it. The result is that, under the combined operation of the Bankruptcy Acts of 1883 and 1890, all the conditions existed which are necessary to give the trustee in the bankruptcy a title to the goods. Putting the two sections together the point taken by the appellants appears to be unarguable. Therefore, on both grounds, I think that Williams, J. was right, and that the appeal must be dismissed with costs.

Lindley, L.J.—I am of the same opinion. [His Lordship stated the facts and continued:] I am satisfied upon the evidence that the business was really that of John Burns-Burns alone. As to the other point, it is contended that the decision of Williams, J., in *Figg* v. *Moore Brothers* (71 L. T. Rep. 232; (1894) 2 Q. B. 690) was erroneous, and that, even if the facts are as I have stated them, the trustee in the bankruptcy is not entitled to the goods. In my opinion, that decision was perfectly right, and I agree in the reasons which the learned judge gave for his decision. I do not see how it is possible to construe the Bankruptcy Act of 1890 in any other way. *Ex parte Villars; Re Rogers* (30 L. T. Rep. 104; L. Rep. 9 Ch. App. 432) was decided upon a different Act, and it is not applicable to the altered state of the law.

Smith, L.J.—I am of the same opinion, and have nothing to add upon the question of fact.

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With regard to *Figg* v. *Moore Brothers* (*ubi sup.*), reading sect. 45 of the Bankruptcy Act 1883 and sect. 1 of the Bankruptcy Act 1890 together, they seem to me to show that that case was rightly decided. Sect. 1 of the Act of 1890 makes the holding of the goods by the sheriff for twenty-one days an act of bankruptcy. That has taken place in the present case. Here the goods in question were held by the sheriff for twenty-one days. I turn to sect 45 of the Act of 1883, and see what is to happen. An execution creditor is not entitled to retain the benefit of the execution against the trustee in bankruptcy of the debtor if before the completion of the execution he has notice of the commission of any available act of bankruptcy by the debtor. It is clear that the defendants had notice of an available act of bankruptcy committed by the debtor before the execution was completed, for they themselves put in the execution, and must be taken to have had notice that the sheriff had held the goods for twenty-one days. The case is, therefore, brought entirely within sect. 45 of the Bankruptcy Act 1883, and I think that *Figg* v. *Moore Brothers* (*ubi sup.*) was rightly decided.

C. F. Collins appeared for the sheriff, and asked for his costs.

Their Lordships declined to allow any costs to the sheriff, his appearance on the appeal being totally unnecessary.

Appeal dismissed.

Solicitor for the appellants, *Thomas A. Jones.*

Solicitors for the respondents, *Ward, Perks,* and *McKay*; *Samuel Price* and *Sons.*

Dec. 18 *and* 19, 1894.

(Before Lord HALSBURY, LINDLEY and SMITH, L.JJ.)

Re O'SHEA; COURAGE *v.* O'SHEA. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

Bankruptcy — Protected transaction — "Contract, dealing, or transaction with bankrupt"—Charging order against fund in court belonging to bankrupt — 1 *&* 2 *Vict. c.* 110, *s.* 14 — *Bankruptcy Act* 1883 (46 *&* 47 *Vict. c.* 52), *ss.* 45, 49, *sub-sect.* (*d*).

A charging order under sect. 14 *of* 1 *&* 2 *Vict. c.* 110, *is not "an execution against the goods of a debtor" within sect.* 45 *of the Bankruptcy Act* 1883, *nor is it a protected transaction within sect.* 49 *of that statute.*

Re Pillers; *Ex parte* Curtoys (44 *L. T. Rep.* 691; 17 *Ch. Div.* 653) *applied.*

Per Lindley, L.J.: Whether the doctrine established by Lucas *v.* Dicker (43 *L. T. Rep.* 429; 6 *Q. B. Div,* 84) *and Ex parte* Sedgwick (9 *Morr.* 217) *can be extended to a case where all previous bankruptcy petitions have been dismissed, so that notice to dismiss a petition is equivalent to notice of other acts of bankruptcy,* quære.

IN Nov. 1892 S. Hannington, who carried on business at Brighton, obtained a final judgment against W. H. O'Shea in respect of goods sold and delivered and costs.

Not being able to obtain payment of the amount he shortly afterwards presented a bankruptcy petition against O'Shea, which was ultimately dismissed, on the 21st April 1893, on the understanding that other petitions then pending against O'Shea in London were also dismissed, and that payment of the judgment debt was made in certain instalments.

The London petitions, presented at the date of the dismissal of Hannington's petition, were dismissed in May 1893.

The arrangement for settlement of the judgment debt having fallen through, and there being a fund in court belonging to O'Shea, a charging order *nisi* was on the 1st June 1893, on the application of Hannington, made *ex parte* by North, J.'s chief clerk, and a date fixed for O'Shea to show cause against the same being made absolute.

O'Shea having filed evidence in opposition, the chief clerk declined to grant the charging order absolute.

The matter was consequently referred to the judge, and on the 17th July 1893 the order absolute was made by his Lordship.

On the 4th Aug. 1893 the action of *Re O'Shea*; *Courage* v. *O'Shea*, came before North, J. on further consideration, when an inquiry was directed, amongst others, as to what was due to various incumbrancers on the fund in court (including Hannington) for costs incurred in respect of their securities, and also as to the priority of the various incumbrancers. The inquiry was founded on the chief clerk's certificate, dated the 3rd Aug. 1893, which included Hannington as an incumbrancer on the fund.

On the 13th Dec. 1893 a receiving order was made against O'Shea upon a petition which had been presented by one Moore, on the 30th May 1893, *i.e.*, two days before the charging order *nisi* was granted.

The official receiver sought to vary the chief clerk's certificate of the 4th Aug. 1893, which certified Hannington's charging order to be a valid incumbrance on the fund in court, and also a previous certificate of the chief clerk, dated the 30th March 1894, which certified the amount of costs incurred by Hannington in respect of his security, and which costs were by the charging order directed to be added to his security.

The grounds upon which the official receiver based his application sufficiently appear from the judgment of North, J.

The summons to vary the chief clerk's certificates was adjourned into court, and came on to be heard before North, J. on the 18th Nov. 1894, when the following judgment was delivered:—

NORTH, J.—In the present case Hannington got a good charge against the fund in court belonging to O'Shea, which he was entitled to enforce, and with respect to which he obtained a charging order *nisi* founded upon his judgment, which order was afterwards made absolute. That is perfectly good unless it can be displaced upon the grounds on which the official receiver attempts to displace it. The chief ground on which he does so is, that the charging order having been made absolute on the 17th July 1893, at that time Moore's bankruptcy petition had been presented, under which an adjudication has since been completed. On the 30th May 1893 the petition was presented, the act of bankruptcy having been committed a few days previously. Then, he says that on the 7th April 1893 another act of bank-

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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ruptcy had been committed, to which the bankruptcy commencing under Moore's petition has relation back. Therefore, he says that on the 7th April 1893 his title as trustee in bankruptcy arose, and it was not until after that that the charging order was obtained. There are three points. The first is this: whether on the 7th April 1893 such an act of bankruptcy as is alleged was committed or not. I must say, with respect to that, that I have not heard the argument out, because I thought it was more material to consider the second point. But, as regards the act of bankruptcy, I am quite satisfied on the evidence as it stands that there is no evidence that there ever was such an act of bankruptcy at all. There is no doubt that a petition was presented, which alleged that there had been such an act of bankruptcy, and if an order had been made on that petition I should have thought that the act of bankruptcy was sufficiently established. But that petition was dismissed, no order except an order of dismissal being ever made upon it. And there was no adjudication, therefore, as to whether there was an act of bankruptcy or not. Then it is said that an affidavit was filed in that bankruptcy before the registrar which could have proved the petition. It may be so. There is no such affidavit before me on the present application, and such an affidavit, if it exists, is not evidence at large against all the world. It is not an affidavit made in this matter at all in any way. Therefore, subject to the question of whether I should have allowed further evidence to be given if necessary, I must say at present that, in my opinion, it is not proved that there was any such act of bankruptcy. The second question is whether, assuming that there was such an act of bankruptcy, Hannington had notice of it, because, if he had notice of it, the security he got on the 17th July 1893 would not be effectual as against the official receiver. Now, as regards that, assuming that there was an act of bankruptcy, in my opinion it is not shown that Hannington had any notice at all. It is said by the counsel for the official receiver that the onus of proof is upon Hannington, who swears positively that he had not any notice. I see no reason whatever to doubt that that is perfectly accurate. But then, of course, he may be liable for such a notice as the agent who managed the matter for him had, and it is necessary to consider the matter from that point of view. Now, I have considered the evidence as to what notice there was, bearing in mind that I must look not only upon the evidence which says that there was no notice, but also upon that which is said to be evidence of notice, so that I might consider the general position from both sides of the case. I have come to the conclusion that there is no ground whatever for saying that either personally, or through his agents, Hannington had notice of the matter. It is unnecessary, therefore, formally to decide the point whether the debt was proved or not; though, of course, if it is not proved that there was an actual act of bankruptcy to begin with, no question of notice could arise. Then the third point remains, with regard to the difficulty arising from the delay which has taken place in complaining of the chief clerk's certificate. I have heard the evidence, and I am not satisfied that there are sufficient grounds for allowing the matter to be opened now so long after the certificate has been made. The summons to vary is in time as regards the second certificate, but that would not be a very material matter. As to the first, it is out of time, and, without saying what I might have done if the facts had been proved, I think it impossible to say that the matter can be opened afresh now. The summons will be dismissed with costs as against Hannington. As regards the other party, Dixon, counsel who appeared for him submit to an order being made such as is asked.

From that decision the official receiver now appealed.

Muir Mackenzie and *Greig* for the appellant.—A charging order under 1 & 2 Vict. c. 110. s. 14, is not "an execution against the goods of a debtor" within sect. 45 of the Bankruptcy Act 1883:

Re Hutchinson; Ex parte Hutchinson or *Plowden*, 54 L. T. Rep. 302; 16 Q. B. Div. 515.

Nor is it a protected transaction within sect. 49 of that statute. As to the meaning of the word "transaction," see per Mellish, L.J. in

Re Wright; Ex parte Arnold, 35 L. T. Rep. 21; 3 Ch. Div. 70, 78.

A charging order is merely a statutory security. Sect. 49 provides that, subject to the foregoing provisions of the Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing in the Act shall invalidate in the case of a bankruptcy any contract, dealing, or transaction by or with the bankrupt for valuable consideration; provided that the contract, dealing, or transaction takes place before the date of the receiving order and that the person (other than the debtor) with whom the contract, dealing, or transaction was entered into, had not at the time notice of any available act of bankruptcy committed by the bankrupt. The onus is on the execution creditor, who claims the protection of sect. 49 of the Bankruptcy Act 1883, to prove that he had no notice of any prior act of bankruptcy:

Ex parte Schulte; Re Matanlé, 30 L. T. Rep. 478; L. Rep. 9 Ch. App. 409.

That onus the execution creditor here has not discharged. He was at any rate put on his inquiry by the circumstance that other concurrent bankruptcy petitions had been presented and dismissed. A notice to an execution creditor which states that a petition in bankruptcy against the execution creditor has been filed on a date, at a court, and by a person named in the notice, is sufficient notice of an act of bankruptcy to prevent the execution being a protected transaction, since such creditor ought to know that the petition would contain a statement that the debtor had committed an act of bankruptcy. In the present case the execution creditor had notice of other bankruptcy petitions against the debtor, and that they were dismissed. Therefore he must be taken to have had constructive notice of other acts of bankruptcy:

Lucas v. *Dicker*, 43 L. T. Rep. 429; 6 Q. B. Div. 84;

Re Sedgwick; Ex parte Hobbs, 9 Morr. 217.

S. Hall, Q.C. (*A. H. Carrington* with him) for the respondent Hannington.—I do not suggest that the charging order comes within sect. 45 of the Act of 1883. But I submit that it is a pre-

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tected transaction within sect. 49. Although a garnishee order attaching a debt, payment not having been obained, was held not a protected "dealing" with the bankrupt under sect. 94 of the Bankruptcy Act 1869:

Ex parte Pillers; Re Curtoys, 44 L. T. Rep. 691; 17 Ch. Div. 653;

yet a seizure of goods under an irrevocable licence to seize them was held to come within the words "contracts, dealings, and transactions," in sect. 133 of the Bankruptcy Act 1849:

Krehl v. *The Great Central Gas Consumers' Company and Musis*, 23 L. T. Rep. 72; L. Rep. 5 Ex. 289.

The meaning of the word "transaction" was considered in

Graham v. *Furber*. 14 C. B. 134.

The effect of a charging order made by a judge in favour of a judgment creditor, under 1 & 2 Vict. c. 110, does not depend on the capacity of the judgment debtor to give a valid charge, but upon the validity of the judgment; and the 14th section of that Act, and the proviso in the 1st section of 3 & 4 Vict. c. 82, must be read as meaning that the judgment creditor is to have the same remedies, and the order of the judge the same effect, as if the judgment debtor had made a valid and effective charge in favour of the judgment creditor:

Re Leavesley, 64 L. T. Rep. 269; (1891) 2 Ch. 1.

[LINDLEY, L.J.—A charging order is in the nature of an execution: (see per Wood, L.J. in *Haly* v. *Barry*, 18 L. T. Rep. 491; L. Rep. 3 Ch. App. 452.] The Legislature, in introducing the word "transaction" into sect. 49 of the Act of 1883 must have meant something more than "contract or dealing," which were the words used in sect. 94 of the Act of 1869. In so doing the Legislature reverted to the words used in sect. 133 of the Act of 1849.

A. à Beckett Terrell, for the respondent, the trustee of the fund, took no part in the argument.

Muir Mackenzie replied.

Lord HALSBURY.—I think that we are all agreed with Mr. Mackenzie, as to the construction of the 49th section of the Bankruptcy Act 1883, that this charging order is not a protected transaction, but is really more in the nature of an execution. But that will not suit Mr. Hall's case; therefore, I think that Mr. Mackenzie is right. Looking at the language of the section it is impossible to my mind to give any other interpretation to the word "transaction." I agree with the view taken by Mellish, L.J., in the case of *Re Wright; Ex parte Arnold* (35 L. T. Rep. 21; 3 Ch. Div. 70, 78). It seems to me that a "dealing" is very much the same thing when you look at the words with which the term "transaction" is accompanied. I cannot overlook that the general idea founded by the Legislature was, that what they really are protecting by that clause are *bonâ fide* dealings with the bankrupt as a trader, which, having been completed before notice of the act of bankruptcy, ought to be protected. That being the condition of things, I think that Mr. Mackenzie's point is a good one, and that the answer to it is insufficient. It becomes unnecessary, therefore, to enter into the other question at all, because that depends upon a comparison of all the affidavits. And I am not prepared to say that my mind is fully made up as to what decision I should arrive at if that was the question I had to determine. We are now in this position, that we really have not before us the same question which was argued before North, J. We are sitting in appeal on a totally different point from that which was raised before North, J. Furthermore, I have this observation to make, that every part of this transaction seems to me to be tainted with irregularity or error. This is not a motion to vary the chief clerk's certificate at all. The chief clerk's certificate is perfectly right. It seems to me it ought to have been an application to make an order notwithstanding the chief clerk's certificate. The result of all that is, that I think that Mr. Mackenzie's client must succeed; but that he must be satisfied with not receiving any costs, for we will not give any costs of this appeal.

LINDLEY, L.J.—I am of the same opinion. The substantial question is whether a charging order obtained against a fund in court belonging to the judgment debtor under 1 & 2 Vict. 110, s. 14, falls either within sect. 45 or sect. 49 of the Bankruptcy Act 1883, and is valid as against the official receiver acting as the trustee in bankruptcy of the judgment debtor, whose title to the fund relates back to a time anterior to the charging order. Unless the charging order is protected under one or other of those two sections—sect. 45 and sect. 49—it is not protected at all as against the official receiver's title relating back to a time anterior to it. Therefore, the question we have to consider is, whether it is either a "protected execution" within sect. 45 or a "protected transaction" within sect. 49. Sect. 45 is so worded as to exclude the possibility of holding that this is a protected execution within that section. Mr. Hall admits that, and has very properly not argued it, Therefore, we may disregard sect. 45. But, although we need not consider sect. 45, it will not do to lose sight of the real nature of the charging order. The real nature of a charging order is much more akin to an execution than what is commonly called a "dealing or transaction." It must not be forgotten that a charging order is obtained in the first instance *ex parte*. The practice is to get an order *nisi*, and then to give notice to the debtor. All the subsequent proceedings are no doubt done on notice to the debtor. That being the nature of the step taken in the present case, I cannot think that it is fairly construing the expression "contract, dealing, or transaction," in sect. 49 of the Bankruptcy Act 1883, to hold that a step taken behind the back of a debtor and without his sanction, and in which he takes no part whatever, is a "contract, dealing, or transaction by or with" him. I think that that would be stretching the words too far. I do not think that this is a novel decision at all, having regard to the case of *Ex parte Pillers; Re Curtoys* (*ubi sup.*), in which it was held that a charging order was not a dealing under the previous Bankruptcy Act of 1869, because it was a step *in invitum*, and not in any fair sense a contract or dealing. In substance and in point of reason that decision covers the present case. Sect. 4 of the Act of 1883, re-enacting the language of sect. 94 of the prior Act of 1869, has had put into it the word "transaction" after "dealing." I for one very much doubt whether anything has been gained

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by that. "Contract, dealing, or transaction by or with the bankrupt" means something done—something in which the bankrupt would not be put in the same position as he is in the case of a charging order. I think that it would be straining the language of sect. 14 of 1 & 2 Vict. c. 110—which says that a man who has a charging order is to have the like remedies as a person would have if he had an agreement of charge—if we were to hold that he was to be deemed a person in whose favour such an agreement has been made. I think we should be straining the language, and the case not being within sect. 49, the opposition to this appeal fails. Now, as regards the question of notice we need not go into it. I am not at all satisfied that the doctrine of *Lucas* v. *Dicker* (*ubi sup.*) could be stretched so far as Mr. Mackenzie is asking us to stretch it here, for this reason amongst others, that all the petitions were dismissed. I doubt very much whether the cases of *Lucas* v. *Dicker* (*ubi sup.*) and *Re Sedgwick* (*ubi sup.*) can be pressed so far as to say that a man who has notice to dismiss a petition has notice of other acts of bankruptcy. I say no more about that, as it is unnecessary for the determination of the present case. As regards the costs, the summons is all wrong. The certificate was quite right—perfectly right—when it was made. Here is an incumbrancer who has a charge on the fund in court, and his priority is quite right; but by reason of the bankruptcy of the judgment debtor his charge is invalid as against the official receiver acting as trustee in bankruptcy. The proper form of the application would have been an application to the court, notwithstanding the chief clerk's certificate, that the money should not be paid out to the judgment creditor, but should be paid out to the official receiver. That would have been the right form. Having regard, therefore, to the fact that the proceedings are all wrong in form, and having regard also to the fact that this point was never taken before North, J., and further affidavits having been filed on the subject, I do not think that it would be right to give the official receiver any costs. I think the case must be treated as fought out on the merits, and there ought to be an expression of opinion of this court that that charging order is invalid as against the official receiver acting as the trustee in bankruptcy. That would put the matter right. But I do not think that he should be allowed any costs of the appeal.

Smith, L.J.—This case comes before this court in a peculiar way. The point argued before North, J., on which he gave judgment, has been practically abandoned. North, J. gave judgment on the hypothesis that the only evidence and knowledge of an act of bankruptcy was the knowledge of the petition, which itself would contain a statement of the act of bankruptcy which was subsequently dismissed. The learned judge said that he was not quite satisfied on the evidence that any act of bankruptcy had ever been committed at all. Therefore, he gave judgment against the official receiver. Thereupon the official receiver appeals, and the first thing he does is not to controvert the judgment of my brother North, but he starts another point, and he begins with another affidavit of Captain O'Shea for the purpose of showing, what he had not deposed in his former affidavit, that there was an act of bankruptcy *de facto* on the 7th April. So he begins with a new statement of facts in this court. And then, further, counsel for the official receiver takes a point of law, which nobody took on behalf of the official receiver when before North, J., viz., the point of law that the charging order is not protected because of either sect. 45 or sect. 49 of the Bankruptcy Act of 1883. Sect. 45 of the Act of 1883 is abandoned. The present case is not within that section. But it is said that it is not a transaction protected within sect. 49. Upon that point of law, for the reasons which have been given by Lord Halsbury and Lindley, L.J., the official receiver succeeds. He has, however, brought up an entirely new case, which I do not think North, J. would have recognised if he had been sitting here. Having brought up a new case of facts and law he gets a judgment. But, what is right to be done as to costs? I think the least to be done is not to let him have his costs of the appeal; and, therefore, he gets judgment without costs.

Appeal allowed.

Solicitor for the appellant, *Graham Gordon.*

Solicitors for the respondents, *Nye* and *Moreton*, agents for *J. K. Nye* and *Treacher*, Brighton; *Leman, Groves*, and *Leman.*

Wednesday, Oct. 31, 1894.

(Before Lord Esher, M.R., Lopes and Rigby, L.JJ.)

Lysaght v. Coleman and others. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Marine insurance—Cargo—Damage to some of goods insured—Examination of all the goods—Expenses of examining such of the goods as were undamaged—Actual damage—Liability of underwriters.

The plaintiff shipped a number of cases of galvanised iron for carriage from Bristol to London, there to be transshipped by barges to another vessel for export to Australia. The goods were insured for the voyage from Bristol up to and including the transshipment, and by the policy average was agreed to be recoverable on each package separately or on the whole. In a storm upon the insured voyage most of the cases were wetted by salt water, and in London the plaintiff had them all landed and examined. All the cases were unpacked; and those in which the iron was found to be undamaged were repacked and exported, while those in which the iron was damaged were sold by auction.

Held, that the plaintiff was entitled to be reimbursed by the underwriters only for the loss upon the cases in which the iron had been damaged, and was, therefore, not entitled to the expenses incurred by him in the examination of those cases of iron to which no damage had in fact occurred.

This was an appeal from the judgment of Wills, J. upon further consideration after the trial of the action with a jury at Bristol.

The action was brought by the assured under a policy of marine insurance to recover from the underwriters the expenses incurred by him in the

(a) Reported by E. Manley Smith, Esq., Barrister-at-Law.

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examination of 391 cases of galvanised iron, part of the cargo of 497 cases, which was the subject-matter of the policy.

The plaintiff shipped the 497 cases on a vessel to be carried from Bristol to London, there to be transshipped by barges into another vessel for export to Australia. The cases were insured for the voyage from Bristol up to and including the transshipment, and by the policy average was "recoverable on each package separately or on the whole." The policy also contained the usual suing and labouring clause.

The ship met with bad weather on the voyage, and most of the cases were wetted with sea water.

The plaintiff, therefore, had all the 497 cases landed at the West India Docks in London for the purpose of examination. He gave notice of this to the underwriters, and they appointed a surveyor to attend it.

The cases were then all unpacked and examined, and it was found that in 106 the iron was damaged, the remaining 391 being undamaged. The examination lasted for two months. Finally the 391 undamaged cases were repacked and exported to Australia, while the 106 damaged cases were sold by auction.

The plaintiff's claim in respect of the 106 damaged cases, namely, the difference between the invoice price and the sale price of this number of cases together with the costs of their sale and a proportion of the expenses of the examination, was paid by the underwriters. The plaintiff now sued for the remaining expenses of the examination, namely a proportionate part of the whole in respect of the 397 undamaged cases.

Wills, J., upon further consideration after the trial, gave judgment for the defendants.

The plaintiff appealed.

Pyke, Q.C. and *E. U. Bullen* for the plaintiff.—A partial loss has been incurred within the terms of the policy, and the only question is who is to pay for the expenses of finding out what was the partial loss. In Phillips on Insurance, Art. 1791, it is stated that "the charges for ascertaining the amount of the loss should fall upon the party who must have sustained the loss had its amount been ascertained without any expense." By the terms of the policy average is recoverable on the whole, and this distinguishes the case of *Cator and others* v. *The Great Western Insurance Company of New York* (29 L. T. Rep. 136; L. Rep. 8 C. P. 552), which was decided on the special nature of the policy then in question, which was on each specific parcel. The plaintiff is also entitled to his claim under the suing and labouring clause, because, if the packages had not been opened, they would have deteriorated through being allowed to remain wet with sea water.

Bucknill, Q.C. and *English Harrison* for the defendants.—The plaintiff has chosen to claim average on each particular package, and therefore cannot claim on packages to which no damage happened. Underwriters are only liable to pay for actual loss on damaged goods. [He was stopped.]

Pyke replied.

Lord ESHER, M.R.—In this case the assured shipped a cargo of cases of galvanised sheet iron to be carried by sea from Bristol to the Thames, where it was to be transshipped by barges from the ship it arrived in into another ship lying in the river for carriage to Australia. He then effected an insurance on the iron for the voyage commencing at Bristol and terminating upon the completion of the transshipment into the ship that was going to carry it to Australia. The ship which carried the iron from Bristol arrived in the Thames; but on her voyage had met with heavy weather so that some at all events of the goods insured suffered damage by sea-water. The assured thereupon became entitled to claim against the underwriters. Now he had insured all the cargo of galvanised iron that was put on to the ship; but the policy contained a provision that average should be recoverable on each package separately or on the whole. The first question that arose was whether the insurance was an insurance of the cargo as a whole or of each package separately. I am inclined to think, though the matter is not material, that it was an insurance on the whole cargo, and not on each package separately. The provision in the policy which I have referred to gives the assured the right of taking the loss on each package without reference to the whole cargo, or on the whole cargo, whichever he liked. Now a loss did in fact take place, and on the arrival of the ship in the Thames, the assured, having taken the goods out of her and put them into barges, thought it right that he should have them examined before being put into the other ship for export. He therefore had them landed at the West India Docks for the sole purpose of having them examined with the view of finding out which of them was damaged and to what extent. He gave notice to the underwriters of what he was doing, and they appointed a surveyor and told the assured he was to do the best he could with the goods. Each separate package was then examined in order to see whether it had been damaged by sea-water and to decide what had better be done with it, if it was damaged. In 106 packages it was found that the iron had been damaged, in the other 391 it was found to be uninjured. The 391 uninjured packages were forwarded to Australia, the 106 damaged ones were sold by auction. The assured then claimed from the underwriters the difference between the original value of the 106 injured packages and the price obtained at the auction, together with the expenses of examining them, and the underwriters paid him this sum. But besides this he now claims to be paid the expenses incurred by him in having the undamaged packages examined. That claim must be put forward either in respect of the damaged goods or else of the undamaged goods. It cannot be put forward in respect of the damaged goods, because he cannot have suffered any loss in respect of them further than that which the underwriters have paid for. But if the claim was made in respect of damage to the undamaged goods, the assured can only mean that their market value was injured by reason of the damage to the other goods. Although the assured acted in a very reasonable way it seems clear to me that he cannot claim these expenses from the underwriters. It is said that there is authority in favour of the plaintiff's contention; there is certainly very strong authority directly opposed to it. In the fifth edition (1835) of Stevens on Average, at pages 157 and 158, he says the most satisfactory reason why the underwriter is not liable, is, "because he is accountable *only* for the actual damage done to the

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thing insured. He engages to guarantee the assured against the *direct operation* of sea damage, but not against the *consequential results*." The same view is taken in Phillips on Insurance. Then again it is entirely contrary to the practice of average adjusters to allow to an assured that which the plaintiff now claims. The result therefore is that principle, authority, and the practice of average adjusters are all opposed to allowing the plaintiff's claim. I think that the judgment of Wills, J. was right and this appeal must be dismissed. I will only add this, that the argument on the suing and labouring clause seems to me perfectly idle; and that what was insured was the iron in the cases, not the cases themselves, though the cases may have added to the value of what was insured.

Lopes, L.J.—The matter has been so fully treated by the Master of the Rolls that I will say very few words. The insurance was effected on 497 cases of sheets of galvanised iron, and on the ship's arrival in London it was found that the iron in 106 cases had been damaged by sea-water on the voyage. With regard to these cases the plaintiff has been paid what he was entitled to, and no question about them is raised here. What the plaintiff is now asking for is repayment of expenses incurred by him in examining the 391 cases which were not damaged. A policy of marine insurance is an insurance against actual damage, and there has been no actual damage to the 391 cases. The most that could be said is that there was a suspicion that they might have been damaged, but a suspicion is not enough. I quite agree with everything that the Master of the Rolls has said. As for the suing and labouring clause it is clear that no part of the expenses incurred about the examination of the 391 cases was incurred in diminishing any loss suffered through perils of the sea.

Rigby, L.J.—I am of the same opinion. It seems to me that this claim is an attempt to extend the law of marine insurance. It cannot be said that a mere suspicion of damage to the goods, entitled the plaintiff to incur costs and claim them afterwards from the defendants when in fact no damage had taken place. *Appeal dismissed.*

Solicitors for the plaintiff, *Whites* and *Co.*, for *Press* and *Inskip*, Bristol.

Solicitors for the defendants, *Lowless* and *Co.*

Wednesday, Nov. 14, 1894.

(Before Lord Esher, M.R., Lopes and Rigby, L.JJ.)

Reg. *v.* The Justices of Essex. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Poor rate—Appeal to sessions—Appearance of assessment committee as respondents—Consent of guardians—Condition precedent—Waiver by appellant—Union Assessment Committee Amendment Act 1864 (27 & 28 *Vict. c.* 39), *s.* 2.

Sect. 2 *of the Union Assessment Committee Amendment Act* 1864 *enables an assessment committee to appear as respondents to an appeal to quarter sessions, "with the consent of the guardians of such union, after notice shall have been sent to every guardian."*

Held (affirming the decision of the Queen's Bench Division), reported ante, *p.* 296, *that it is a condition precedent to the appearance of an assessment committee as respondents to an appeal that, after notice has been sent to every guardian they shall have obtained the consent of the guardians to their appearance in that appeal: and if such consent has not in fact been obtained, the appellant cannot waive compliance with the condition precedent so as to enable the assessment committee to be a respondent to the appeal.*

This was an appeal from a decision of the Queen's Bench Division (Mathew and Day, JJ.), which is reported *ante* p. 296, discharging a rule for a *mandamus* obtained by the West Ham Assessment Committee against the justices of Essex, directing them to order the clerk of the peace for the county to tax the costs of the assessment committee in eleven several appeals entered by the London County Council against poor rates in the parishes of East and West Ham.

By the Union Assessment Committee Amendment Act 1864 (27 & 28 Vict. c. 39) it is provided, with reference to any appeal heard by any quarter sessions against a poor-rate, as follows:—

Sect. 2. The assessment committee of such union may, with the consent of the guardians of such union, after notice shall have been sent to every guardian, appear as respondents to such appeal . . .

In the above mentioned eleven appeals to the Essex Quarter Sessions, the West Ham Assessment Committee had appeared as respondents without having obtained the consent of the guardians to appear as respondents in those appeals.

The appeals were dismissed, and the appellants ordered to pay the respondents their costs, but the clerk of the peace refused to tax the costs of the assessment committee on the ground that, not having obtained the consent of the guardians, they were not properly respondents to the appeal.

The assessment committee contended that under the circumstances of the case, which are fully set out in the report of the decision of the Queen's Bench Division, *ante*, s. 296, they were entitled to have their costs taxed by the clerk of the peace, and they obtained a rule for a *mandamus* to the justices directing them to order the clerk of the peace to tax the committee's costs.

The Queen's Bench Division discharged this rule.

The assessment committee appealed.

Jelf, Q.C. and *Morten* for the assessment committee.—No question was ever raised by the London County Council as to our right to appear as respondents. We were requested by the county council to appear at quarter sessions and consent to the appeals being respited. All our costs have been incurred through what we have done at the request of the county council. Therefore our compliance with the provisions of sect. 2 as to obtaining the consent of the guardians has been waived by them, and they cannot now be heard to say that we ought not to have appeared as respondents. Compliance with a statutory condition such as this may be waived by the conduct of the other party to an appeal:

Reg. v. *The Justices of Hertfordshire*, 4 B. & Ad. 561.

(*a*) Reported by E. Manley Smith, Esq., Barrister-at-Law.

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The assessment committee in fact obtained the consent of the guardians to appear as respondents to one appeal, brought by the London County Council, though they did not obtain it for the other appeals subsequently brought. In a case decided upon sect. 1 of this Act, it was held that an appellant need not go several times through the useless form of making an application to an assessment committee before bringing several appeals against rates made in conformity with the same valuation list. The same reasoning applies here, and it is sufficient that the committee had obtained the guardians' consent in the matter of one appeal.

Reg. v. *The Justices of Denbighshire*, 53 L. T. Rep. 388; 15 Q. B. Div. 451.

Bosanquet, Q.C. (*Wedderburn* with him), for the London County Council, was not called upon.

Lord ESHER, M.R.—In this case the West Ham Assessment Committee are asking for a *mandamus* to the Justices of Essex, directing them to order their clerk of the peace to tax the costs said to have been incurred by the assessment committee in several appeals to quarter sessions. The clerk of the peace refused to tax these costs on the ground that he had no jurisdiction to tax, because the assessment committee had no authority to appear before the justices, and could not legally have been heard by the court. The question whether the assessment committee had any right to appear before the quarter sessions on these several appeals depends upon an Act of Parliament. It is said that they had not put themselves in a position to be heard by the court, because they had not complied with certain conditions precedent to their right to be heard in an appeal to quarter sessions. The question depends upon the true construction of sect. 2 of the Union Assessment Committee Amendment Act 1864. During the argument the case of *Reg.* v. *The Justices of Denbighshire* (*ubi sup.*) was strongly relied upon, but that case was decided upon the construction of sect. 1 of the Act of 1864, a different section from that which we have to deal with in the present case. Sect. 2 gives power to an assessment committee to appear as respondents to an appeal, "with the consent of the guardians" and "after notice shall have been sent to every guardian." Reading that section according to its ordinary grammatical construction, it appears to me plain that the assessment committee cannot appear as respondents to an appeal, unless and until they have obtained the consent of the guardians of the union, after notice has been sent to every guardian. Until they show that, they have no right to be heard in an appeal. Those are conditions precedent, proof of the fulfilment of which lies on the assessment committee. They are conditions precedent which must be fulfilled before the court has jurisdiction to hear the assessment committee, and such being the case, no consent by the opposite party can give jurisdiction to the court by waiving their fulfilment. If there has been any agreement between the London County Council and the Assessment Committee, or if either has deceived the other so as to cause the other to incur some liability; that is a question which they must settle between themselves. The question before us is whether the clerk of the peace had jurisdiction to tax these costs. It seems to me that he acted quite rightly in asking for proof of fulfilment of the conditions precedent to the right of the assessment committee to appear, and, therefore, precedent also to his jurisdiction to tax their costs. It is perfectly clear that they had never been fulfilled, and, therefore, he had no jurisdiction to tax the costs. This is not a case in which the conditions precedent had, in fact, been fulfilled, and the mere proof of their fulfilment was dispensed with in court. They never were, in fact, complied with, and we must, therefore, refuse to issue a *mandamus* to the justices, which would require them to do a thing which in law they had no power to do. The appeal must be dismissed.

LOPES, L.J.—This case arises out of a rating appeal at quarter sessions. Two respondents appeared in it, one being the churchwardens and overseers of the parish, and the other the assessment committee. The appeal raised an important question, and was carried up to the House of Lords, so that the case extended over a long period of time, and meanwhile considerable costs were incurred in entering and respiting several similar appeals at quarter sessions. When the House of Lords had given its decision, and the appeals which had been respited were dismissed with costs, those costs had to be taxed. The clerk of the peace accordingly taxed the costs of the churchwardens and overseers, as he undoubtedly had power to do. But the assessment committee also asked the clerk of the peace to tax their costs, which they had incurred in the respiting of the several appeals I have mentioned. The clerk of the peace refused to tax, saying that, as the assessment committee had not complied with the requirements of sect. 2 of 27 & 28 Vict. c. 39, they had no *locus standi*, and he had no jurisdiction to tax their costs. Sect. 2 prescribes certain conditions precedent to the right of an assessment committee to appear as respondents to an appeal, and there is no evidence in the present case that the West Ham Assessment Committee has ever complied with these conditions. In fact, it is clear that they have never been complied with. It appears to me that the clerk of the peace was perfectly right in refusing to tax, and that he only did what, under the circumstances, he was bound to do. But two cases have been cited in the argument which were said to govern the present case. One was *Rex* v. *The Justices of Hertfordshire* (*ubi sup.*). In my opinion that case is no authority whatever for the proposition that was suggested, namely, that these conditions precedent can be dispensed with. In that case the appellant appeared at sessions ready to prove his notice of appeal. It was not proved, nor an admission required; but, upon the respondent praying a respite, a notice was handed by him to the clerk of the peace, and filed with the records of the court. At the next sessions the appeal was called on, and it was held by the King's Bench that, under the circumstances, further proof of the notice of appeal was unnecessary, and the appeal ought to be heard. The other case relied on was *Reg.* v. *The Justices of Denbighshire* (*ubi sup.*). That case also is, to my mind, of no assistance in the present case. It was decided upon sect. 1 of the Act, which is quite different from sect. 2. Speaking for myself, I think that the case was rightly decided on sect. 1; but it is of no effect whatever with regard to sect. 2. I

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therefore come to the conclusion that the view taken by the clerk of the peace was right, as also was the decision of the Divisional Court.

RIGBY, L.J.—The right of the assessment committee to appear as respondents in this appeal is a statutory right, and the only statutory authority that has been laid before us is that which is contained in sect. 2 of the Union Assessment Committee Amendment Act 1864. The right which is there given to an assessment committee depends upon the consent of the guardians after notice has been given to each guardian. It was faintly argued, but I do not think much reliance was placed upon this fact, that that consent had actually been obtained, and if it had been, that would have gone some way towards establishing the position of the assessment committee. But when the matter had been thoroughly threshed out, it appeared that the only consent actually obtained was a consent to appear in the name of the guardians upon one appeal only, and there were, at any rate, ten other appeals as to which no consent was obtained. It was then said that the obtaining the consent had been waived by the London County Council. The answer to that was that the county council had no right to waive such a condition, if condition be the right term, or the substance of the section which gives the right to appear. In support of the proposition that a statutory condition may be waived, there was cited the case of *Rex* v. *The Justices of Hertfordshire* (*ubi sup.*). But in that case no statutory condition was waived. The condition in question was that a certain notice of appeal should be served, and it was served. There was no waiver. It appears, from the report of the case, that the appellant who had to prove the notice was in court ready to prove it, and everyone in court knew that the proper evidence was ready. There was nothing more than an omission to ask for the formal proof of that which everyone knew to be the fact. Then it was argued that in the case of *Reg.* v. *The Justices of Denbighshire* (*ubi sup.*) it was laid down that one application to the assessment committee is a sufficient compliance with the statutory condition precedent, which is to be found in sect. 1. The court there held that the condition precedent had been complied with, but that decision does not affect the case now before us. We should be holding in direct contradiction to what appears to be the fact, if we were now to hold that the condition in sect. 2 had been complied with at all. I, therefore, entirely agree with the conclusions that have been arrived at, and I think this appeal should be dismissed.

Appeal dismissed.

Solicitor for the London County Council, *W. A. Blaxland.*

Solicitors for the Assessment Committee, *Hillearys.*

Tuesday, Nov. 27, 1894.

(Before Lord ESHER, M.R., LOPES and RIGBY, L.JJ.).

WILLIAMS *v.* CARTWRIGHT AND OTHERS. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Writ of summons—Service out of the jurisdiction—Defendant resident in Scotland—Action of tort—Co-defendants within the jurisdiction — Discretion — Comparative cost and convenience—Order XI., rr. 1 (*g*), 2, 4.

By Order XI., r. 1 (*g*), *service out of the jurisdiction of a writ of summons may be allowed whenever "any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."*

In an action of tort, in respect of the issuing of an alleged false and fraudulent prospectus, which was brought against three defendants, two of whom resided within the jurisdiction, but the third was resident at Edinburgh:

Held (by Lopes and Rigby, L.JJ., Lord Esher, M.R. dissenting), that, under the circumstances of the case, and considering the comparative cost and convenience of all parties to the action, the action was one in which service on the defendant who resided at Edinburgh ought to be allowed.

THIS was an appeal, from an order of Wright, J. at chambers, discharging an order previously made by him allowing a writ of summons to be served out of the jurisdiction upon one of the defendants in the action.

The action was brought against three defendants, two being directors and the other the London manager, of the Equitable Mortgage Company of New York, and by the indorsement on the writ the plaintiff claimed "damages against the defendants by reason of their having induced him to purchase shares in the Equitable Mortgage Company by issuing and sending to him in London a false fraudulent and misleading prospectus and report of the assets, liabilities, and business of the said company."

Two of the defendants resided near London, and the writ was duly served upon them.

The other defendant, J. E. Guild, was a Scotchman, resident in Edinburgh.

Upon an *ex parte* application to Wright, J. at chambers, the learned judge granted leave for service of the writ upon Guild in Edinburgh, but, on a subsequent application by Guild, the learned judge discharged the previous order, but gave leave to appeal, saying the matter was one which ought to be brought before the Court of Appeal, and at the same time he gave leave to the parties to file further affidavits as to the facts.

The plaintiff accordingly appealed.

McCall, Q.C. and *Whitehouse* for the plaintiff.—The defendant Guild is a proper party to the action within Order XI., r. 1 (*g*). The rule has been considered in two actions of contract:

Massey v. *Heynes*, 59 L. T. Rep. 470; 21 Q. B. Div. 330;

Firth v. *de las Rivas*, 69 L. T. Rep. 666;

and it has been treated as applicable to actions of tort:

Croft v. *King*, 68 L. T. Rep. 296; (1893) 1 Q. B. Div. 419.

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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Witted v. *Galbraith* (68 L. T. Rep. 354, 421; (1893) 1 Q. B. Div. 431, 577) was also a case of tort in which the Divisional Court granted leave to serve a writ out of the jurisdiction under Order XI., r. 1 (*g*), and though that decision was reversed by the Court of Appeal, it was only upon the ground that the facts did not show any *bonâ fide* cause of action against the person who had been served within the jurisdiction. Here the case of the plaintiff is exactly the same against all three defendants, the evidence will be exactly the same, and it will be in every way more convenient to have the action tried once in England than that the matter should be tried twice over. The principal witnesses are in England, the books of the company are either in England or America, and as a commission to America will be necessary, it will save expense to have only one commission instead of two commissions, which will be necessary if there are two actions.

Sir *Richard Webster*, Q.C. and *H. S. Theobald* for the defendant Guild.—In actions of contract where the defendants are so connected together that there can be no distinction made between them in point of law, it is proper that service should be allowed out of the jurisdiction. In some cases of tort, as for instance in an action for malicious prosecution, the same considerations may apply. But though the words of rule 1 (*g*) are large enough to cover all cases of tort, it ought not to be applied to an action of deceit such as the present. Fraud depends on the knowledge of the defendant, and though several people may be concerned in a fraud, the matter cannot properly be treated as a joint Act. Though the two other defendants have done the same thing as Guild may have done, that will not constitute a joint transaction. Evidence against his co-defendants would not necessarily be evidence against Guild. The granting of leave for service out of the jurisdiction under Order XI. is discretionary, and the court ought not to interfere when once a judge has exercised his discretion upon the matter. This action can be well tried in Scotland in the Sheriffs Court, and the "comparative cost and convenience" between that court and the High Court in England is in favour of trial in Scotland.

McCall replied.—The "comparative cost and convenience" to be considered by the court is that of all the parties to the action, not of that defendant only who is out of the jurisdiction:

Kinahan v. *Kinahan*, 62 L. T. Rep. 718; 45 Ch. Div. 78.

Lord Esher, M.R.—It seems to me that the question of jurisdiction that has been discussed is a very nice one, and I should be very much inclined to say that the power given by Order XI. is not to be used in actions of tort or, at least, of fraud. And for this reason: If there were only one defendant in this action, Order XI. could not be made use of, and service in Scotland or elsewhere out of England could not be allowed by the court. It would be strange, therefore, if a defendant cannot be sued alone in England, yet can be sued in England if the plaintiff joins another defendant with him. Nevertheless, the words of rule 1 (*g*) are large enough to include cases of tort, so that it seems to me that in some cases, at all events, of joint torts, the rule may be applicable. But I think that it ought never to be allowed to be used in such cases except under extreme circumstances. I should, therefore, be very loth to apply the rule here. Now the rule is a discretionary one, and this action is one of a very common kind. It is a most ordinary charge of fraud in connection with the issuing of a prospectus, and the allegations against the defendants are of the ordinary kind. It seems to me, therefore, that no such extreme circumstances have been shown in this case as the court, in my opinion, ought to insist upon before applying the rule. I cannot say that Wright, J. was wrong. When a judge in a case of this kind has exercised his discretion, the court ought not to overrule it except in extreme cases. What I have said applies to rule 1; but if there is any doubt as to the applicability of rule 1, then rule 2, which is a rule made for the further protection of defendants, may be taken into consideration. I think that the appeal should be dismissed.

Lopes, L.J.—I agree with what the Master of the Rolls has said with regard to interference by the court with the discretion of a judge; but it seems to me that this is a somewhat exceptional case. Wright, J. at first granted leave for service out of the jurisdiction, then he refused it, but at the same time expressed great doubt, and gave leave for the filing of further affidavits as to facts not before him to be used on the appeal. For these reasons I think that the exercise of his discretion might be interfered with on lighter grounds than would otherwise be necessary. This action is an action of deceit against three defendants, one of whom is resident out of the jurisdiction in Scotland. The plaintiff's claim is against them jointly, and there is no doubt that all persons engaged in a common wrongful act are liable both jointly and severally. Now Order XI., r. 1 (*g*), provides that service out of the jurisdiction may be allowed when "any person out of the jurisdiction is a necessary or proper party to an action" properly brought against another person within the jurisdiction. In this case the question is whether this Scotch defendant is a "proper party" to the action. The true test of that seems to me to be whether, if he had been within the jurisdiction, he would have been a proper party. No one can deny that he would have been properly sued with the other defendants if he had been within the jurisdiction. Some question has been raised whether rule 1 (*g*) applies to an action of tort, and cases were referred to to show that it does. The words of the rule are general, and are quite large enough to cover actions of tort, and it has been admitted in this argument that this rule 1 (*g*) is applicable to such actions. Now rule 4 shows what discretion the judge may exercise in this matter, and it shows that the discretion is of the most ample kind. I agree that there may be some cases of tort when the judge in the exercise of his discretion ought to refuse to allow service out of the jurisdiction, and some cases in which he ought not to refuse it. In the present case we have also to consider the effect of rule 2, which provides that when leave is asked to serve a writ under rule 1, in Scotland or Ireland, if it shall appear that there may be a concurrent remedy in Scotland or Ireland (as the case may be), "the court or judge shall have regard to the comparative cost and convenience of proceeding in England or in the

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place of residence of the defendant or person sought to be served." That is one element that the judge has to consider in exercising his discretion. In the present case I think it has been clearly made out that the comparative cost and convenience is in favour of trying the action in England. In my opinion it is not the comparative cost and convenience as regards the defendant merely that is to be considered by the judge, but the cost and convenience of all the parties to the action. Here, as I understand, the books of the company are in England, the material witnesses, or at least most of them, are in England and the prospectus was issued in England. Moreover a commission will have to be sent to America, and if the action were tried twice over, once in England against the English defendant, and once in Scotland against the Scotch defendant, that would necessitate two commissions to America, and double the expense. Having regard to all these facts, I have come to the conclusion that the comparative cost and convenience is strongly in favour of the plaintiff's contention. I am therefore unable to agree with the Master of the Rolls, and I think that service out of the jurisdiction ought to be allowed against the defendant Guild. I think the appeal should be allowed.

RIGBY, L.J.—This is an appeal to the discretion of the court against the way in which the learned judge at chambers has exercised his discretion. I agree with all that has been said as to our not interfering with the way in which a judge has exercised his discretion except upon a clear state of facts. I attribute no importance in considering this appeal to the first order made *ex parte* by Wright, J., but only to the one appealed against. It seems to me to be a matter of the greatest importance that the whole of the facts were not before Wright, J., and that he gave leave to file further affidavits, saying that the case was eminently one to be taken to the Court of Appeal. Now as to rule 1.: If Guild had been sued alone, there is no doubt that he must have been sued in Scotland, but rule 1 (*g*) seems to me to mean only this, that though a person resident out of the jurisdiction might not be sued alone in England on the ground of his foreign residence, nevertheless, if a plaintiff wishes to join him as a defendant with other persons, he may then come within the rules. To my mind the only question is whether, if this defendant had lived in England he would have been properly joined as a defendant with the other defendants in the action. It has been admitted that the court has jurisdiction under rule 1 (*g*) to make the order which the plaintiff has asked for, so that the question before us is merely one of convenience. We must therefore take into account all the circumstances of the case including the defendant's place of residence. If he lived at the other end of the world, that might be a matter of importance; but, on the other hand, the fact that he lives in Edinburgh, only a short distance out of England, ought not to be conclusive against him. The question is whether, on the circumstances stated in the affidavits, it would be more convenient to try the action in London or in Edinburgh. That is the important question. Rule 2 of Order XI. was no doubt intended to give special protection to Scotch and Irish defendants. It provides that "the court shall have regard to the comparative cost and convenience of proceeding in England" or in the country where the defendant resides. That is the general convenience of all parties in the action, not of the defendant alone. And then the court is also to have regard to the fact, which may exist, that if the plantiff's claim is small, there are courts in Scotland or Ireland where the matter may be conveniently prosecuted. That is all that that rule enacts. Now, in considering the circumstances of this case, one which impresses me is the fact that Guild came to London to carry on the business out of which the plaintiff's claim has arisen. Another fact is, that from the plaintiff's affidavits and other documents, it seems that the prospectus was issued in London by the three defendants. Besides this, there is the fact that a commission to America will be necessary, and that is a thing which ought to be done once and for all. It cannot be said that after taking it once for the English action it would be convenient that another commission should be taken for the purposes of the Scotch action. Again it is said that the principal witnesses who will be called are all resident near London, and Guild's only answer to that, is a general statement that he intends to call some Scotch witnesses. Besides this, the greater part of the documents that will be required are kept in London. Taking all these facts into consideration, and the words of rules 2 and 1 of Order XI., I am of opinion that Guild would be a proper defendant to the action if he lived in England, and that he comes within the provisions of rule 1 (*g*), and that this is an exceptional case in which the plaintiff has succeeded in making out that Guild ought to be joined as a defendant in this action in England. I think that we ought to reverse the order of Wright, J., and that this appeal should be allowed.

Appeal allowed.

Solicitor for the plaintiff, *W. M. Willcocks.*

Solicitors for the defendant, *Thorne* and *Welford.*

Wednesday, Nov. 28, 1894.

(Before Lord ESHER, M.R., LOPES and RIGBY, L.JJ.)

NICHOLS *v.* THE NORTH METROPOLITAN RAILWAY AND CANAL COMPANY. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Company — Promoting and obtaining Act — Solicitor's costs—Agreement for payment of costs on condition of "the capital" being raised —Issue of part of the company's capital—Rights of solicitors.

A company was being promoted for the building of a railway, and for the purchase, in connection therewith, of a certain canal. The promoters and a firm of solicitors came to an agreement, afterwards adopted by the company, by which the solicitors consented to give their services gratis "in the event of the application to Parliament failing, or the capital not being raised," but in the event of these two conditions being fulfilled, they were to be paid the customary professional charges for work done. An Act of Parliament was obtained incorporating the company, and providing for the transfer to it of the canal, and authorising the construction of the

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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railway. The capital was not to exceed eight million pounds, and the company was authorised to resolve that the canal undertaking and capital necessary for it should be a separate undertaking, with a separate capital. This course was adopted by the company, and the canal capital fixed at one and a quarter millions. This amount was raised, but the rest of the capital of the company was not raised. In an action by the solicitors to recover the customary professional charges for work done by them:

Held (reversing the decision of Charles, J., reported ante, *p.* 249), *that the raising of the canal capital was not a raising of "the capital," and that the conditions of the contract made between the promoters and the solicitors not having been fulfilled, the solicitors were not entitled to succeed in the action.*

THIS was an appeal, from a judgment of Charles, J. at the trial of the action without a jury, which is reported *ante*, p. 249.

The action was brought by the representative of a firm of solicitors, Messrs. Higginson and Vigers, to recover the costs alleged to be due for work done by Messrs. Higginson and Vigers in obtaining certain Acts of Parliament for the defendant company.

The facts are fully set out in the report of the trial of the action before Charles, J., at p. 250, *ante*.

Under the agreement between the promoters of the company and Messrs. Higginson and Vigers, it was arranged that the latter should be paid in respect of the matters now sued upon, in the event only of the Act being obtained and the capital raised. The only point dealt with in this court was, whether the condition as to the raising of "the capital" had been fulfilled so as to entitle the plaintiff to bring this action.

Charles, J. held that this condition had been fulfilled, that "the capital" did not mean the whole capital, but that it was enough that a substantial issue of capital had taken place. He, therefore, gave judgment for the plaintiffs.

The defendants appealed.

Sir *Henry James*, Q.C. and *Lawson Walton*, Q.C. (*Hollams* with them) for the defendants.

Finlay, Q.C. and *Rowlatt* for the plaintiffs.

Lord ESHER, M.R.—The question in this case turns upon what was the contract made between the plaintiffs and the promoters of the defendant company, for it cannot be doubted that that contract, whatever it was, was adopted by the company when it came into existence. The terms of that contract are in writing. They are contained in the minute of a resolution of the promoters at a meeting held on the 16th Nov. 1880, the terms of which were communicated to the plaintiffs and were accepted by them by their letter of the 30th Dec. Now first of all we have a right to see what was the state of affairs at the time the contract was made. The minutes of the meeting of the 16th Nov., contain the resolutions passed just before the resolution which contains the terms of the contract. Those resolutions show that the real undertaking, the substantial part of it, was the making of a railway from the Albert Docks to Paddington. For that purpose it was necessary to buy land on which to build the railway; and as a matter of business, it was obviously necessary, if the railway was to be built alongside of the canal, that the canal itself should be bought up, as it would otherwise be a most dangerous competitor with the proposed railway. That being so, a resolution was passed on the 16th Nov. that "the object of the promoters is the construction of a railway from the Royal Victoria and Albert Docks to Paddington." That was the principal and fundamental object of the undertaking, but for the purpose of making the railway and working it at a profit, there was the subsidiary necessity of buying up the canal. Now in order to carry out this project or undertaking, with as little expense to themselves as possible, the promoters proposed certain terms to the surveyors, engineers, and solicitors who were going to be employed. These terms were embodied in a resolution in these words: "It is distinctly understood that the professional gentlemen concerned will unite with the promoters by giving their services gratis in the event of the application to Parliament failing, or the capital not being raised, and only receive actual out of pocket expenditure incurred with the sanction of the committee." The question here turns upon the meaning of the second alternative. What is the meaning of the words "the capital?" The capital then in contemplation, was the capital for buying the canal and making the railway. The words of the resolution could not, in my opinion, refer only to the capital necessary for the purchase of the canal. That was only the beginning of what was to be done in laying out and building the railway. When the terms of that resolution were forwarded to the plaintiffs, they replied by letter on the 30th Dec. as follows: "We agree to the terms of the resolution of the 16th Nov., upon the condition that in the event of an Act of Parliament being obtained, and the capital raised, we shall be paid the customary professional charges for work done, and be secured in the business properly appertaining thereto as solicitors to the company." That, in my opinion, is nothing more really than an acceptance of the terms of the resolution, but if there is in that letter any counter proposition it was afterwards agreed to. Now the capital to be raised for carrying out the object of the company, viz., the purchase of the canal and the making of the railway on land purchased from the canal company, was, under the Act of Parliament which was obtained, divided into two parts, one for the purchase of the canal, the other for making the railway. These being the circumstances, two cases decided in the Court of Appeal were cited on behalf of the plaintiffs, with the view of showing that the raising of the capital for the purchase of the canal was a sufficient satisfaction of the second alternative in the contract to enable the plaintiffs to succeed in this action. The cases were *Allan* v. *The Regent's Canal Docks and Railway Company* (unreported), and *The Vestry of St Luke's* v. *The same Company* (unreported). In both those cases the court held that the capital, upon the raising of which certain payments depended, was all one capital, namely, the capital of the company. But then, applying that to the conditions in the two cases upon which the payments depended, the court held that the raising of the canal capital was enough to fulfil those conditions, which in one case was the raising of "the first capital," and in the other the issuing of the authorised capital "wholly or in part." In my opinion, "the capital",

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in the present case means the whole capital of the company necessary to be raised for the purchase of the canal and the making of the railway, and, if it should be necessary, capital for the starting of the working of the railway. Only a part of the capital of the company, enough for the purchase of the canal, has been in fact raised, and therefore it seems to me that, upon the true construction of their contract, the plaintiffs are not entitled to the payment for their services which they now claim. It was argued that such a construction of the contract would compel us to hold that "the capital" means the full amount of capital authorised by the Act of Parliament, so that the plaintiffs would not be entitled to payment for their services until the whole of that capital should be raised, even though the whole of it might not be required for the purposes of carrying out the undertaking. The Act, however, only provides that the capital is not to exceed eight millions. In my view, "the capital" in this contract means the capital necessary for making and starting the railway, so that not until that had been raised would "the capital" of the company have been raised and the condition in the contract fulfilled.

LOPES and RIGBY, L.JJ. concurred.

Appeal allowed.

Solicitors for the plaintiffs, *E. Rushworth Keele.*

Solicitors for the defendants, *Hollams, Sons, Coward*, and *Hawksley.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

April 13, *May* 8, *July* 24 *and* 25, 1894.

(Before STIRLING, J.)

Re DEAKIN; STARKEY *v.* EYRES. (*a*)

Will—Construction—Power of appointment to wife, illegitimate and childless, among her "relations"—Validity of appointment to children of her "brothers and sisters"—Construction of term "relations"—Class—Powers Law Amendment Act 1874 (37 *&* 38 *Vict. c.* 37), *s.* 1.

T. D. by his will, after giving to his wife L. D. a life interest in his property, gave one moiety of the residue thereof to his wife's relations as she might direct. L. D. survived T. D., and by her will purported to exercise this power in favour of the children of her "brothers and sisters." L. D. was illegitimate and childless. Her "brothers and sisters" were children of her father and mother born after their marriage. L. D. had been brought up with and recognised as one of the children of her father and mother, and T. D. was aware of her illegitimacy. L. D. being now dead:

Held, that T. D. contemplated those persons who would have been his wife's relations if her birth had taken place after the marriage of her parents.

Re Standley's Estate (*L. Rep.* 5 *Eq.* 303) *not followed.*

Semble, *that case has been overruled by* Hill *v.* Crook (42 *L. J.* 702, *Ch.*; *L. Rep.* 6 *H. of L.* 265; 22 *W. R.* 137; sub nom. Crook *v.* Hill *in C. A.*, 24 *L. T. Rep.* 488; *L. Rep.* 6 *Ch.* 311).

(*a*) Reported by JOHN SANDERSON, Esq., Barrister-at-Law.

Upon a further question as to the validity of the appointment to one of the children of a "brother" of L. D., who was living at L. D.'s death:

Held, that the power was non-exclusive; that the statute 37 *&* 38 *Vict. c.* 37, *s.* 1, *did not affect the law as laid down in* Pope *v.* Whitcombe (3 *Mer.* 689), *and the class to take was confined to the next of kin living at the death of the widow.*

ORIGINATING SUMMONS.

Thomas Deakin, by his will, dated the 6th Dec. 1854, gave all his property to his wife for life, and after her death directed payment of certain legacies, and then gave one moiety of the residue "to my wife's relations as she may direct."

He died on the 14th Feb. 1855, leaving his wife, Lydia Deakin, surviving him.

By her will, dated the 11th Nov. 1891, Lydia Deakin purported to exercise the power conferred by the will of her husband, Thomas Deakin, in favour of the children of persons described as her brothers and sisters.

She died on the 27th Nov. 1892.

The first question was whether the will of Lydia Deakin was a valid exercise of the power.

It appeared that she was born in 1807, and was the daughter of Jane Hanson, a spinster. In May 1808 Jane Hanson intermarried with John Wilkinson. John Wilkinson recognised Lydia Deakin as his child, and made no distinction in his treatment of her and of the children born after the marriage. Lydia Deakin intermarried with Thomas Deakin on the 13th April 1825, but she had no children. At the date of Thomas Deakin's will she was about forty-seven years of age. It was proved that the testator knew she was illegitimate.

By her will, dated the 11th Nov. 1891 Lydia Deakin, after reciting the power of appointment given her by the will of Thomas Deakin, continued as follows:

> Now, in pursuance and exercise of the power given to me by the said will of my late husband, and of every other power (if any) enabling me in this behalf, I do hereby direct that the said one-half share of, and in the proceeds arising from the sale and conversion into money of the property of my said late husband, and all other my share, estate, and interest, in my said late husband's property, shall be divided into eight equal parts or shares, and that one of such eighth parts or shares shall go in equal shares to the children of my brother Thomas Wilkinson, who being sons shall attain or have attained the age of twenty-one years, or being daughters shall attain or have attained that age, or shall marry or have been married, and another of such eighth parts or shares shall go in equal shares to the children of my late sister, Margaret Deakin, wife of James Deakin,

in a form similar to that of the earlier gift. The testatrix gave another eighth part to "the children of my late brother John Wilkinson;" another eighth part to "John Oscar Wilkinson, the natural son of my sister Phœbe Wilkinson;" another eighth part to "the children of my late brother Samuel Wilkinson;" another eighth part to "the children of my brother George Wilkinson;" another to the children of my late brother William Wilkinson." And she concluded:

> The remaining eighth part or share shall be divided into three equal parts, and one-third part thereof shall go to my niece Jane, the wife of Henry Starkey . . . another one-third part thereof to my nephew Thomas Wilkinson, the son of my late brother Joseph Wilkinson, and the

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remaining third part thereof to the three children of my niece Sarah Edwards, deceased, in equal shares.

She also made a general bequest of residue to be divided into eight shares, and applied in the same manner as the appointed shares.

All the brothers and sisters of the testatrix, except her brother George Wilkinson, died in the lifetime of the testatrix.

The first question arising on the summons was, whether the testator, Thomas Deakin, by using the term "relations" intended legitimate relations of his wife, or whether his will gave her authority to appoint to persons who would have been her relations, had she been of legitimate birth.

Seddon for the trustees and executors.—The testator was aware of the circumstances of his wife's birth. I do not think I can successfully contend that the relations intended by the testator were those who are strictly related to the testatrix. In this sense she had no relations. He may, however, have meant those persons who would, had she not been illegitimate, have been her relations. But the fact that Lydia Deakin might have married again, and ultimately had relations strictly so called, is against any assumption that this was what the testator intended.

J. W. Clydesdale for a beneficiary under the will of Thomas Deakin.

Arnold Herbert for appointees.—Under the will of Lydia Deakin other than John Oscar Wilkinson we cannot argue that there is any presumption of law against child-bearing. There could have been only children of Lydia Deakin. We say that the word "relations" does not include children. The question is, what was the intention of the testator. He knew the circumstances, and that his wife had no legitimate relations, and he evidently intended that the appointees should take. Lord Halsbury, in *Re Jodrell; Jodrell* v. *Seale* (63 L. T. Rep. at p. 17; 44 Ch. Div. at p. 605), said that the law does not presume an intention in a testator to make provision for persons connected with him by blood, though not in every link by wedlock, nor does it make any presumption to the contrary; but it makes no presumption at all, and a court of construction is not called upon to put particular interpretations upon particular words with reference to any presumption the law makes either way. The only alternative construction which can be given to the words "relations of my dear wife" is to take them to mean legitimate children whom she may have on a second marriage. In the present case this cannot be the intention; it would be unreasonable to suppose that the testator had any wish or intention to benefit her children by a second husband:

Re Harrison; Harrison v. *Higson*, 70 L. T. Rep. 868; (1894) 1 Ch. 561.

Graham Hastings, Q.C. and *R. J. Parker* for the representatives of William Deakin and John Deakin, brothers of the testator.—A gift to relations is in the same case as a gift to children. In both cases legitimate persons are meant. Here the gift to relations fails altogether. The case here is the same as in

Hill v. *Crook* (or *Crook* v. *Hill*), 24 L. T. Rep. 488; L. Rep. 6 H. of L. 265; 42 L. J. 702, L. Rep. 6 Ch. 311;

Dorin v. *Dorin*, 33 L. T. Rep. 281; L. Rep. 7 H. of L. Cas. 568.

Here she might have had legitimate relations before her death. Lydia Deakin, it is said, was forty-seven years of age at the date of the will. The court has nothing to do with this. The law does not admit the impossibility of having more children, and will not concern itself with the probability or absence of probability of children being born:

Jee v. *Audley*, 1 Cox, 324;

Re Overhill's Trusts, 1 Sin. & Giff. 362; 22 L. J. 485, Ch.;

Re Saville's Trusts, 14 W. R. 603.

Paul v. *Children* (25 L. T. Rep. 82; L. Rep. 12 Eq. 16; 19 W. R. 941) is a strong instance of this. There is an intestacy of that portion of the residue to which the power refers. The knowledge possessed by the testator of the circumstances is of no importance.

C. E. E. Jenkins and *Clydesdale* for other parties.

A. F. Peterson for John Oscar Wilkinson.—If this is a good appointment to the relations, why should not John Oscar Wilkinson be included? He would be entitled to come in and share with other relations. He was in existence at the date of the will, and is the illegitimate child of one of the sisters. In the alternative I contend that the appointment is altogether invalid:

Re Standley's Estate, L. Rep. 5 Eq. 303.

[STIRLING, J.—I have great difficulty in reconciling that case with *Re Jodrell; Jodrell* v. *Seale*, 63 L. T. Rep. 15; 65 L. T. Rep. 57; 44 Ch. Div. 590; (1891) A. C. 304; and *Hill* v. *Crook*, L. Rep. 6 H. of L. 265; 42 L. J. 702, Ch.]

Cur. adv. vult.

May 7.—STIRLING, J. (after stating the facts of the case) continued:—It is contended that the word "relations" in the will of Thomas Deakin means *primâ facie* legitimate relations: that, although Lydia Deakin had not at the date of Thomas Deakin's will any such relations she might have had issue by a subsequent marriage, who would have been legitimate relations of hers, and that, under those circumstances, Thomas Deakin cannot be taken to have authorised her to make an appointment in favour of persons who are not legally her relations. Arguments of a similar kind have been frequently urged, and have been frequently dealt with in modern times in many cases, of which I desire to mention particularly two: (*Crook* v. *Hill*, 24 L. T. Rep. 488; L. Rep. 6 Ch. 311; L. Rep. 6 H. of L. 265; and *Re Jodrell; Jodrell* v. *Seale*, 63 L. T. Rep. 15; 65 L. T. Rep. 57; 44 Ch. Div. 590; (1891) A. C. 304.) [His Lordship referred to these cases and proceeded:] The law is stated by Lord Selborne in a single sentence, in *Dorin* v. *Dorin* (33 L. T. Rep. at p. 283; L. Rep. 7 H. of L. at p. 577), thus: "The word 'children' in a will means legitimate children, unless, when the facts are ascertained and applied to the words of the will, some repugnancy or inconsistency (and not merely some violation of a moral obligation or of a probable intention) would result from so interpreting them." This statement equally applies to the word "relations." Now, among a wife's "relations" may be included her children or issue if she has any; but the word "relations" is a much wider term than issue, and certainly, according to its ordinary meaning, includes other persons

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than children or issue. It might, no doubt, be interpreted to mean "issue" if the context of the will afforded ground for so doing; but there is no such context in the will of Thomas Deakin. On the contrary, such context as there is points in the other direction, for the testator speaks of the "children" of his sister Fanny Dignum. I must take it then on the true construction of the will that the testator intended to benefit other relations than her possible future issue. Legally no such persons existed; but, inasmuch as the testator knew that his wife, after nearly thirty years of married life was childless, and inasmuch as he knew that she was illegitimate, and consequently had no relations who would be benefited if the will were read in the strict legal sense of the word, it seems to me that the court ought, in accordance with the principles laid down in *Hill* v. *Crook* and *Re Jodrell*; *Jodrell* v. *Seale*, to read the word "relations" otherwise than in its strict primary meaning. It is true that the present case does not in point of decision fall within those cases, for in both of them the courts arrived at the meaning of the wills which they had to construe by using those wills as dictionaries for the purpose of ascertaining the meaning of the language used. Whereas here the interpretation is arrived at by reading the language in the light of the surrounding circumstances. That this may be done is shown by the case of *Re Haseldine*; *Grange* v. *Sturdy* (54 L. T. Rep. 322; 31 Ch. Div. 511), before the Court of Appeal, where, as it seems to me, the conclusion was arrived at on more slender grounds than exist in the present case. If, then, the word relations is to be read (as I think) in a secondary sense, I have no difficulty in holding that by his wife's relations the testator meant those persons who had recognised her and been recognised by her as relations, the persons who would have been her relations in case her birth had taken place after instead of before the marriage of John Wilkinson and Jane his wife. The case of *Re Standley's Estate* (L. Rep. 5 Eq. 303), decided by Lord Hatherley when Vice-Chancellor, was relied upon as an authority adverse to the conclusion at which I have arrived. I must confess myself unable effectually to distinguish it; but it was decided before *Hill* v. *Crook* (*ubi sup.*). The reasoning on which the decision is based appears to be inconsistent with the principles there laid down, and, notwithstanding the weight justly due to any decision of Lord Hatherley, I am unable to follow it, having regard to the more recent authorities which are binding on me. I think, therefore, that the appointments made by the will of Lydia Deakin are good, except that in favour of John Oscar Wilkinson, whom she describes as "the natural son of my sister Phoebe Wilkinson." There is nothing either in the will or the external circumstances (so far as I am entitled to look at them) which would entitle me to draw the inference that the testator included him among the persons whom he designated as his wife's relations.

A further question arose upon this decision, viz., whether the relations who were objects of the power were confined to those who would have been Lydia Deakin's next of kin according to the statutes of distribution if she had been legitimate, or comprised all persons who would have been related to her by blood at the time of her death if she had been legitimate. The summons, therefore, stood over for further argument on this point.

July 24.—*Seddon* for the trustees.—The question for your Lordship's determination is whether the persons to whom Lydia Deakin had power to appoint must be limited to those who come within the statutory class of next of kin. According to the old rule, where there was a power to appoint among relations, selection was authorised; then the donee could appoint to any relations though outside the statutory class; but where it authorised distribution merely, the donee could appoint only to the next of kin according to the statute:

Pope v. *Whitcombe*, 3 Mer. 689.

That was the rule before the passing of Lord Selborne's Act (37 & 38 Vict. c. 37). At that time a distributive power could not be well exercised unless an appointment of something was made to each member of the class. The old rule may, therefore, have been no more than a rule of convenience. There seems now no reason for the rule. I submit, first, that on the true construction of the will Lydia Deakin had a selective power to appoint. If the court is against me on that point, I say she is now, under Lord Selborne's Act, in the same position as if she had had a selective power previous to that Act. [STIRLING, J.—I do not see any substantial difference between this power and that in *Pope* v. *Whitcombe* (*ubi sup.*).] Then I rely upon Lord Selborne's Act. She could say under Lord Selborne's Act, I will give to one relation to the exclusion of another relation. [STIRLING, J.—I agree she could, under Lord Selborne's Act.] The rule which limits relations to the statutory next of kin was only one of convenience, because formerly under a distributive power every one of the objects had to receive something: (*Grant* v. *Lynam*, 6 L. J. O. S. 129, Ch.; 4 Russ. 292.) The remarks of Sir John Leach, M.R., at 4 Russ. p. 296, bear out this view. I say the Act sweeps away the distinction between distributive and selective power. I do not say that it makes persons objects of the power who were not so before. The old rule of construction is not applicable, there being no longer any object for restricting the class.

A. F. Peterson for the statutory next of kin.—This is a power of distribution merely. The class of objects taking a benefit under the power is confined to the next of kin. The old rule of construction applies:

Lawlor v. *Henderson*, Ir. Rep. 10 Eq. 150;
Farwell on Powers, 2nd edit., 505.

There is no case of relations except the case in Russell (*Grant* v. *Lynam*, *ubi sup.*), and the remarks of Chitty, J., in *Wilson* v. *Duguid* (49 L. T. Rep. at pp. 126, 127; 24 Ch. Div. at pp. 251, 252). Lord Selborne's Act does not alter the class that is to take. It does not provide that the rule of construction shall abate or be annulled. It is said it is annulled; annulled automatically because it is unnecessary. What Lord Selborne's Act does is this: it says that the fact of an appointment under a distributive power to some members of a class to the exclusion of others shall not render the appointment invalid. I contend that the distinction between selective and distributive powers has not been annulled. There must be some statutory enactment to annul the distinction.

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Jenkins in reply.—*Harding* v. *Glyn* (1 Atk. 468) has been considered in *Brown* v. *Higgs* (5 Ves. 495, 501, 502).

STIRLING, J., in delivering judgment (after stating the facts) continued:—The wife survived, and before she died made a will purporting to be in exercise of the power of appointment conferred upon her. One of the objects of the appointment made by the wife was the illegitimate child of her sister, as to which I have already held that the appointment fails. But there is a further question as to the validity of the appointment made to one of the children of the brother of the testatrix who was living at her death, and the question turns on what meaning is to be given to the word "relations" in the will of the testator. Obviously in one sense a child of the brother of the testatrix was a relation; but it is contended that in the circumstances of this will the word is to be more limited in its meaning and must be confined to next of kin of the wife living at her death. The law as to that is in rather a peculiar state. I have not to express any opinion as to whether it is satisfactory or not; but simply to administer the law as I find it. The point is shortly stated by the Irish Master of the Rolls in *Lawlor* v. *Henderson* (Ir. Rep. 10 Eq. 150). At p. 151 he says: "The word 'relations' in gifts of this character has received a settled meaning, and the only point is, whether the executors had under the will a power of selection or a simple power of distribution. It is plain that in the latter case they must confine themselves to the class falling within the limits of the Statutes of Distribution, subject, of course, to the consideration of the period when that class has to be ascertained. I am of opinion that the principle laid down in *Pope* v. *Whitcombe* governs this case, and having regard to it, I think there was no power of selection, but one of distribution simply." That is to say, that in deciding what meaning to attribute to it you have to consider in the first place whether the donor of the power has conferred on the donee what is commonly termed an exclusive power or not. If the power given is exclusive, enabling the donee to select any one or more of the objects, then the word relations has, according to the cases of *Harding* v. *Glyn* (1 Atk. 469) and *Grant* v. *Lynam* (4 Russ. 292), a wide meaning given to it. So that the donee is able to select any one person who is properly designated a relation according to the ordinary meaning of the word in the English language. If, however, the power is not exclusive, but is a non-exclusive power, then the court puts a narrow meaning on the term. That is clearly established by *Pope* v. *Whitcombe* (3 Mer. 689) where the language of the will was this: The testator gave the residue of his estate and effects to his wife for life, with remainder to his son absolutely if he should attain twenty-one; but, in case of his son's death before twenty-one, and without issue, then he gave certain legacies to some of his relations; and he directed his wife to dispose of the residue amongst his (the testator's) relations, in such manner as she should think fit. The son died under twenty-one and without issue in the lifetime of the testator. There the power was non-exclusive, and it was held by the Master of the Rolls that the objects of the power were limited to the next of kin of the testator. The first point to be considered here is whether the testator in the present case has conferred an exclusive or non-exclusive power. He gives one moiety "to my wife's relations as she may direct." In my opinion it was plainly the latter. In the language of the Master of the Rolls of Ireland (Ir. Rep. 10 Eq. at p. 151) the testatrix had merely a power of distribution and not a power of selection. According to the cases as they stood before the passing of Lord Selborne's Act it is clear that the power is only to be exercised in favour of the persons constituting the next of kin at the decease of the wife. That is clearly the period of distribution. The gift is to the wife's relations as they would in the absence of anything to the contrary be ascertained at her death. Then comes the question, Has that Act made any difference in the construction of the will or any difference in the effect of the power? Lord Selborne's Act is simply the completion of legislation which has reversed the old rule of law. That rule was that, where there was a non-exclusive appointment the donee was compelled to give some portions of the property to every object of the power. That was first broken in upon by the statute of 1830 (11 Geo. 4 & 1 Will. 4, c. 46), which provided that "no appointment which from and after the passing of this Act shall be made in exercise of any power or authority to appoint any property, real or personal, amongst several objects, shall be invalid or impeached in equity, on the ground that an unsubstantial, illusory, or nominal share only shall be thereby appointed to or left unappointed, to devolve upon any one or more of the objects of such power; but that every such appointment shall be valid and effectual in equity as well as at law, notwithstanding that any one or more of the objects shall not thereunder, or in default of such appointment take more than an unsubstantial, illusory, or nominal share of the property subjected to such power." The effect of that Act was to compel the donee to make an appointment, however small, to every object of the power, or to leave a portion undealt with so as to devolve on them in default of appointment. That continued down to recent times, when in the year 1874 another Act (Lord Selborne's) was passed, which provides that "No appointment which from and after the passing of this Act shall be made in exercise of any power to appoint any property, real or personal, amongst several objects, shall be invalid at law or in equity on the ground that any object of such power has been altogether excluded, but every such appointment shall be valid and effectual notwithstanding that any one or more of the objects shall not thereby, or in default of appointment take a share or shares of the property subject to such power." That relieves the donee of a power from the necessity of making an appointment of something to every object of that power, or leaving them a portion to devolve upon them in default of appointment. That is what the Act proposed to do. That is all it does. It does not alter the rule of construction laid down as to the meaning of powers, nor does it purport to affect the class which is to take. There is nothing to show that the Legislature had such a case as this in contemplation. But it is contended that if you go back to the beginning of this series of old cases, and try to ascertain the reasoning on which these decisions are based, probably, if the law had then been as it now is, the result would have been that relations would

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be construed in the same way in all cases. I am not persuaded that that result would follow. It is difficult to find the origin of the rule. *Harding* v. *Glyn* (1 Atk. 469; explained at 5 Ves. p. 501) is the first case, and no reasons are given for the decision. I do not think I ought to speculate in this inferential way what might have been decided if the law had been different in 1739, when that case was decided. I have only to apply the law as I find it, and I am of opinion that Lord Selborne's Act does not apply, and the rule is unaffected by that Act. I hold that the class to take is the same as it was before the passing of the Act, and is confined to the next of kin living at the death of the widow.

Solicitors: *Taylor, Hoares*, and *Pilcher*, for *A.* and *J. E. Fletcher*, Northwich; *Coode, Kingdon*, and *Cotton*, for *W. C. Deakin*, Northwich; *Busk* and *Co.*, for *John H. Cooke*, Winsford.

QUEEN'S BENCH DIVISION.

Monday, Dec. 3, 1894.

(Before GRANTHAM and LAWRANCE, JJ.)

HOLMES *v.* FORMBY. (*a*)

County Court—Jurisdiction—Summary Procedure under Agricultural Holdings (England) Act 1883, (46 & 47 *Vict. c.* 61), *ss.* 6, 24—*Tenant's claim for compensation—Landlord's counter-claim—Balance in favour of landlord—Enforcement of award—Writ of prohibition.*

In the case of a claim by a tenant for compensation under sect. 6 *of the Agricultural Holdings (England) Act* 1883, *and a counter-claim by the landlord, if the umpire in his award finds that the counter-claim overtops the claim, the court will prohibit the County Court from exercising its summary jurisdiction under the Act to enforce the award.*

The landlord's counter-claim can only be in reduction of, and must not exceed, the tenant's claim.

THIS was an application by the defendant for a writ of prohibition.

The facts of the case are as follows:

The applicant, William Formby, occupied certain farms and lands belonging to the respondent, Thomas Holmes, under a tenancy which expired on the 11th Oct. 1893, and on the previous 8th Aug. signified his intention of claiming for unexhausted improvements under the Agricultural Holdings (England) Act 1883. On the 23rd Oct. 1893 the respondent sent in a counter-claim for compensation under the same Act in respect of breaches of covenants and agreements by the applicant, and for dilapidations and waste. Under sect. 9 each party appointed a referee, and these appointed an umpire, who duly made his award the 30th June 1894. By this award it was found that the applicant was entitled to the sum of 18*l.* 16*s.* 5*d.* in respect of compensation, and that the respondent was entitled to the sum of 49*l.* 7*s.*, thus leaving a balance of 30*l.* 10*s.* 7*d.* to be paid by the applicant to the respondent. The respondent then took summary proceedings in the County Court, under the powers given by the Agricultural Holdings Act to enforce the award, and obtained an order for the payment of the balance due to him, and thereupon issued execution. The applicant then applied to the judge at chambers for a writ of prohibition, directed to the judge of the County Court and the respondent, to prohibit them from further proceeding in the matter on the ground that the court had exceeded its jurisdiction, and that the award was bad on the face of it. The learned judge referred the matter to this court.

The Agricultural Holdings (England) Act 1883 (46 & 47 Vict. c. 61) provides that:

Sect. 1. Subject as in this Act mentioned, where a tenant has made on his holding any improvement comprised in the first schedule hereto, he shall, on and after the commencement of this Act, be entitled, on quitting his holding at the determination of a tenancy, to obtain from the landlord, as compensation under this Act for such improvement, such sum as fairly represents the value of the improvement to an incoming tenant. . . .

Sect. 6. In the ascertainment of the amount of the compensation under this Act payable to the tenant in respect of any improvement, there shall be taken into account in reduction thereof: (*a*) Any benefit which the landlord has given or allowed to the tenant in consideration of the tenant executing the improvement; and (*c*) Any sums due to the landlord in respect of rent, or in respect of any waste committed or permitted by the tenant, or in respect of any breach of covenant or other agreement connected with the contract of tenancy committed by the tenant, also any taxes, rates, and tithe-rentcharge due, or becoming due, in respect of the holding to which the tenant is liable as between him and the landlord.

Sect. 7. . . . Where a tenant gives such notice, the landlord may, before the determination of the tenancy, or within fourteen days thereafter, give a counter-notice in writing to the tenant of his intention to make a claim in respect of any waste or any breach of a covenant or other agreement.

Sect. 24. Where any money agreed, or awarded, or ordered on appeal to be paid for compensation, costs, or otherwise, is not paid within fourteen days after the time when it is agreed, or awarded, or ordered to be paid, it shall be recoverable, upon order made by the judge of the County Court, as money ordered by a County Court under its ordinary jurisdiction to be paid is recoverable.

Channell, Q.C. and *F. Low*, for the applicant, contended that the court should grant a writ of prohibition. Sect. 6 of the Agricultural Holdings Act 1883 only gives the arbitrators power to entertain the landlord's counter-claim when it is in reduction of the tenant's claim for compensation. The County Court has no summary jurisdiction to enforce the award, if it is in favour of the landlord on his counter-claim.

Farquharson v. *Morgan*, 70 L. T. Rep. 152; (1894) 1 Q. B. 552.

See also sect. 7 of the Act. [GRANTHAM, J. referred to sect. 57.]

Jelf, Q.C. and *H. F. Wilson* for the respondent.—The words "in reduction thereof" contained in the section must necessarily, it is submitted, include a total wiping out of the tenant's claim. The counter-claim under this Act is not, as in the case of a set-off, limited to the same kind of claim as that made by the plaintiff. Further, the counter-claim need not of necessity be less than, but may exceed, the amount of the tenant's claim. The Legislature in framing this statute never intended the landlord's counter-claim to be different to any counter-claim in an ordinary action. It would be reducing the Act to an absurdity if the contention to the contrary were

(*a*) Reported by HENRY LEIGH, Esq., Barrister-at-Law.

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to be held good. Take for instance the case of a tenant who claims 50*l.* and a landlord who counter-claims 60*l.* in respect of breaches of covenants and dilapidations. How, if the contention on the other side holds good, is the landlord to recover the balance of 10*l.*? He cannot bring an action to recover the balance in another court, because the award would not be binding between the parties before such tribunal. The landlord would have no remedy and would be unable to recover the balance at all.

Grantham, J.—The Agricultural Holdings Act 1883 was intended by the Legislature to enable tenants to obtain compensation for unexhausted improvements, which previously they were unable to do. In order, however, that hardship should not be imposed upon the landlord, certain provisions were inserted which gave them power to charge their estates with the amount payable for improvements, and to set off in reduction of the tenant's claim any claim that he (the landlord) himself might have against the tenant. This Act, however, was not passed for the benefit of the landlord, but of the tenant. In this case, the umpire has found by his award that there is a balance on the claims in favour of the landlord. The question that we have now to decide is, whether the Act contains any words that show that there is power to make the tenant pay to the landlord the amount by which the latter's counter-claim exceeds the tenant's claim exactly as if it was a counter-claim by the landlord in an ordinary action. It must not be assumed that, because since the Judicature Act counter-claims have been allowed, and a defendant may now recover against the plaintiff more than the amount that the latter claims, the Legislature in passing this Act ever intended that a landlord, in cases of claims by tenants under the Act, should be placed in the position of a defendant in an action, and be able to recover against the tenant, by way of counter-claim, more than the tenant claims by way of compensation. That is most certainly not so. We have no power to add to the Act, but must take it as it stands, and our judgment must be that the writ of prohibition asked for should be granted.

Lawrance, J.—I am of the same opinion. Under this Act the landlord cannot start a claim. He can only, when a tenant gives him notice of a claim for compensation, give a counter-notice in respect of waste or breach of covenant or agreement in answer to, and in reduction of, the tenant's claim. [The learned Judge then read sect. 6.] In my opinion that section can only mean that when the tenant makes a claim the landlord may reduce it or equalise it by his counter-claim; but when such counter-claim overtops the tenant's claim, the landlord is placed in the same position, and has only the same remedies open to him, as he had before this Act was passed. The Act gives the tenant new powers and rights, but it does not deprive the landlord of any of the rights that he possessed before it was passed. The application must be granted and the prohibition must go.

Solicitors for the applicant, *Crowders* and *Vizard*, for *Mills* and *Reeve*, Norwich.

Solicitors for the respondent, *White, Barrett*, and *Co.*, for *Garrod* and *Wilson*, Diss.

Friday, Dec. 7, 1894.

(Before Pollock, B. and Grantham, J.)

Re A Solicitor (H. Kelly); *Ex parte* The Incorporated Law Society. (*a*)

Solicitor—Allowing name to be used by unqualified person—Striking off roll—Discretion of court—Solicitors Act 1843 (6 *&* 7 *Vict. c.* 73), *s.* 32

An offence under sect. 32 *of the Solicitors Act* 1843 (6 *&* 7 *Vict. c.* 73) *being proved, the court has no discretion, but is bound to strike the solicitor off the roll.*

This was an application on behalf of the Incorporated Law Society that the name of a certain solicitor should be struck off the roll.

Hollams for the Incorporated Law Society.—After stating the facts of the case, in answer to a question of the court whether they were bound to strike off, cited the following cases, as he desired to obtain the opinion of the court whether they had a discretion under sect. 32 of the Solicitors Act 1843, or whether they were bound to strike off the name of the solicitor on the offence being proved. In the case of *Re Two Solicitors and Two Unqualified Persons* (28 Sol. J. p. 90) the Court expressed the opinion that they had no discretion. But there are later cases in which the court has expressed a contrary opinion:

Re a Solicitor, 4 Times L. Rep. 749;
Re Sykes, 34 Sol. J. 285.

In *Re Lamb* (61 L. T. Rep. 374; 23 Q. B. Div. 477), Cotton, L.J., referring to sect. 32, says: "I assume that when an application is made to strike a solicitor off the roll, the court has power, if it thinks fit, not to inflict so serious a punishment. That is my present opinion, but I do not in any way decide the point." He also cited

Re Eede, 59 L. J. 376, Q. B.; 25 Q. B. Div. 228.

[Pollock, B. referred to sect. 11 of 22 Geo. 2, c. 46.]

Overend, for the respondent, submitted that the court had a discretion, and asked them to exercise it in this case.

Pollock, B.—I regret to say that in this case the facts that have been proved against the solicitor in question are so clearly established, and the character of the offence is so continuous, that I think this court can have no option but to deal with the matter, treating it as a series of acts that show that the solicitor is permanently unfitted to hold the office and position of a solicitor of this court, and therefore it is our duty, I think, to say that he should be struck off the roll. This therefore is apart from what we think is the proper construction of sect. 32 of the Solicitors Act 1843 (6 & 7 Vict. c. 73). But after the matter has been so very properly brought to our attention by Mr. Hollams and the cases he has cited, I am bound to say that my brother Grantham and myself have no doubt that the true meaning of the words "shall and may be struck off the roll" is, that the court has no discretion, but that, in obedience to the statute, we are bound, if the facts are proved to our satisfaction, to strike the incriminated solicitor off the roll. The word "shall" is so absolutely clear that there could be no doubt whatever except for the words "and may be." There is no doubt some little difficulty

(*a*) Reported by H. Leigh, Esq., Barrister-at-Law.

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in seeing why those words should be inserted at all; but I think ground is given to the course of legislation by the earlier statute 22 Geo. 2, c. 46, sect. 11, which I have already referred to, because it shows that at so early a date as 1749 the Legislature had dealt with this very offence, apart from any judicial discretion and apart from the sort of domestic forum by which these matters were governed by the courts, and had there used the words that where the offence was proved to the satisfaction of the court "every such attorney or solicitor so offending shall be struck off the roll." Therefore it is no new thing to say that the court has no discretion, and I confess I cannot see how, because we have a discretion in other matters when there is no statute, we can say we have a discretion here when then is a statute containing extremely plain words.

Grantham, J.—I have also no doubt upon this question. With regard to the facts of the case, the facts proved are very serious; not only in one instance but in many this solicitor committed serious breaches against the law relating to solicitors, and therefore, under the circumstances, there is no doubt that we ought to punish him as directed by the Act. But I think we should express an opinion upon this point, which is said to be a doubtful one, and from the expressions of opinion of some of our brothers, it may be doubtful as to what is the meaning of the words "shall and may." In the case of *Re Lamb* (61 L. T. Rep. 374) Cotton and Fry, L.JJ. say that, whatever may be the meaning of the words "shall and may," they are quite clear in their view that where a person is struck off the roll, he is for ever after disabled from practising as an attorney or solicitor; and if one looks at the language of the section it appears to me that that interpretation would scarcely hold good if there were any value in the word "may." It seems to me, if the view of Lopes, J. is correct, that there is a discretion in the court in every case notwithstanding this section. If that be so, then this section should read, "every such attorney or solicitor shall and may be struck off the roll, and if so struck off, shall for ever after be disabled from practising as attorney or solicitor." But there is no alternative. The section is, "shall and may be struck off the roll" (there being a comma after the word "roll"), "and for ever after disabled from practising as an attorney or solicitor." If it were open to any question, and if there was a discretion in the court, then it seems to me that the section would have had the words inserted in it, "and if he shall be struck off the roll, then for ever after shall be disabled from practising." Those words not being there, it seems to me the penalty is one, and under those circumstances there is no discretion. Whether it may or may not be desirable to give the court such discretion is another matter.

Application granted.

The order of the Court was, that Henry Kelly, of 10, Camomile-street, in the City of London, be struck off the roll.

Solicitor for the Incorporated Law Society, *E. W. Williamson.*

Solicitor for the respondent, *H. Kelly.*

Monday, Dec. 10, 1894.

(Before Wills and Wright, JJ.)

Harris (app.) v. The London County Council (resps.). (a)

Weights and measures—Milk churns or cans—Churn used for conveyance of milk—Measure for use for trade—False or unjust—Weights and Measures Act 1878 (41 & 42 *Vict. c.* 49), *ss.* 22, 25, 44—*Weights and Measures Act* 1889 (52 & 53 *Vict. c.* 21), *s.* 7.

The appellant, a farmer, supplied milk to a customer, to whom he sent it through a railway company in churns or cans professing to contain a specific amount of imperial measure, and containing a gauge whereby the quantity of the milk was marked. Both the railway company and the purchaser relied on the accuracy of the guages. Two of the churns, on being tested by the respondents' inspector, were each found to contain two pints less than the gauge indicated. The appellant was summoned and convicted under sect. 25 *of the Weights and Measures Act* 1878 (41 & 42 *Vict. c.* 49) *for having in his possession for use for trade measures which were false or unjust.*

Held, that the conviction was right. The churns used came within the meaning of sect. 25, *and were measures for use for trade. The essence of the legislation is, that for trade purposes dealings in quantities should be carried on with respect to accurate and not with respect to rough standards of weight and quantity.*

Case stated by one of the metropolitan police magistrates.

The appellant was summoned by the respondents under sect. 25 of the Weights and Measures Act 1878 (41 & 42 Vict. c. 49), at the Clerkenwell Police-court, for having had for use for trade two measures, namely, two milk churns, which were alleged to be false or unjust.

The facts proved at the hearing of the summons showed that an agreement was entered into between the appellant, a farmer at Stoke-on-Trent, and one E. Handsley, a dairyman in London, whereby the former agreed to supply milk in his own churns to the latter. The milk was delivered by the appellant in churns each capable of containing about sixteen or seventeen gallons. Each churn was fitted inside with gauges, so as to indicate the number of imperial gallons of fluid in the churn. The churns were conveyed by the North Staffordshire Railway Company under a contract between them and the appellant, and were delivered to the purchaser at Euston Station. The consignments usually consisted of from two to six churns. The appellant was accustomed to attach to one of the churns of each consignment a label on which he stated the number of churns in the consignment, and the aggregate number of gallons. The amount paid by the appellant to the railway company was 1½*d.* per gallon or part of a gallon, and his contract with the railway company contained the following terms:

> Each can must have the number of imperial gallons it is capable of taking marked upon it, and the inside of each can must be marked to indicate the space occupied by four gallons and by each additional gallon. . . . Senders must in each case sign consignment notes showing the actual quantity of milk in imperial gallons in each can to be forwarded.

(a) Reported by Henry Leigh, Esq., Barrister-at-Law.

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The railway company treated the churns as measures of the quantity of milk carried, and tested such quantity only by the gauges inside the churns. Evidence was given by the purchaser that the churn gauges were the measure by which he received the milk, and that he had never tested the quantity of milk.

On the 26th April 1894, the appellant consigned from Leigh to Euston Station four churns, a label being attached to one of them showing the total amount of the consignment was sixty-six gallons. On the 27th April 1894 a similar consignment was made by the appellant of three churns, a label being attached to one of them showing the total amount of the consignment to amount to fifty gallons. Two of these churns, one from each of the above consignments, were subsequently handed by the purchaser to the London County Council inspector to be tested, and each when filled to the sixteen gallons mark was found to contain two pints less than sixteen gallons.

It was contended on behalf of the appellant, (1) that the said churns were not measures within the meaning of sect. 25 of the Weights and Measures Act 1878, but were merely conveyances for the consignment of milk from the farmer to the dealer, and that the gauging inside the churn was merely as a guide to the railway company, whose rates were fixed at so much per gallon or part of a gallon, and were not affected by any smaller quantity, and consequently the appellant came within the exception provided by sect. 22 of the same Act; (2) that it would be impossible to enforce the provisions of the Act with respect to milk churns, as, owing to their necessarily receiving rough usage in transit, indentations were frequently made which reduced the capacity of the churn, and consequently the gauging would not remain correct; (3) that the appellant could not be convicted on the summons, because the inspector when testing the churns had not complied with sect. 44 of the Weights and Measures Act 1878, and sect. 7 of the Weights and Measures Act 1889 (52 & 53 Vict. c. 21), inasmuch as if the churns are "measures" there should have been a standard churn with which to compare them, but it was admitted that no standard milk churn had been supplied to, or was in the possession of the local authorities. The respondents contended that, having regard to the facts of the case, the churns were "measures," and were represented by the appellant as containing particular amounts of imperial gallons.

The magistrate found that in the dealings between the appellant and Handsley, the purchaser, and between the appellant and the railway company, the gauged churns were used as measures, and that the two churns which were tested did, in fact, each contain two pints less than sixteen imperial gallons. Upon these facts he held that the two churns were measures within the meaning of sect. 25 of the said Act, and that they were false or unjust, and he accordingly convicted the appellant.

The question of law for the opinion of the court was whether upon the facts the appellant was rightly convicted.

Sect. 25 of the Weights and Measures Act 1878 (41 & 42 Vict. c. 49), provides that:

Every person who uses or has in his possession for use for trade any weight, measure, scale, balance, steelyard, or weighing-machine, which is false or unjust, shall be liable to a fine not exceeding five pounds . . .

Sect. 22 provides that:

Nothing in this Act shall prevent the sale, or subject a person to a fine under this Act for the sale, of an article in any vessel, where such vessel is not represented as containing any amount of imperial measure, nor subject a person to a fine under this Act for the possession of a vessel where it is shown that such vessel is not used nor intended for use as a measure.

Bosanquet, Q.C. (*Avory* with him) for the appellant.—The question here is, whether a milk churn, used for conveying milk, is a "measure" within the meaning of sect. 25 of the Weights and Measures Act 1878. Any vessel marked or gauged as containing up to such mark a certain quantity is not a "measure" within the meaning of the Act, unless it is a measure "for use for trade." It is submitted that these churns are not such measures. They are mere receptacles for conveying the milk in, and the gauge within them is only placed there for the convenience of the railway companies. The gauge is not to be taken as indicating an accurate measure, for though, when the churn is in a perfect state, it holds a known quantity, yet, after a short time, it becomes indented by being knocked about in transit, and is no longer an accurate measure. Further, if these churns are measures within sect. 25, they must bear a Government stamp (see sects. 28 and 29), but no such stamp is to be found on them. These churns, it is submitted, come within the exception of sect. 22, for they are not used nor intended for use as measures, and therefore the magistrate was wrong in convicting the appellant.

Cripps, Q.C. (*Daldy* with him) for the respondents.—The churns were used as measures by the appellant, who represented to the railway company and to the purchaser that they contained a specified quantity, and they undoubtedly were used as measures for trade purposes within the Act, and the magistrate, on the facts of the case, was right in so finding. These measures were found to be inaccurate to a certain degree, and the magistrate was right in finding they were "false or unjust," and in convicting the appellant. It is essential for the purposes of this Act that accurate and not rough measures should be used, and if a dealer uses a measure that has become inaccurate, he must take the consequences.

WILLS, J.—I am of opinion, notwithstanding the doubts which Mr. Bosanquet succeeded in raising in my mind, that the learned magistrate was right with regard to both parts of his finding. He has found that, both as between the seller and purchaser of the milk, and as between the seller and the railway company, these churns were used as measures. That they were so used as between the seller and the railway company there seems to be really no contest at all, and I cannot conceive that there can be. It is quite obvious that it is impossible for the railway company, for the purposes of the railway, to have any other gauge by which to judge of the quantity of the milk. That is sufficient to support the conviction. But I go further, and say that in my opinion the magistrate was right on the other point also. The question whether they were used as measures or not between the parties is one of fact for him. It does not follow with absolute necessity from

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the provision as to gauging in the contract that it was the measure adopted between them; but when it is found that at the purchaser's end no measurement of the milk took place, and that the churns, professing in this way by this measure to hold sixteen or seventeen gallons, were forwarded without further verification, that is, I think, strong evidence that they were so used. The only remaining piece of evidence required to make out that they were used as measures between the parties is, that the seller of the milk, as well as the purchaser, should have been aware of the course of business pursued at the other end. I should think the great probability is, that it was taken for granted between the parties that that was the mode of dealing, and was the ordinary mode used in the trade; and, if that is so, every link in the chain of evidence would be complete. It is sufficient for me to say, at all events, that there was evidence before the magistrate on which I think he could properly find that the course of business between the parties was that the churns were marked for the purpose of measurement; and I agree with Mr. Cripps that it is very important not to fritter away an Act of Parliament of this kind by any nice distinctions or qualifications, and that the essence of all legislation of this character is to say that rough measures should not be used for trade purposes; that the interests of society require that for trade purposes dealings in quantities shall be carried on with respect to accurate, and not with respect to rough standards of weight and quantity. I think, therefore, that there is quite enough to justify the magistrate in finding that these churns were dealt with as between the parties, as well as between the seller and the railway company, as trade measures. That is really the only question in the case, because, if the magistrate has found that they were false, I should think he was quite justified in so finding; but whether he was justified in that or not, it was clearly a matter for him to say whether the departure from accuracy was of a sufficient amount to justify him in treating the measure as false, because of course in this, and in all other matters of common life, there must be some reasonable allowance made for commercial necessities and for the impossibility of filling any vessel of this kind with absolute mathematical accuracy. I do not, however, see any reason to suppose that the magistrate has gone wrong in that respect.

Wright, J.—I am of the same opinion. Now that I am fully informed of what took place before the magistrate, I come to the same conclusion, because I think that, although the point of the measurement capacity of the churns having been reduced by the shaking and so forth in travelling to and fro by the railway was not made, or if made was not proved, I think we must assume that the magistrate thought he had ground for finding and did find, as I think he might well do, that these particular churns were originally falsely constructed to a uniform extent of a substantial character; because a quart on each churn means, according to the price in the contract, 1½*d.* a day on each of these churns for every day through the period. That is certainly substantial. I am inclined, therefore, to think that on both parts of the case the magistrate was right; I certainly think he was right after hearing Mr. Cripps' argument on the railway point, because when it is once pointed out that the railway contract does require the contents of the churns to be marked accurately for each gallon, I think there is nothing in that part of the case at all. It remains to say that it seems to me, notwithstanding the requirements of the Act, some regard ought to be had to the nature of the trade and the nature of the receptacles, and if it really appeared, as it will inevitably in the case of milk churns, that there should be some diminution of capacity by injury in transit which must occur from day to day, I should hesitate before I held that the churn could be regarded as a false or unjust measure merely because it was fractionally reduced to this extent. However, we have not to decide that. The appeal will be dismissed with costs.

Appeal dismissed accordingly.

Solicitors for the appellant, *Morris* and *Bristow*, agents for *Smith, Leech*, and *Bostock*, Derby.

Solicitor for the respondents, *W. A. Blaxland.*

Dec. 6 *and* 13, 1894.

(Before Pollock, B. and Grantham, J.)

Bury v. Thompson. (*a*)

Landlord and tenant—Notice to quit.

The plaintiff was the lessee and the defendant the lessor under an indenture of lease for a term of twenty-one years, determinable by the lessee at the end of the seventh or fourteenth year, on his giving six months' previous notice. More than six months before the expiration of the seventh year the lessee wrote a letter to the lessor, informing him that, after making inquiries, he found that he was paying too high a rent, and added, "I understand that the rent is 50l. too high, and I shall not be able to stop unless some reduction is made.

Held, that this was a good and effectual notice to quit, and that the plaintiff was entitled to a declaration that the term of years created by the lease had been determined by such notice.

This was a special case by order of the master at chambers made by consent for the opinion of the court on a point of law.

By the writ in this action the plaintiff claimed a declaration that the term of years created by a certain indenture of lease dated the 25th Feb. 1888, and made between the defendant of the one part and the plaintiff of the other part, had been determined by the plaintiff on the 25th Dec. 1894, by notice pursuant to a proviso in that behalf contained in the said lease.

By an indenture of lease dated the 25th Feb. 1888, and made between the defendant of the one part and the plaintiff of the other part, the defendant demised to the plaintiff a messuage and premises known as No. 33, Courtfield-road, Kensington, in the county of Middlesex, for the term of twenty-one years from the 25th Dec. 1887, at the yearly rent of 270*l.*

The lease contained a proviso in the terms following:

Provided always and it is hereby agreed and declared that, if the lessee shall be desirous of determining this demise at the end of the seventh or fourteenth year of

(*a*) Reported by Henry Leigh, Esq., Barrister-at-Law.

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the said term, and of such his desire shall give to the lessor six calendar months' notice next before the expiration of such seventh or fourteenth year, then and in such case at the end of such seventh or fourteenth year as the case may be, the said term hereby granted shall absolutely cease and determine, save and except as to any right that may previously have accrued to either of the parties hereto, and which may then remain unsatisfied.

On the 21st Oct. 1893 the plaintiff wrote to the defendant as follows:

I have just been looking at my lease, and I see that my first seven years will be determined on the 25th Dec. 1894. I have been making inquiries for some time past, and I find that I am paying too high a rent and considerably higher than any of the adjoining houses are able to let for now. I understand that the rent is 50*l.* too high, and I shall not be able to stop unless some reduction is made. I give you an early intimation of this that you may have ample time to consider what course you would like to adopt.

The defendant on the 23rd Oct. 1893 replied as follows:

I think your idea of rent is considerably too low, but I should be glad to meet your views if possible; therefore, if you will at once waive your right to determine the lease at Christmas next year, I will agree to take a reduced rent of 20*l.* per annum, making it 250*l.* in lieu of 270*l.* for the second period of seven years.

The plaintiff did not accept this offer. Subsequent proposals and offers took place between the parties as to the reduction of the rent, but no agreement was come to.

On the 6th July, less than six months before the end of the seventh year, the plaintiff made another proposal as to the amount of rent, to which the defendant on the 7th July replied as follows:

As you did not give me notice to determine the tenancy, I quite understood that you had made up your mind to continue for another seven years, and I can see no reason now for altering the terms of the lease.

The question of law for the opinion of the court stated by the special case was, whether the letter of the 21st Oct. 1893 was sufficient and effectual to determine the term of years created by the lease.

R. M. Bray (*E. Bray* with him) for the plaintiff.—The notice contained in the letter of the 21st Oct. was a good notice to determine the tenancy, and therefore the plaintiff is entitled to the declaration he asks for. The notice to quit is clear and direct and comes within the decision of *Ahearn* v. *Bellman* (40 L. T. Rep. 771; L. Rep. 4 Ex. Div. 201), in which case the landlord gave the tenant notice to quit on a certain day, and that if he retained possession after that date the rent would be increased. The court there held that the notice to quit was good, and was not affected by the fact that it was accompanied by the further notice. At p. 214 (4 Ex. Div.), Bramwell, L.J. instances a case similar to the present one. He says: "Let us suppose that the tenant had given a notice to quit sufficient in its terms, and had said, 'but I am willing to continue in possession and will, if you will let me, at the diminished rent of so much.' Could there have been any doubt that that would have been a good notice on the part of the tenant?" In the present case what has happened is this: The plaintiff has given notice of his intention to leave at a certain date unless a reduction in the rent is made. This is not an alternative, but merely a statement of his reason for leaving.

Hon. *A. Lyttelton* for the defendant.—*Ahearn* v. *Bellman* is not an authority in favour of the plaintiff. This is not a notice within the authorities. It is not a clear but an ambiguous notice to quit; it is merely a commencement of a negotiation for a reduction of rent. The notice does not definitely state that the plaintiff is going to determine the tenancy. The whole point is, not whether the notice was qualified by something else, but whether it was a fixed and determined notice to quit. He also referred to

Muskett v. *Hill and Tozer*, 5 Bing. N.C. 694;
Doe d. Matthews and others v. *Jackson*, 1 Doug. Rep. 175.

E. Bray in reply.

Cur. adv. vult.

Dec. 13.—The following judgment was delivered by

Pollock, B.—In this case the plaintiff is the tenant of certain premises, and the defendant is the landlord, and the plaintiff asks for a declaration that a term of years created by a lease made between himself and the defendant has been duly determined by a notice that he has given to the defendant pursuant to a proviso contained in the lease. The lease is for twenty-one years, and the terms relating to the determination of it, were that, if the plaintiff were desirous of determining the tenancy at the end of the seventh or fourteenth year, he could do so by giving the defendant notice to that effect six calendar months next before the expiration of the seventh or fourteenth year. Now the notice on which the plaintiff relies was contained in a letter by him to the defendant, and dated the 21st Oct. 1893, about fourteen months before the end of the seventh year, and, therefore, well within the period required by the proviso. [The learned Judge then read the letter dated the 21st Oct. 1893.] This letter was acknowledged by the defendant, who made some suggestions as to the reduction of the rent asked for. No further or other notice was given. Now the only question we have to decide is whether, considering the terms of it, this letter amounted to a notice to determine the lease. No particular form of words is necessary to constitute a good notice to quit, and all that was material in this case was, that the notice should be such as showed an intention to quit, and not merely as meaning that thereafter, if the defendant did not lower the rent, the plaintiff would be obliged to give notice. If the notice had been in the alternative, "either you must let me pay a lower rent or I shall go," it would not have been sufficient, as was held long ago by Lord Mansfield in *Doe, Lessee of Matthews and others*, v. *Jackson* (1 Dougl. Rep. 175). But there is no alternative here. The letter clearly shows an intention on the part of the plaintiff to quit; the remaining part of the letter merely explains the plaintiff's reason for giving notice, but that does not in any way affect the sufficiency of the other part of the letter which constitutes the notice. In the more recent case of *Ahearn* v. *Bellman* (*ubi sup.*) the question was carefully considered, and the court came to the conclusion that there was no objection to a notice in which there was a definite statement by the landlord or tenant that the tenancy would be determined

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unless certain proposals were acceded to. In the present case I am of opinion that a proper notice has been given, and that the plaintiff gave a distinct intimation that he would determine the tenancy at the end of the seventh year unless the defendant made a reduction in the rent which would satisfy him. The notice, therefore, I think, was sufficient to determine the lease, and the plaintiff is entitled to the declaration he asks for.

GRANTHAM, J.—I am of the same opinion. [The learned Judge here stated the facts of the case.] How can it be said that this is not a notice, and that this letter does not clearly express the intention of the plaintiff to determine the tenancy unless the rent was reduced by 50*l.* per annum? The defendant did not reduce the rent as desired, and the notice therefore held good and determined the lease. The defendant very well knew that the plaintiff did not intend to remain as a tenant unless the rent was reduced as he required, and that he would not continue to pay the rent he had been paying. A correspondence ensued, no arrangement was come to, the six months previous to the termination of the seventh year was entered upon, and then the defendant turned round and wrote to the plaintiff as follows: "As you did not give me notice to determine, on the 7th July, the tenancy, I quite understood that you had made up your mind to continue for another year, and I can see no reason for altering the terms of the lease." We cannot assist him in such conduct as this. Bramwell, L.J. says that a notice to quit must be "clear and intelligible," that it should be clear and certain in its terms, and be neither ambiguous nor optional. I am of opinion that here the notice contained in the letter of Oct. 21, 1893, was clear and perfectly intelligible, and was not ambiguous nor optional. Therefore, the plaintiff must succeed, and he is entitled to the declaration he asks for, namely, that the term of years in his lease was determined by the notice contained in that letter.

Judgment for plaintiff with costs.

Solicitor for the plaintiff, *F. T. Adshead.*

Solicitors for the defendant, *Gush, Phillips, Walters,* and *Williams.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

PROBATE BUSINESS.

Monday, Dec. 3, 1894.

(Before the PRESIDENT (Sir F. H. Jeune.)

IN THE GOODS OF SHEATHER (deceased). (*a*)

Administration—Creditor—Limited grant refused—General grant to creditor.

Upon a motion by a creditor for a limited grant of administration, the court, while thinking that in this particular case it might be a convenient course to make a limited grant to the creditor, declined to depart from the practice in such cases, which requires that a creditor who applies for administration shall take a general grant.

MOTION by a creditor for a limited grant of administration.

The applicant was a secured creditor to the extent of 100*l.* upon a debenture bond, the amount of the whole debt being 149*l.* 19*s.* 8*d.* The estate was said to be worth only about 7*s.* in the pound. There was no other known creditor, save the holder of one other debenture bond of like date and amount.

Cluer moved for a limited grant.—Rule 29 certainly gives the court power to make a limited grant, and if it could see its way to depart from the usual practice, no harm could be done to anyone in this case. There is no reported authority against the application, and there is authority for a limited grant of administration *pendente lite*:

Stanley v. *Bernes*, 1 Hagg. Eccl. 221.

He also referred to

In the Goods of Carrol, L. Rep. Ir.; 31 Ch. Div. 388.

The PRESIDENT.—I am of opinion that the applicant must take a general grant. I should have been very glad to help the creditor in this particular case, and I daresay that it might be a convenient course to pursue in this instance. The peculiarity of these applications is that they are made *ex parte*, and it is quite right that they should be so made; but the court is therefore bound to take every kind of precaution to see that no possible injustice may be done to anyone. Although it is not probable that, in this particular case, any injustice would be done to anybody, still I cannot take upon myself to say that none is possible. Another thing which influences me very much is that it is a good general rule of practice that a creditor asking for administration shall take a general grant. If this rule were to be broken into, there would be a great number of these applications, and the change in the practice might involve considerable expense which it is desirable to avoid. For these reasons, I think it better to adhere to the universal rule of practice, that a creditor applying for administration is required to take a general grant, and shall not be allowed to take a limited grant. As I understand that the applicant is now willing to take a general grant, I decree letters of administration to him. In doing so, I do not affect any preferential right of the applicant in regard to the security which he holds.

Solicitors: *Paddison, Fullilove,* and *De la Chapelle.*

ADMIRALTY BUSINESS.

Dec. 13 *and* 14, 1894.

(Before BRUCE, J., assisted by TRINITY MASTERS.)

THE CITY OF NEWCASTLE. (*a*)

Salvage—Fire—Services rendered by steamship to vessel lying alongside jetty—Amount of award.

A fire broke out on board a vessel which was lying alongside a jetty at the entrance to a dock. The vessel was under repairs, with no steam up, and had no one but her master and a watchman on board. At the request of the master a steamship, which had just arrived, hove alongside, and, getting her hose on board the burning vessel, extinguished the fire which, if it had remained unchecked, would have caused very serious damage. The services were such as might have been rendered by a fire engine on shore. The

(*a*) Reported by H. DURLEY-GRAZEBROOK, Esq., Barrister-at-Law.

(*a*) Reported by BUTLER ASPINALL, Esq., Barrister-at-Law.

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value of the salved vessel was 9500l. The defendants tendered 200l.

The Court upheld the tender, being of opinion that the services were not of such a character as to require that the award should be assessed upon the same liberal principles as obtain in the ordinary cases of sea salvage rendered by one ship to another.

THIS was an action instituted by the owners, master, and crew of the steamship *Blue Cross*, to recover salvage remuneration for services rendered to the steamship *City of Newcastle*.

On the 5th Aug. 1894 the *City of Newcastle*, an iron screw-steamship of 1973 tons gross register, was lying in the cutway of the Mount Stuart Dry Dock at Cardiff under repairs. The only persons on board of her were her master and a watchman. At about eight o'clock in the morning the carpenter's shop, in one of the alley-ways on deck, was found to be on fire. The master and the watchman at once commenced to draw water in buckets over the ship's side and pour it on the fire, but their efforts were insufficient to master the flames. A steamship called the *Elsie* was lying alongside of the *City of Newcastle*, but she had not got her steam up, and was not able to render any assistance. At this time the *Blue Cross*, a steamship of 3028 tons gross register, arrived in ballast from Rotterdam and began to heave alongside the *Elsie* for the purpose of entering the dock. On being hailed by the master of the *City of Newcastle* to assist, the master of the *Blue Cross* having hove his vessel alongside the *Elsie*, set his donkey-engine and pump to work, and attached a hose of about sixty feet in length, which was carried by the third mate and boatswain across the *Elsie*, and through the ports leading to the part of the *City of Newcastle* from which smoke was issuing. In about an hour and a half the water from the hose extinguished the fire. The third mate and boatswain of the *Blue Cross*, who had the management of the hose, got their clothes wet and dirty, and were placed in an uncomfortable position, but the learned judge found that they incurred no risk and no danger.

The plaintiffs alleged that by reason of their services the destruction of, or great loss and damage to, the *City of Newcastle* were averted, and that, but for the prompt assistance rendered, the fire would have spread, and would probably have burnt out the *City of Newcastle* and have extended to the *Elsie*, as there was no other apparatus for extinguishing fire near at hand.

The defendants denied that the fire was a serious one, or that any great damage to the *City of Newcastle* was averted by the services rendered, and stated that they had communicated by telephone with the chief fire office, and that, in the absence of the *Blue Cross*, assistance could easily have been procured from there or elsewhere.

The value of the *Blue Cross* was 30,000*l.*, and that of the *City of Newcastle* 9500*l.*

The defendants tendered 200*l.* in settlement of the claim.

Sir *Walter Phillimore* and *Temperley* for the plaintiffs.—We were practically the only available salvors. The amount tendered is altogether insufficient.

Butler Aspinall for the defendants.—The court ought not in a case like the present to award salvage with the same liberality that obtains in cases of sea salvage, where the property of the salvors is exposed to serious maritime risk. In the present case the services were very analogous to those rendered on land by the fire brigade. The *Blue Cross* was not only in no danger, but was in no sense used as an instrument to render the services, which in fact consisted only in three men playing a hose on a fire.

BRUCE, J. (having stated the facts) proceeded:—There can be no doubt that the service rendered was an effectual service. If the fire had been unchecked very serious damage would have ensued to the *City of Newcastle*. The *Blue Cross* was enabled, by the appliances at her disposal, to render at a critical moment the very service which was wanted. The case does not seem to me to be one of that class in which public policy demands that a most liberal award should be given. The services were such as might well have been rendered by any person on land with a steam fire engine and hose ready at hand; they were such as might have been rendered by a fire brigade. But, at the same time, services were rendered, and for these no doubt an award ought to be made. The sum of 200*l.* has been tendered, and the question for the court to consider is whether that sum is a sufficient reward for the services. Having given the case full consideration, and having had the advantage of considering other cases in this court where similar services have been rendered, and, particularly, having considered the case of the *Ethiopia*, decided by Butt, J. in May 1883, I come to the conclusion that the tender of 200*l.* is sufficient. The plaintiffs will have their costs up to the date of the tender, and the defendants will have their costs after that date.

Butler Aspinall for the defendants.—We submit that this is a case which should have been brought elsewhere than in the High Court, and in which only costs on the County Court scale should be allowed.

Temperley, contrà.—In view of the circumstances of the case, and the value of the vessels concerned, the salvors were justified in proceeding in this court. He cited

The Saltburn, 69 L. T. Rep. 88; 7 Asp. Mar. Law Cas. 325; (1892) P. 333.

BRUCE.—J.—I think this is a case in which costs should be allowed on the higher scale.

Solicitors for the plaintiffs, *Botterell* and *Roche*.

Solicitors for the defendant, *Thomas Cooper* and *Co.*

House of Lords.

Nov. 13 *and* 15, 1894.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON and MACNAGHTEN.)

THURSBY AND ANOTHER *v.* CHURCHWARDENS, &c., OF BRIERCLIFFE WITH EXTWISTLE. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Rating—Lighting and Watching rate—Land—Coal mines—Property other than land—43 Eliz. c. 2, s. 1—Lighting and Watching Act 1833 (3 *&* 4 *Will.* 4, *c.* 90), *s.* 33.

Coal mines are property other than land rateable

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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to the relief of the poor under the statute 43 Eliz. c. 2, and are, therefore, liable to be rated at the higher rate imposed on such property by the Lighting and Watching Act 1833 (3 & 4 Will. 4, c. 90).

Judgment of the court below affirmed.

THIS was an appeal from a judgment of the Court of Appeal (Lopes and Davey, L.JJ.), reported in 70 L. T. Rep. 618, and (1894) 2 Q. B. 11, who had affirmed a judgment of the Queen's Bench Division (Mathew and Collins, JJ.), reported in (1894) 1 Q. B. 567, upon a case stated by the Court of Quarter Sessions for Lancashire.

The appellants, who were colliery proprietors, appealed, under the provisions of the Lighting and Watching Act 1833 (3 & 4 Will. 4, c. 90), to the Court of General Quarter Sessions against a rate made by the respondents on the 6th Feb. 1893, and a special case was stated for the opinion of the court, which raised the question whether, under the provisions of the Act in question, coal mines are to be regarded as "land," and therefore are only liable to be rated on the lower scale, or whether they are liable to be rated on the higher scale as being included in the words "houses, buildings, and property (other than land)." The Divisional Court held that they came within the latter designation, and affirmed the rate on the higher scale, and that decision was affirmed by the Court of Appeal.

Balfour Browne, Q.C. and *W. Graham*, for the appellants, contended that the question was whether a coal mine was "land" within the meaning of the Act 3 & 4 Will. 4, c. 90, and therefore only liable to be rated on the lower scale. The argument which prevailed in the court below was, that it is not "land" because "coal mines" are mentioned as well as "land" in the statute 43 Eliz. c. 2. If so, then "saleable underwoods" are not land, as they are also specified in the 43 Eliz. c. 2. We say that it is land in which the owner has made a hole. In the case of *R.* v. *Southwark and Vauxhall Water Company* (6 E. & B. 1008) water-pipes underground were held to be "land" within the section. In *Peto* v. *Overseers of West Ham* (2 E. & E. 144) docks were held to be *ejusdem generis* with houses, and therefore to be rateable on the higher scale, as are yards and gardens occupied with buildings; so coal mines, if not "land," are *ejusdem generis*. It is not the less land because it is below the surface, whether it be one foot or a hundred feet down. [Lord WATSON.—Is it not a subterranean building, like a tunnel?] In *Reg.* v. *Overseers of Neath* (24 L. T. Rep. 871; L. Rep. 6 Q. B. 707) a canal, and in *Reg.* v. *Midland Railway Company* (32 L. T. Rep. 753; L. Rep. 10 Q. B. 389) a railway, were held to be land within the section. The language shows that "land" is not used in the same sense as in the Act of Elizabeth. The two Acts are not *in pari materiâ* for the division of rateable property. The object of the statute of Elizabeth was not to say that coal mines were not "land," but to create an exception of all other mines from rating. It is an exception from an exception, and must be read "all land except mines, except coal mines." See

Lead Smelting Company v. *Richardson*, 3 Burr. 1341;
R. v. *Sedgely*, 2 B. & Ad. 65;
Morgan v. *Crawshay*, 24 L. T. Rep. 889; L. Rep. 5 H. of L. 304.

Mines other than coal mines were only made rateable by the statute 37 & 38 Vict. c. 54 in 1874. [Lord WATSON.—The principle of the statute of Elizabeth seems to be that mines are not "land."] As to the principles of the construction of statutes, see the observations of Jessel, M.R. in *Ex parte Blaiberg* (49 L. T. Rep. 16; 23 Ch. Div. 254). The whole principle of rating is on the ground of benefits received, and these mines can receive no benefit from the lighting of the township. Thus brickfields are land, and kilns are buildings. [The Lord CHANCELLOR.—Yet the brickfields might employ half the population of the place.]

Castle, Q.C. and *W. W. Mackenzie*, who appeared for the respondents, were not called upon to address their Lordships.

At the conclusion of the argument for the appellants, their Lordships gave judgment as follows:—

The Lord CHANCELLOR (Herschell.—My Lords: This is an appeal from a judgment of the Court of Appeal affirming a judgment of the Divisional Court. The point is a very short one, whether under the Lighting and Watching Act, 3 & 4 Will. 4, c. 90, sect. 33, a coal mine is to be rated at the higher rate provided for by that section or at the lower rate. The section provides "that owners and occupiers of houses, buildings, and property (other than land) rateable to the relief of the poor in any such parish shall be rated at and pay a rate in the pound three times greater than that at which the owners and occupiers of land shall be rated at and pay for the purposes of this Act." The contention on the part of the appellants is, that a coal mine is land and therefore falls to be rated at the lower rate. The contention of the respondents, to which effect has been given by the court below, is that a coal mine is not land within the meaning of that provision, and therefore is to be rated at the higher rate. No doubt, in a broad sense, the word "land" may be said to include a mine; but it is equally certain that the word "land" is sometimes used in a more limited sense which would not include a mine. In the present case I think the sense in which the word "land" must be interpreted is pointed out for us by the Legislature. The 33rd section commences by an enactment "that the overseers shall, for the purpose of collecting, raising and levying the rate necessary for the purposes of this Act, proceed in the same manner and have the same powers, remedies, and privileges as for levying money for the relief of the poor in the said parish." And by the 9th section of the same Act the sum necessary for lighting and watching was "to be raised upon the full and fair annual value of all property rateable for the relief of the poor within the parish." The effect of those provisions was to extend the rating power given by the statute of Elizabeth, which was there confined to a rate for the relief of the poor, to a rate for the purposes of lighting and watching. The property rateable was made the same, and the methods of rating were made the same. In fact, except that the purpose was different, the overseers were to proceed in precisely the same way in raising the rate for the lighting and watching purpose as they had done for the relief of the poor. The particular part of the section which has to be construed is a proviso upon the earlier part of the section which enacts

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that the overseers "shall proceed in the same manner" "as for levying money for the relief of the poor." Having regard to those facts, it seems to me to be impossible to do otherwise than to hold that the word "land" is used in this enactment in the same sense in which it is used in the statute of Elizabeth. The whole legislation is but a development of the legislation which had its origin in the statute of Elizabeth. I turn, then, to the statute of Elizabeth to see in what sense the word "land" is used. The Legislature there describes the subjects to be rated and provides in the first clause that the rate shall be assessed on "every occupier of lands, houses, tithes," "coal mines, or saleable underwoods." A question was raised many years ago whether mines other than coal mines were rateable. It was held that they were not, on account of the specific mention of coal mines as a subject of rating. Of course the contention that they were rateable would rest upon this, that the word "lands" was large enough to cover them. That was undoubtedly true; but it was nevertheless decided—ultimately in this House—that the specific mention of coal mines as a subject of rating, showed that the Legislature did not intend other mines to be rated: (*Morgan* v. *Crawshay*, 24 L. T. Rep. 889; L. Rep. 5 H. of L. 304.) If so, it showed, as it seems to me, that the word "lands" in the statute of Elizabeth was used in its more restricted and limited sense so as to exclude all mines. Of course coal mines being specifically mentioned, were rated not by the use of the word "lands," but by their express inclusion. Other mines were not rated because the express provisions relating to coal mines showed that the word "lands" was not used in a sense which would include them. Ever since that time coal mines have been rated conformably to the statute of Elizabeth. They are rateable not as lands; they are rateable as coal mines; and in rating them for the purposes of the Lighting and Watching Act, the overseers, proceeding in the same method as has been usual under the statute of Elizabeth, would rate them not as lands, but as coal mines. When, therefore, we have such an enactment as that under consideration, dealing with the rating, dividing into classes the rateable subjects under the statute of Elizabeth, and when we find in one of those categories "lands," it seems to me that that category cannot include anything more than the word "lands" included in the statute of Elizabeth, and therefore it follows, I think, that it cannot include coal mines. It is upon that simple ground that I desire to rest my opinion. The particular point now under consideration has not previously been before the courts. It cannot be denied that there are *dicta* in some of the cases to which reference has been made, which indicate the view that the word "property" in the statute is not to be interpreted as a general word sweeping in everything else besides those things specifically mentioned, namely, "lands" in the one category and "houses and buildings" in the other, but that it is to be read in a limited sense as confined to things *ejusdem generis* with houses and buildings; and it was said that inasmuch as coal mines are not *ejusdem generis* with houses and buildings, they cannot be within the word "property," and therefore they must be within the word "land." If that argument be a sound one, it seems to me that there is this complete answer, without deciding how the word "property" is to be interpreted. In the case of tithes it seems to me that the word "lands" cannot cover them; they would not fall properly within such a term, and if "property" is to be read in a sense *ejusdem generis* only with houses and buildings, it cannot be said that tithes are *ejusdem generis* with either houses or buildings, and therefore it follows that tithes are not inserted in either of these categories any more than coal mines are. It seems to me that that indicates strongly that the word "land" at all events is intended to be used in the sense in which it was used in the statute of Elizabeth, that the lower assessment is confined to that and to that alone, and that it does not apply to any of the things specifically mentioned in the statute of Elizabeth. If "property" is to have the narrow construction contended for, then all that would result is that from the higher category certain things have been omitted, that there are no words there to cover them, but that nevertheless as they are not included in the word "land," and as everything is to be rated which is rated under the statute of Elizabeth, somehow or other they must fall within that higher category, because they do not come within the excepted category of "land," which is to be rated at the lower rate. I confess that I think the argument tends strongly to show that it is impossible in the case of this statute to confine the word "property" to something *ejusdem generis* with "houses and buildings." But, however that may be, it is sufficient to say that the appellants, in order to succeed, must bring themselves within the word "land." For the reasons which I have given I think they have failed in doing so. It is not really necessary to enter upon a discussion of the cases to which reference has been made (they have given rise to a good deal of difference of opinion amongst the learned judges who have taken part in them) because, for the reasons which I have given, they do not seem to me any of them directly to bear upon the case which your Lordships have to decide, although, no doubt, the *dicta* with reference to the sense in which the word "property" is used have been, naturally and properly, much relied on by the learned counsel for the appellants. For these reasons I move your Lordships that the judgment of the court below be affirmed and the appeal dismissed with costs.

Lord WATSON.—My Lords: I also am of opinion that the judgment of the court below ought to be affirmed. My reasons may be very shortly stated. We have to construe in this case a statutory proviso applicable to an assessment imposed in terms of the Act of Elizabeth, and I am of opinion that the expressions in the proviso were intended by the Legislature, and must be taken, to have the same meaning which they bear in the older statute. If that view be right, a coal mine, not being "land" within the meaning of that statute, comes within the description of "property other than land" in the proviso.

Lord MACNAGHTEN.—My Lords: I concur.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Littledale* and *Lefroy*, for *Artindale* and *Southern*, Burnley.

Solicitors for the respondents, *Warriner* and *Kirch*, for *T. Nowell*, Burnley.

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Nov. 16, and 19, 1894.

(Before the LORD CHANCELLOR (Herschell), Lords WATSON, and MACNAGHTEN.)

THORNE *v.* CANN. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Mortgage—Transfer of first mortgage to owner of equity of redemption—Rights of subsequent mortgagee—Intention.

S. purchased the equity of redemption in a property upon which more than one mortgage was outstanding. He afterwards paid off the first mortgage, and took an assignment to himself of the mortgage debt and all benefits and rights in respect of it, as a transfer, not as a reconveyance. He afterwards assigned the mortgage to the respondent.

Held (affirming the judgment of the court below), that as the manifest intention was to keep the security alive, the title of the respondent prevailed over that of a person claiming through a subsequent mortgagee, on the principle of Adams *v.* Angell (36 *L. T. Rep.* 334; 5 *Ch. Div.* 634) *and that the rule in* Toulmin *v.* Steere (3 *Mer.* 210) *did not apply.*

THIS was an appeal from a judgment of the Court of Appeal (Lindley, Kay, and Smith, L.JJ.), who had affirmed a judgment of Romer, J. The facts appear in the judgment of their Lordships, and from the head-note above.

Cozens-Hardy, Q.C. and *W. F. Phillpotts* appeared for the appellants.

Haldane, Q.C. and *F. H. Colt* who appeared for the respondent, were not called upon to address their Lordships.

At the conclusion of the argument for the appellant their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Herschell). — My Lords: The question in the action was whether the respondent had made out a good title to sell. One objection, and one only, to that title was taken and argued before the court of first instance, and in this House. I think it is not open to your Lordships to consider any other point but that single one so taken. The property had originally belonged to a Mr. Piller. He mortgaged it in the first instance for the sum of 300*l.* He then mortgaged it to a Mr. Forward for the sum of 150*l.* Subsequently to that mortgage to Forward an arrangement was come to that the first mortgage of 300*l.* should be transferred to a Miss Arnold, and that she should also have a further charge of 700*l.*; so that she became a mortgagee for 1000*l.* It may be that as regards 700*l.* there was a priority on the part of Forward, but I do not think it will turn out that that is material so far as the question now to be determined is concerned. Afterwards there was a mortgage to Thorne, the appellant's testator. The mortgage transactions appear to have been carried out through the medium of Mr. Searle, a solicitor who acted for both sides, and he gave an undertaking to each of the mortgagees, by which he guaranteed the mortgage in effect, because he undertook either to take a transfer of the mortgage, or, at his option, to make good any deficiency which might arise on the realisation thereof. None of the parties could insist upon his taking a transfer, but if he did not take a transfer they could each of them insist that if upon the realisation of the security there was a deficiency he should make good that deficiency. Piller, the mortgagor, afterwards became bankrupt, and, under his bankruptcy, Searle bought the equity of redemption from the trustee in bankruptcy, and thus became the owner of the equity of redemption. Miss Arnold desired to receive the mortgage money, and to be no longer out of it. Accordingly she entered into communication with Mr. Searle with that object. Thereupon he, not having the money, or not being prepared to advance the money himself, went to the Devon and Cornwall Bank, with whom he had an account, and obtained 1000*l.* from them as a special advance, with the view of obtaining the money to pay to Miss Arnold. At that time it would seem that he was in negotiation with a Mr. Cann, with a view to his taking the mortgage; but at that time it was a mere matter of negotiation, and no absolute agreement had been come to on the subject. But this is certain that he obtained 1000*l.* from the bank, and that it was the intention of himself and of the bank that the bank should receive the mortgage security which he was going to discharge. I think that is perfectly clear from the answers given by the bank manager (and there is nothing in Mr. Searle's evidence inconsistent with it), and from the documents put in. The bank manager says "I knew nothing about Miss Arnold or Mr. Cann, because frequently he had got a client. I have had many transactions with him. If a client asked him to pay off a mortgage he would come to the bank, if he had not got another client ready, and we would wait until he had one." Now, what is the meaning of that, but that they were to find the money to pay off the mortgage? That is, they, advancing the money, were to have the benefit of the mortgage security until he found a new client who should afford the means of paying the money back to the bank, when that new client was to have the security. That obviously was the intention of both Mr. Searle and the bank. Under those circumstances he receives the money from the bank, and he pays Miss Arnold; he takes an instrument from her, to which I will call attention in a moment, and he deposits the deeds with the bank. Some months or so afterwards Mr. Cann advances 900*l.* and takes from Mr. Searle an assignment of the security. Now, the instrument executed by Miss Arnold witnesses that: "In consideration of the sum of 1000*l.* this day paid to the said Jane Owen Arnold by the said James Searle (the receipt whereof the said Jane Owen Arnold doth hereby acknowledge), she, the said Jane Owen Arnold, as mortgagee, doth hereby assign unto the said James Searle, his executors and assigns, all that the said sum of 1000*l.* now owing to the said Jane Owen Arnold on the security aforesaid, and all interest henceforth to accrue due for the same, and the full benefit of the covenants entered into by the said James Piller in the said indentures and of all other securities for the same premises and all the estate and interest of the said Jane Owen Arnold in the premises and every part thereof." That was the nature of the instrument executed, and it purports, as will be seen, to assign the mortgage debt and all the securities held in respect thereof. Now I do not think, as I

(*a*) Reported by C. E. MALDEN, Esq., Barrister-at-Law.

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have already said, that it can for a moment be doubted, looking at the surrounding circumstances existing at the time when the money was paid to Miss Arnold and the instrument taken, that it was the intention of Mr. Searle to keep this security alive. It appears to me that such intention is indicated by the form of the instrument taken. I cannot myself conceive, when the owner of the equity of redemption paid Miss Arnold, the mortgagee, what was the object of his taking to himself the assignment of the mortgage debt and all benefits and rights in respect of it if it was not to keep alive that security. Now, that having been the intention which I infer from the instrument itself, and from the surrounding circumstances at the time, is that intention defeated by some rule of law which prevents effect being given to it? Reliance has been placed by the learned counsel for the appellant upon the case of *Toulmin* v. *Steere* (3 Mer. 210). *Toulmin* v. *Steere* is a case which certainly has not met with universal acceptance; it has been often commented upon and criticised adversely. It appears that an appeal was contemplated, although circumstances rendered it unnecessary; and possibly the decision might be open to reconsideration in your Lordship's House. But it is not necessary to determine any such point on the present occasion, because if *Toulmin* v. *Steere* be accepted as good law it does not, in my opinion, govern the present case. In *Toulmin* v. *Steere* the owner of the equity of redemption (being so far in the same position as Mr. Searle in the present case) had purchased the property with the intention of paying off all the mortgages upon it, and thought all the mortgages had been paid off out of the purchase money. One mortgage had been omitted; but so far from the intention there being to keep any of the mortgages alive, the intention was to extinguish all the mortgages, and it was believed that that intention had been successfully accomplished. If there remained a mortgage it was not because there had been any intention to keep it alive, nor was there any intention to keep it alive afterwards, when it was paid off and extinguished, as the intention had been to extinguish all the mortgages. Now, in the case of *Adams* v. *Angell* (36 L. T. Rep. 334; 5 Ch. Div. 634), as here, the equity of redemption had been purchased from a trustee under a bankruptcy. The question was whether the mortgage security had been kept alive, and the principle laid down by Jessel, M.R., in giving his judgment, is this, "that in all these cases the question is one of intention, and looking at the terms of the deed by the light of the surrounding circumstances, I am of opinion that an intention was clearly shown not to let in Newson" (the subsequent mortgagee in that case) "except on the terms of his paying Adams his principal, interest, and costs." Adopting that principle, I say here, looking at the deed itself, which I think would have been sufficient where there is nothing pointing to the contrary, I am of opinion that the intention was to keep the security alive. It seems to me one method, recognised by conveyancers, of expressing such an intention, is, that an assignment is taken of the mortgage security; but if you are to look at the terms of the deed together with the surrounding circumstances at the time, so far from their pointing the other way they all, to my mind, point in the same direction and indicate, beyond any possibility of dispute, that that was the intention. Reliance has been placed by the appellant upon the documents, and among them the undertaking to which I have referred given by Mr. Searle. I do not think they militate against the respondent's case It is said that they explain why it was that the transfer was taken from Miss Arnold in this form. They do; they show that it was intended to be a transfer of the mortgage—as excellent a way of expressing the intention of the parties as could well be conceived. For these reasons, I think the judgment of the court below is perfectly correct and ought to be affirmed, and the appeal dismissed with costs, and I move your Lordships accordingly.

Lord WATSON.—My Lords: I concur. I am satisfied that it was the intention of James Searle, the owner of the equity of redemption, to keep on foot the mortgage which he acquired from Miss Arnold, and subsequently transferred to the respondent. I think that is a reasonable inference from the tenor of the document by which these transactions were carried out, and the only inference consistent with the circumstances attending their execution. That inference in fact is sufficient to dispose of this appeal. It seems clear, upon authority, that, in such circumstances, intention must prevail, and that the case does not fall within the rule laid down in *Toulmin* v. *Steere* (3 Mer. 210).

Lord MACNAGHTEN.—My Lords: I do not think there is any foundation for this appeal in principle or authority. The case of *Toulmin* v. *Steere* which was pressed into the service of the appellant, has not as it seems to me any application to the present case. The facts in the two cases are not the same, nor is there, I think, any real resemblance between them. In *Toulmin* v. *Steere* it was decided that a purchaser who took a conveyance purporting to be free from incumbrances, could not set up a mortgage which had been paid off out of the purchase-money against an incumbrance subsequent in date of which he had constructive notice. The authority of that case cannot nowadays be treated as going beyond the actual decision. Whether it would be regarded as a binding authority in a case on all fours with it except in a Court of First Instance is at least doubtful. It would not, I think, on the present occasion be proper to go beyond what has been said in *Stevens* v. *The Mid-Hants Railway Company* (29 L. T. Rep. 318; L. Rep. 8 Ch. 1064); and *Adams* v. *Angell* (36 L. T. Rep. 334; 5 Ch, Div. 634). But I may remind your Lordships of an observation which was made by James, L.J. in the former case, and is not, I think, without application to the case now before your Lordships. "Of course it is quite right" said his Lordship "that an intermediate incumbrancer should not be prejudiced by any dealings between his debtor and another incumbrancer. At the same time it is not for this court to find some recondite technical reason for giving a man a benefit at the expense of another man who was under no liability whatever to pay him." The material facts in this case are very simple. When Searle agreed to buy the equity of redemption from Piller's trustee in bankruptcy, he became the owner of the estate subject to certain charges. The debts which those charges were intended to secure were not

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his debts, nor was he personally liable to pay them. I do not forget the undertakings which Searle had given. But those undertakings did not make the debts his or bind him to pay, so that he could be sued as debtor. There was nothing inconsistent with Searle's duty to Thorne in his performing his undertaking to Miss Arnold. Nothing I think is better settled than this, that when the owner of an estate pays charges on the estate which he is not personally liable to pay, the question whether those charges are to be considered as extinguished or as kept alive for his benefit is simply a question of intention. You may find the intention in the deed, or you may find it in the circumstances attending the transaction, or you may presume an intention from considering whether it is or is not for his benefit that the charge should be kept on foot. Here I think the intention appears plainly on the face of the deed by which Miss Arnold purported to transfer her mortgage. There is no release of the debt. Payment is not acknowledged simply. But the debt is assigned. The mortgage is transferred. The power of sale and other powers are kept alive. To put it shortly it is a transfer, and not a reconveyance. If it were necessary to look at the circumstances attending the transaction, it seems to me that the dealings with the bank, and the negociations with Cann which began before Miss Arnold was paid, show the intention clearly enough. These dealings and transactions would have been simply a fraud on the part of Searle if it had not been his intention to keep the charge alive. Moreover, if it were necessary to consider the point, it was plainly for the benefit of Searle to keep Miss Arnold's mortgage on foot. On these broad grounds, without considering any special equity to which Mr. Cann may be entitled, I think the decision of Romer, J. affirmed by the Court of Appeal is quite right, and I am of opinion that the appeal should be dismissed with costs.

Order appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellant, *Mear* and *Fowler*, for *G. H. Thorne*, Nottingham.

Solicitors for the respondent, *Torr*, *Gribble*, *Oddie*, and *Sinclair*, for *C. T. K. Roberts*, Exeter.

Supreme Court of Judicature.

COURT OF APPEAL.

Saturday, Nov. 3, 1894.

(Before Lindley and Smith, L.JJ.)

Perry *v.* The Phosphor Bronze Company Limited. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Discovery and inspection of documents—Entries in bankers' pass-books—Affidavit of documents disclosing pass-books—Inspection of bankers' books—Jurisdiction to order—Bankers' Books Evidence Act 1879 (42 *Vict. c.* 11), *s.* 7.

Where a plaintiff makes an affidavit of documents to which he schedules his banker's pass-books, the defendant is not debarred from obtaining inspection, under sect. 7 *of the Bankers' Books Evidence Act* 1879, *of the entries in the banker's books.*

Parnell *v.* Wood (66 *L. T. Rep.* 670; 1892. Prob. 137) *distinguished.*

(*a*) Reported by E. A. Scratchley, Esq., Barrister-at-Law.

The plaintiff brought an action for wrongful dismissal, claiming unpaid salary and damages.

The defendant company by its statement of defence justified the dismissal and counter-claimed for damages. The counter-claim alleged that the plaintiff had grossly mismanaged the affairs of the defendant company and misconducted himself in certain respects mentioned, and in particular that the plaintiff was intrusted by the defendant company with large sums of petty cash, and when called upon to restore or account for such moneys he failed to do so, having applied them to his own purposes.

It was stated that at the commencement of 1893 the plaintiff had accumulated petty cash with which he had been intrusted by the defendant company, and which he did not hand over to the defendant company when called upon to do so: and that from the date of the commencement of his employment in Jan. 1891 until Jan. 1893 he had been in the habit of paying all sums received by him for petty cash into his own private account at a certain bank.

In the course of the proceedings the plaintiff made an affidavit of documents, to which he scheduled his bankers' pass-books as being among the documents in his possession, custody, or power relating to the proceedings.

The defendant company, however, contended that the pass-books did not disclose what it required to see, namely, what the various items actually were, and it desired to obtain inspection of the bankers' books into which the entries from the pass-books were copied, as showing more definitely the nature of the plaintiff's account at the bank.

Accordingly a summons was taken out by the defendant company, under sect. 7 of the Bankers' Books Evidence Act 1879, and an order was made by Wright, J., sitting at chambers on the 16th July 1894, that the bank should at all seasonable times, upon reasonable notice, produce at their office their books containing the account of the plaintiff between certain specified dates; and that the defendant company should be at liberty to inspect and peruse the entries in such books relative to such account, and take copies and abstracts thereof and extracts therefrom at their own expense.

The plaintiff appealed.

Percy Gye for the appellant.—As the appellant has filed an affidavit making discovery of his bankers' pass-books, the respondent company is not entitled to go behind that affidavit and seek to obtain inspection of the appellant's account in the bankers' books:

Parnell v. *Wood*, 66 L. T. Rep. 670; (1892) Prob. 137.

This case is practically on all-fours with *Parnell* v. *Wood* (*ubi sup.*), although the point there arose in a different way. [Lindley, L.J.—I think not.] At any rate the principle of the case is exactly the same. The authority which may be cited against my contention is *Arnott* v. *Hayes* (57 L. T. Rep. 299; 36 Ch. Div. 731). But I say that that case is distinguishable from the present.

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G. Spencer Bower, for the respondent company, was not called upon to argue.

LINDLEY, L.J.—I think that the attempt to make this case the same as *Parnell* v. *Wood* (*ubi sup.*) altogether fails. [His Lordship stated the facts and continued:] The plaintiff has made an affidavit of certain documents in his possession, custody, or power. He has scheduled his bankers' pass-books to that affidavit; but, of course, he does not schedule the account books of the bankers, for they are not in his possession, custody, or power. Before the passing of the Bankers' Books Evidence Act 1879 (42 Vict. c. 11) there was no means before trial of obtaining inspection of the entries in bankers' books. But under sect. 7 of that statute, on the application of any party to a legal proceeding, a court or a judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. The question is whether that section is applicable to the present case. The court would be reluctant to throw open to inspection a party's accounts in the books kept by his bankers unless a strong case were made out for so doing. The ground of the defendants' application that the court should do so in the present case was that the plaintiff's affidavit did not disclose what the defendants desired to see. They want to find out where he got the various cheques from. The bankers' books, they say, would show those particulars. *Primâ facie* a judge would not look to that point. But, if a special case is made for the exercise of the judge's discretion, then it is different. In my opinion the decision in *Parnell* v. *Wood* (*ubi sup.*) has nothing to do with this case. Here the defendants have seen the plaintiff's pass-books, and the object of their application is to get behind those pass-books. I think that there is ample jurisdiction to make the order under sect. 7 of the Bankers' Books Evidence Act 1879, although the case is an unusual one. I think, therefore, that the decision of Wright, J. must be affirmed. The appeal will, consequently, be dismissed with costs.

SMITH, L.J.—I am of the same opinion. [His Lordship considered the facts and continued:] The defendants ask the court to put into force sect. 7 of the Bankers' Books Evidence Act 1879. That is a strong thing to do, and should only be done when a proper case is made out for the exercise of the discretion of the court. I think that this is a proper case. It is said that the learned judge (Wright, J.) was transgressing the practice, because this case is similar to *Parnell* v. *Wood* (*ubi sup.*). But this case must be made the same as *Parnell* v. *Wood* (*ubi sup.*) before we can say that Wright, J. was not justified in making the order that he did. In my opinion it is not the same as *Parnell* v. *Wood*. It seems to me that a case has been made out for inspection of the bankers' books; and that, therefore, the appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant, *Barlow* and *James*, agents for *Philip M. Butlin*, Birmingham.

Solicitors for the respondents, *Devonshire*, *Monkland*, *Davies*, and *Sanders*.

Monday, Dec. 3, 1894.

(Before Lord HALSBURY, LINDLEY and SMITH, L.JJ.)

FOSTER v. THE LONDON, CHATHAM, AND DOVER RAILWAY COMPANY. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Railway company—Arches underneath permanent way—Temporary letting of interiors of arches for purpose of profit—Implied powers.

Any mode of user by a railway company of its own land is permissible so long as it is not inconsistent or incompatible with the business for which compulsory powers have been intrusted to them by the Legislature, and is not prejudicial to the legal rights of others.

There is nothing to prevent a railway company from temporarily letting (with power to resume possession on short notice) the interiors of their arches in order to produce a profit to themselves, provided that such a course does not interfere with the use of their railway.

Norton v. The London and North-Western Railway Company (39 *L. T. Rep.* 25; 9 *Ch. Div.* 623) *doubted.*

Decision of Mathew, J. affirmed.

THIS action was brought by Thomas Gregory Foster for an injunction to restrain the defendant company and their tenants from continuing to occupy or overhang with buildings or otherwise obstruct a strip of land or footpath lying between land in the possession and occupation of the plaintiff and the arches of the defendant company's railway and from encroaching upon the lands of the plaintiff. Also for a *mandamus* commanding the defendant company to restore the strip of land and to maintain the same as a footpath, and to maintain a good and sufficient fence between the boundary of their land and that of the plaintiff; and damages for the nuisance to the plaintiff by reason of the obstruction and occupation of the footpath and of the encroachments on the plaintiff's land and deposit of material thereon and trespassing by the defendant company and their tenants on the plaintiff's land.

The facts of the case sufficiently appear from the judgment of Mathew, J.

On the 21st June 1894 the action came on for trial before Mathew, J. and a special jury.

The jury found that the strip of land was acquired by the defendant company absolutely and without any condition that it was to be used as a footway only.

The action was adjourned for further consideration of the questions, first, whether, assuming that the defendant company did acquire the plaintiff's land without condition, they could change the use to which that land was applied; and, secondly, whether that use was within their powers.

On the 23rd June 1894 the action came on to be heard on further consideration.

Lawson Walton, Q.C. and *G. M. Freeman* for the plaintiff.—A railway company can only take land for the purposes of their undertaking, and cannot use it for purposes outside. Under the Railways Clauses Act, when land becomes unsuitable for the purposes of the railway, the company are bound to sell it. That the strip of land in question here was not necessary for the purposes

(a) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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of the defendants' undertaking is shown by the way in which they have used it; they have allowed it to be built upon. It has not been used in any way for the purposes of the railway, but it has been used for the purposes of the tenants who occupy the arches. The defendants could never have acquired the plaintiff's land for those purposes. If they had given notice to treat in order to use it for those purposes, the plaintiff might have successfully restrained them from taking it:

Evereefield v. *The Mid Sussex Railway Company*, 1 Giff. 153;
Dodd v. *The Salisbury and Yeovil Railway Company*, 1 Giff. 158.

Either the defendants took this strip of land for the purposes of a footpath, in which case they are bound to maintain it as such; or else it became superfluous land, and the plaintiff would be entitled to repurchase it. Then we say, assuming that a railway company may acquire land for one purpose and may use it for any other purpose connected with the working of the railway, yet they cannot use it for purposes *ultra vires*, and any person who is affected by such a use is entitled to apply to the court:

Mulliner v. *The Midland Railway Company*, 40 L. T. Rep. 121; 11 Ch. Div. 611.

That case decides collaterally that the arches underneath the permanent way of a railway cannot be sublet by the railway company without special powers. If a railway company cannot grant a right of easement underneath their arches, clearly they cannot create a qualified ownership of those arches by means of granting a lease. By creating tenancies they create an even greater interest. There is no difference in principle between selling the arches and parting with the possession by means of a lease or leasehold interest:

Bostock v. *The North Staffordshire Railway Company*, 4 Ell. & Bl. 798; 3 Sm. & Giff. 283.

Furthermore, the special Act of 1860 of the defendant company contains a provision that their arches shall, whenever required by the local authority, be boarded up by the company so as to prevent their becoming a nuisance to the neighbourhood. That points clearly to the fact that it was contemplated that the arches would be merely used as part of the railway structure itself, and not for shops or other commercial purposes.

Kemp, Q.C. and *H. S. Croft* (*Mansel Jones* with them) for the defendant company. — If the plaintiff's argument is right the defendants are not entitled to use their railway for any purpose other than that of the railroad itself. But in no case has it ever been said that a railway company are not entitled to make use of their property in the best way they can till they want it for the purposes of their railway. On the contrary, it has been held that bookstalls, refreshment-rooms, and things of that kind may be constructed and kept, "and other things done which may be called ancillary or subordinate to the main purpose of the railway company or arising out of or consequent on its existence." Per Bramwell, L.J. in

Attorney-General v. *The Great Eastern Railway Company*, 40 L. T. Rep. 265, 282; 11 Ch. Div. 449, 505; on appeal, 42 L. T. Rep. 810; 5 App. Cas. 473.

If the defendants can use their property for bookstalls, &c., which are not strictly speaking "for the purposes of the railway," they can use their arches in order to obtain profit until required for any particular purpose. They are not bound to leave the arches open and unemployed, but if they can be utilised and the defendants can make a profit out of them, they have a right to do so. The defendants have a right to use their property in as advantageous a manner as possible so long as they do not use it inconsistently with the purposes for which they obtained it. The arches are not permanently let; there is only power for the tenants to retain possession until such time as the defendants want to use the arches for the purposes of the railway. The defendants have reserved to themselves the right to resume possession whenever they think necessary. The case of *Mulliner* v. *The Midland Railway Company* (*ubi sup.*) was commented on in

Bayley v. *The Great Western Railway Company*, 51 L. T. Rep. 337, 342; 26 Ch. Div. 434, 450;
The Grand Junction Canal Company v. *Petty*, 39 L. T. Rep. 767, 768; 21 Q. B. Div. 273, 277.

The special Act of 1860 does not prevent the defendants from using the arches in the way they have been used. If they are properly used they cannot interfere with anyone. With regard to the argument that this is either superfluous land or land required for the purposes of the railway, it is met by the decision in

Betts v. *The Great Eastern Railway Company*, L. Rep. 8 Ex. 294; 3 Ex. Div. 182; on appeal, 42 L. T. Rep. 1; 49 L. J. 197, Ex.

Lands required by a railway company for accommodation works are lands required for the purposes of "the undertaking" or "of the railway:"

Wilkinson v. *The Hull, &c., Railway and Dock Company*, 46 L. T. Rep. 455; 20 Ch. Div. 323.

Lawson Walton, Q.C. replied. *Cur. adv. vult.*

On the 30th June 1894 the following written judgment was delivered by

Mathew, J.—In this case the plaintiff seeks to restrain the defendants from using a strip of land adjoining his property and the railway of the defendants for any other purpose than that of a footway, and he complains that on this land which ought, as he alleges, to be used solely for the purposes of a footway, the defendants have permitted to be erected sheds, chimneys, and other buildings which are prejudicial to him as an adjoining owner. Now the land upon which the railway has been constructed and the adjoining slip had been acquired by the defendants from the plaintiff under the Lands Clauses Act 1845. The plaintiff was the owner of an estate of considerable proportions near Clapham Station, and for the purposes of the railway a portion of the land was acquired. When the land was so acquired the plaintiff's remaining estate was fenced off. At that time a large part of the property was held under a long lease, and that lease has only recently dropped in and been determined, and the plaintiff now finds himself incumbered with and prejudiced, as he says, by reason of the use to which the strip of land in question is now put by the defendants. Now, it appeared upon the trial of the case that the company had

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entered into possession of the land in question before the compensation had been assessed, and having obtained possession of the land, they devoted a part of it to the construction of arches upon which the railway was to run, and at the side they laid out a portion of the land within the limits of deviation as a footway for the use of passengers going by their line, on the south side of the railway, which led up to their station. When the compensation was assessed the land was in that condition. A portion of it was used for the construction of the arches, and the other portion was used as a footway. The first position taken up by the plaintiff at the trial was this, that what the company had acquired was the land to be used for the railway and the strip of land to be used solely as a footway. The case, which was very ingeniously put on the part of the plaintiff, was this: It was said that anyone who was desirous of ascertaining at the time what it was that the plaintiff was required to sell, and what the defendants were purchasing, on going to the spot would see, as if it were upon a plan, what it was that was the subject-matter of compensation. Evidence was given as to the condition of things at the time, and evidence was offered on the part of the defendants as to what took place when the compensation was assessed; and I thought it right to leave to the jury the question whether or not the strip of land in question had been acquired out and out, or was only acquired subject to restrictive obligations on the part of the defendants to use it for no other purpose than a footway. Upon examination of the title and the conveyance, and upon consideration of the facts given in evidence before the jury, the jury came to the conclusion that the strip of land had been purchased out and out, and was subject to no restrictive conditions of any sort, and so far as that question was a question for me, I entirely concur in the conclusion to which the jury came. Therefore the first point which was made at Nisi Prius failed the plaintiff. But then an alternative view of the matter was put forward. It was said that what had been done by the company was this: They had let certain of the arches for business purposes—shops and purposes of trade—and had abandoned the use of the strip of land behind as a footway, and had thrown portions of it into the backyard, so to speak, of the arches, and had permitted the tenants to use those strips of land behind the arches in the way of which the plaintiff complains. In other words, it is alleged that the defendants allowed their tenants to put sheds on this strip of land and throw up chimneys, and to make other arrangements convenient to themselves, but certainly inconvenient to the plaintiff. I think that the plaintiff succeeded in showing, desirous as he was of using his adjoining land for building purposes, that what had been done by the defendants and their tenants was prejudicial to his interests. Now, the case for the defendants with reference to the footway was this: They said the footway could only be used for temporary purposes in that way, and that after a time it appeared to them to be more convenient to have an approach to the station on the north side of their line, and when that approach was made the footway was abandoned, and it was admitted that from time to time as the arches were let a portion of the footway was let to each tenant, and was permitted to be used in the way of which the plaintiff complains. Under these circumstances this position was taken up on behalf of the plaintiff: It was said that the company had no right to let their arches for business purposes, and therefore had no right to let the strip of land behind as part of that which was held with the arches, and that the plaintiff was, therefore, entitled to an injunction prohibiting the defendants from using the land for any such purpose. That was an extremely formidable position to insist upon, and one that had to be considered carefully with reference to the authorities cited in support of it. The first case in point of date on which reliance was placed was *Bostock* v. *The North Staffordshire Railway Company* (4 Ell. & Bl. 798), decided in the year 1854, and that case it was said indicated the true principle with reference to the user of land acquired for the purposes of a railway, or any similar association, and established the plaintiff's position. In that case land had been acquired for the purposes of a reservoir by a canal company. The canal company sought to turn the reservoir to account by permitting it to be used by pleasure boats, and a neighbour who objected to its use in that way took proceedings to compel the canal company and their assignees the railway company to abandon and put an end to such a use of the reservoir. The case gave rise to a considerable difference of opinion. Erle, J. thought that what was done was within the powers of the company. On the other hand, Coleridge, J. and Watson, J. thought that what was done was *ultra vires*. And Lord Campbell agreed with them upon the ground that the Act of Parliament under which the company was constituted distinctly prohibited any such use of the reservoir, and upon that ground, and upon that ground only, the decision proceeded. The next case on which the plaintiff relied was the case of *Mulliner* v. *The Midland Railway Company* (40 L. T. Rep. 121; 11 Ch. Div. 611). There it appeared that the company upon whom Parliamentary powers had been conferred had sold, out and out, a right of way over a part of their property, and the objection was taken that the sale out and out of any part of the property devoted by an Act of Parliament to public purposes was *ultra vires*, and of that opinion was the late Master of the Rolls (Sir George Jessel) before whom the case came in the first instance. And from his very lengthy judgment the only principle that can be extracted is, that an out and out sale or appropriation for other than purposes indicated by the private Act by a company of this sort is *ultra vires*. The same principle applies here. All that was dealt with here was a right of way. It is the same principle as if a portion of land acquired for the purposes of the undertaking had been finally and completely sold by the company. It is clear that the case is no authority for the position taken by the plaintiff in this case, because, as was pointed out by the defendants, the arches and the strip of land behind were only let to tenants from year to year. Possession might, therefore, be resumed by the railway company at any time when the arches or strip of land became necessary for the purposes of their undertaking. Those were the cases relied upon by the plaintiff. The cases on the other hand upon which the defendants relied were, first, the case of *Bayley* v. *The Great Western Railway Company*

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(51 L. T. Rep. 337; 26 Ch. Div. 434) and *The Grand Junction Canal Company* v. *Petty* (59 L. T. Rep. 767; 21 Q. B. Div. 273). The case upon which both those authorities depended was not referred to, but it is the very well-known judgment of Parke, J., reported in the case of *Rex* v. *The Inhabitants of Leake* (5 B. & Ad. 469), the principle being that the temporary use of any land acquired for the purposes of a railway, or a similar undertaking, is not *ultra vires*, provided the use of it be not incompatible with the purposes for which powers have been conferred upon the company. The question of fact that I have to deal with now is, whether it is proved to my satisfaction that the use of the arches, and the strip of land behind each of the arches held under a tenancy from year to year, is incompatible with any of the objects of the undertaking. I am satisfied that there is no evidence that what has been done by the company is *ultra vires* or incompatible with the objects for which the company was constituted. It is in the power of the railway company to resume possession of the railway arches and the land behind on giving notice at any time that they think necessary, and on giving that notice they would have possession of the arches and land for the purposes of their railway. That the strip of land is not superfluous is again an element, because there was not any dispute, and could not be any dispute, that the strip of land was within the limits of deviation. It was obviously a piece of land which it was desirable the company should have for the purposes of repair if repairs were required, or for the purpose of extending their railway if hereafter it should appear to them desirable that that should be done. I deal, therefore, with this part of the case as with the other, and I pronounce judgment in favour of the defendants. I may state that I am only dealing with what was submitted to me on these two important questions to which I have referred, and with reference to which I have discussed the authorities which were cited in the course of the argument. It is not necessary to go through the facts of either of the cases of *Bayley* v. *The Great Western Railway Company* (*ubi sup.*) and *The Grand Junction Railway Company* v. *Petty* (*ubi sup.*), because in each the principle is, as I have said, clearly indicated that the temporary use of land for a purpose not incompatible with the objects of the company is within the powers of the company. No evidence was gone into before me to establish that what was done by the defendants was such an interference with the rights of the plaintiff as to amount to a nuisance, nor is that case set up on the pleadings. I therefore pronounce no opinion on that matter which may hereafter be the subject of discussion, whether the plaintiff's case may not be so shaped as to compel the defendants to alter the mode in which they at present use the property. I have nothing before me to enable me to express any opinion upon that. As the case has been presented to me, the plaintiff has not satisfied me that he has any right to complain in law; and my judgment must therefore be for the defendants, with costs.

From that decision the plaintiff now appealed.

Lawson Walton, Q.C. and *G. M. Freeman* for the appellant.

Kemp, Q.C. and *Mansel Jones* (with them *H. S. Croft*) for the respondents.

G. M. Freeman replied.

The arguments adduced in the court below were substantially repeated, and the authorities there cited were again referred to; with the addition, by the appellant's counsel, of the following cases as further supporting their contentions:

Norton v. *The London and North-Western Railway Company*, 39 L. T. Rep. 25; 9 Ch. Div. 623; on appeal, 41 L. T. Rep. 49; 13 Ch. Div. 268;
The Ashbury Railway, &c., Company v. *Riche*, 33 L. T. Rep. 450; L. Rep. 7 E. & I. App. 653;
Colman v. *The Eastern Counties Railway Company*, 10 Beav. 1;
The United Land Company v. *The Great Eastern Railway Company*, 33 L. T. Rep. 292; L. Rep. 10 Ch. App. 586, 589.

Lord Halsbury.—I am of opinion that the judgment of Mathew, J. must be affirmed. Speaking quite candidly, the difficulty I have in dealing with this case is, that I am very much afraid, looking at the language of the statement of claim and the claims that are put forward upon it, that in what I am about to say I may be said to be pronouncing *obiter dicta* on matters that do not arise, because the questions which are raised on the statement of claim are practically questions which Mr. Walton has been compelled to abandon. Still, one does not like after these arguments that the question should be allowed to go off on a matter of pleading or on a particular form of remedy sought by the statement of claim. Broadly, I think one may say that the railway company have obtained this piece of land, and that they are entitled to use it subject to this question: If they were to attempt to deal with it in such a way as would disenable them to carry on their business as a railway company—inasmuch as the Legislature has given them power to take the land compulsorily in consideration of the public benefiting by their carrying on the business of a railway company including the business of carrying passengers and forwarding goods along their line—then I should say that they could be restrained from alienating their property. In that case they would be departing from the bargain which the Legislature has in fact imposed upon them that they shall only obtain compulsory powers to take land in consideration of carrying on their public business. Again, if a shareholder were to complain and put forward the case that the railway company were undertaking some trade or occupation upon which he, as a shareholder, did not consent to their spending his money and applying their funds, they might be restrained if that could be made out. Or, again, if the Attorney-General thought it right to intervene on the ground that they were carrying on a business which was not authorised by the statute under which their powers were grounded, they might be restrained. But, subject to those considerations, a railway company are like an individual dealing with his own property. It is said that the use of this particular piece of land is a use not authorised by the statute. If it is meant that it is not expressly authorised by the statute, of course it is not. No minute or ancillary use of such part of a railway company's property is ever expressly given by statute. But it might as reasonably be contended, I think, that a railway

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company are not entitled to sell the hay which grows on the banks in cuttings, so that they might make something out of it. In fact, one might go through a great variety of uses which might be made of that which is not a necessary part of the business of carrying passengers or goods backwards and forwards, but is a use of that property without which they could not carry on business, and a use not inconsistent with the purpose for which the statute has incorporated the company. Now let us see what this use is. The company are carrying their line of railway along a line of arches. Arches, I presume, are cheaper than a solid embankment. Arches leave a hollow space, a part of which may be used for a variety of purposes. They may, for example, be used for the purpose of shops or habitations. The maintenance of the railway involves the building of these arches. But it is said that the railway company must not use them for some other purpose than their business requires. It seems to me that that is an entire misapprehension of all the decisions on the subject. No case has been quoted which establishes such a proposition as that. The authorities seem to me to run all one way, but not, I am afraid, in favour of the view which was contended for by Mr. Walton. In the first place, in the case of *Bostock* v. *The North Staffordshire Railway Company* (4 Ell. & Bl. 798) it seems to me that the rights of the adjoining proprietor there, rightly or wrongly, were supposed to rest on the peculiar words of the statute. No adjoining proprietor in the cases we have been referred to has ever suggested that he has a right to object to that use of the property of the railway company which any other person—apart from his being a person from whom the land was purchased—would have a right equally to complain of. I observed that Mr. Freeman—as I should have expected—said that he did not want to argue that question, it not being necessary for his purpose, because in this case the land was purchased, and therefore he wants to confine the argument to that. But, speaking for myself, I am not aware of any principle upon which that can rest. It is either in respect of an express or an implied covenant by the railway company that they will do nothing that will annoy—not that they will do nothing that will involve legal injury, because the plaintiff would have a right to bring an action for private nuisance. The plaintiff, however, has himself admitted that that case has broken down, and that there is no private nuisance. So it comes back to this, that there must be some express language of the statute, or some covenant which the statute has impliedly enacted, that nothing shall be done which shall render it inconvenient or annoying to the adjoining property. For that proposition I think we have complete and absolute authority. The only decision that I remember to have made any way in the other direction is Malins, V.C.'s judgment in *Norton* v. *The London and North-Western Railway Company* (39 L. T. Rep. 25; 9 Ch. Div. 623), which was in respect of a hoarding put up to prevent the acquisition of light. Whether that case has ever been approved of or not, I am bound to say for myself that, if that broad proposition was necessary in order to establish that case, I should unhesitatingly say that I entirely disagree with it. When the matter came on for decision before the Court of Appeal afterwards (see 41 L. T. Rep. 49; 13 Ch. Div. 268) it is clear that that point never was gone into at all. I quite adopt Mr. Freeman's view. I think it is a very just observation that, apart from the question which is raised in this case the railway company might well say that, for the protection of their own property and for the preservation of their property as a railway company, they would be quite entitled to prevent the acquisition of rights by ancient lights being established without their consent. Therefore I do not use that decision as against the present defendants. It seems to me that that leaves the question entirely without authority. I have to see whether there is anything in the Act of Parliament which so prevented the use of the railway arches, and I think the question does come and must come to that. If you have the right to let the railway arches it is impossible to contend that you cannot let this little piece of land, which gives additional accommodation to the railway arches in the form in which they are let. I for one entirely deny that there is any proposition of law established by authority which prevents the railway company from using this land and their arches, which they do not actually require for the purpose of sending an engine backwards and forwards on the line, for some other purpose that may afford profit to them. A great variety of examples have been given by various judges, but I rather hesitate to adopt entirely the language of Bramwell, L.J. in the case of *Attorney-General* v. *The Great Eastern Railway Company* (40 L. T. Rep. 265, 282; 11 Ch. Div. 449, 505). Probably he did not see the effect of what he was saying when he gave the illustration of a ferry boat. But it is familiar to us all that coal stores and bookstalls and a great variety of things may be set up by railway companies, which, although not actually used in the business of carrying passengers and goods, are nevertheless I think in the ordinary and business habits of a railway company things which they may do, and yet carry on their business quite consistently. I for one should be very sorry indeed to place any restriction on their powers to make to the best of their ability their undertaking profitable to their shareholders and a convenience to the public. In anything I have said I am not in the least endeavouring to undervalue the inconvenience and annoyance, and in one sense injury, that this possibly may be to the present plaintiff. I can quite understand it may be an annoyance to him. All I say is, that I cannot see a trace of any legal right of his that has been infringed of which he can avail himself.

Lindley, L.J.—I do not hesitate to say that I think the plaintiff in this case has been wrong from beginning to end. That he was wrong in the way in which he launched his case is obvious, because he has failed altogether to establish the ground on which, by his statement of claim, he sought relief. I refer to the supposed bargain or supposed trust by which this company is there stated to have been bound not to use this footpath for any other purpose. I also refer to the breakdown of the facts as to the alleged nuisance which are referred to in the statement of claim. Then, the plaintiff having failed on those grounds, he falls back on another ground which is a much more plausible one than the first, if it were well founded on the real facts of the case. The plaintiff says, "You the railway company have exceeded

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your statutory powers and I am damnified thereby, and that is a cause of action either at common law for damages, or in Chancery for an injunction." And for the purpose of maintaining that proposition the case of *Bostock* v. *The North Staffordshire Railway Company* (*ubi sup.*) and other cases have been referred to. If the plaintiff is well founded in his allegation that the railway company have exceeded their powers, and that he has proved—as in my opinion he has—that he is damnified, then I think the authorities on which he relies would support his claim and entitle him to relief, although it seems to me from those circumstances no right of his would be infringed. I think the case of *Bostock* v. *The North Staffordshire Railway Company* (*ubi sup.*) goes to that extent, and there are certainly cases to be found in the books in Chancery before Lord Eldon and Lord Cottenham which sanction that proposition. It is plain that the plaintiff is damnified. Now I come to the other part of the case, which is that the defendants are exceeding their statutory rights. Suppose they are, what is the measure of this? The law on that point is I take it now settled, and I do not know that it can be better stated than in the various speeches delivered by Lord Selborne and his colleagues in the House of Lords in the case of *The Attorney-General* v. *The Great Eastern Railway Company* (42 L. T. Rep. 810; 5 App. Cas. 473, 478). Lord Selborne says this: "I assume that your Lordships will not now recede from anything that was determined in *The Ashbury Railway Company* v. *Riche* (*ubi sup.*). It appears to me to be important that the doctrine of *ultra vires*, as it was explained in that case, should be maintained. But I agree with James, L.J. that this doctrine ought to be reasonably and not unreasonably understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorised ought not (unless expressly prohibited) to be held by judicial construction to be *ultra vires*." Then he says: "In the present case I think with the court below that the acts which the information was filed to restrain are not *ultra vires* of the defendant company. But I come to that conclusion not on the ground that they are such acts, on the border line between authority and no authority, as may reasonably be thought incidental to the exercise of powers expressly given, but because I think that they are expressly authorised by the 14th section of the Act of 1863." Now we come to this: I take it that there is nothing in this company's special Acts which expressly authorises that which is complained of. Of course, if there were, it would have been brought to our notice. Then comes the question, whether it is to be fairly implied; and then comes the question, what is the limit of power? Now, with the exception of one single case—namely, that which came before Malins, V.C. of *Norton* v. *The London and North-Western Railway Company* (*ubi sup.*)—it appears to me that all the authorities are consistent with this proposition, that any mode of enjoying a railway company's own land is impliedly permitted if such mode is not inconsistent with the provisions of the special Acts of that company, and is not an infringement of the rights of other persons. I have not found any case, with the exception of that case before Malins, V.C., which is inconsistent with that. The Legislature does not specify anything, but it specifies expressly the purposes for which the company is formed. It gives the railway company power to acquire land, and it gives the company power to use that land for any purpose which does not infringe the rights of others, and is not inconsistent with the purposes for which it is to be used. I believe that that is the true and sound proposition. Certainly there is the direct authority of this court in *Bonner* v. *The Great Western Railway Company* 48 L. T. Rep. 619; 24 Ch. Div. 1). I admit that the case of *Norton* v. *The London and North-Western Railway Company* (*ubi sup.*), before Malins, V.C., is entirely opposed to such a doctrine. He went the length of saying that a railway company were exceeding their powers when they put up a hoarding to obstruct a neighbour's light. I must say I cannot follow that at all. It appears to me to be contrary to sound principle. It is certainly not warranted by any other decision in the books, and it is, in my opinion, quite inconsistent with other decisions. Although that decision of Malins, V.C. was affirmed on appeal, it was affirmed on different grounds. I think the foundation of the case put forward at the last moment fails just as the case in the court below failed, and that therefore this appeal must be dismissed with costs.

Smith, L.J.—I also am of opinion that this appeal fails. I will take it that the indorsement on the writ, the statement of claim, and all the pleadings have been amended to raise the real point which is now submitted to this court, which is, that Mr. Foster claims an injunction to restrain the London, Chatham, and Dover Railway Company from in future letting these arches to tenants with the appurtenances, which I understand are behind. That is the real substance of the case which is now left to us. The question of trespass which was originally started in the pleadings, and the question of nuisance to Mr. Foster, are all out of the case. The question of damages is also gone; and the present question is whether or not Mr. Foster is entitled to an injunction to restrain the London, Chatham, and Dover Railway Company from letting these arches. It is proved that in 1860 the railway company purchased the *locus in quo*—that is the *locus* upon which they built these arches—which purchase was sanctioned by their special Act, and the land upon which this footway in the first instance was made, as owners in fee. It was attempted to set up that they did not buy it as owners in fee, but that they bought it subject to some restrictions. That, however, went to the jury, as it was a point for the jury, and that point has been found contrary to Mr. Foster's contention, and the sole case which is left for us, as I have pointed out, is whether or not he is entitled to this injunction. Now, it has been argued on his behalf that, inasmuch as the London, Chatham, and Dover Railway Company purchased this land for the purpose of their railway, the letting of these arches for profit, and the adjuncts in the rear, is not a purpose for carrying on the railway, and that it is *ultra vires*; and that, therefore, Mr. Foster has a *locus standi* in a court of law to prevent this being done by the company. In the first place, I would remark—although I am not going to decide this point, as it is not necessary—that no legal right of the plaintiff has been infringed. He cannot say that he has suffered any damage for which he could bring any action

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against the railway company; and therefore it is said, inasmuch as you have no such right, you have no *locus standi* at all in the present action. But Lindley, L.J. has stated (and this being an equitable matter it is worthy of the greatest consideration) that, although no legal right had been infringed, equity in some cases would have interfered. Therefore I do not decide this case upon the point of whether or not the plaintiff has or has not a right to come to this court to ask for an injunction. But I decide this case on the point that I am satisfied from the authorities which have been cited by the learned counsel on both sides that the plaintiff's counsel are not right in their proposition when they say that the railway company, when it has purchased land for the purpose of a railway, are only authorised to run their trains backwards and forwards, and to have stations, and so on, for the purpose of carrying goods and passengers upon the railway. That has been decided at any rate by the House of Lords which is a binding authority upon us, and is in consonance with other cases that have gone before. Lindley, L.J. has dealt with that passage in Lord Selborne's judgment in the case of *The Attorney-General* v. *The Great Eastern Railway Company* (*ubi sup.*). Therefore I need not refer to it, but I will directly read a passage from Lord Blackburn's judgment in that case. But it seems to me that the real question which is now before the court had its origin in the case of *Rex* v. *The Inhabitants of Leake* (5 B. & Ad. 469.) I do not cite *Rex* v. *The Inhabitants of Leake* as being a case in point. I only cite it for the passage that is to be found in Park, J.'s judgment (at p. 478), where he says: "If the land were vested by the Act of Parliament in commissioners, so that they were thereby bound to use it for some special purpose, incompatible with its public use as a highway"—the question in that case was whether they could use their bank for the purpose of a highway—"I should have thought that such trustees would have been incapable in point of law to make a dedication of it; but if such use by the public be not incompatible"—now here is his real meaning—"with the objects prescribed by the Act, then I think it clear that the commissioners have that power." That passage in the judgment of Parke, J. is supported by different decisions, in different language I own, in the House of Lords. I will now read what Lord Blackburn says upon this point in *The Attorney-General* v. *The Great Eastern Railway Company* (*ubi sup.*) which is apposite to this case. He says, when dealing with the case of *The Ashbury Railway Carriage and Iron Company* v. *Riche* (*ubi sup.*): "That case appears to me to decide at all events this: that where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorise is to be taken to be prohibited; and, consequently, that the Great Eastern Company, created by Act of Parliament for the purpose of working a line of railway, is prohibited from doing anything that would not be within that purpose"—that means within the Act of Parliament—"My Lords, I quite agree with what James, L.J. has said on the first point as to prohibition, that those things which are incident to, and may reasonably and properly be done under the main purpose, though they may not be literally within it, would not be prohibited." Now, where is there any case contrary to that? If there were any case, of course this judgment in the House of Lords in *The Attorney-General* v. *The Great Eastern Railway Company* (*ubi sup.*) would be conclusive. It has been pointed out by Lord Halsbury and by Lindley, L.J., and also by Mathew, J., that the only case contrary to that is *Norton's* case (*ubi sup.*), decided by Vice-Chancellor Malins, when he prohibited a railway company from putting up a hoarding to protect their own property and take away the light from a neighbouring owner. I do not myself see why he should have prohibited the railway company from putting up a fence to protect their own property. What the railway company were doing there was to protect their own property, and that case has not been followed, nor is it law. It seems to me upon these considerations the letting of these arches, which is the sole cause of complaint, does come within these words—that they are things which are incidental to and proper to be done by them, although they may not literally be within the words of the Act. Upon this ground I am of opinion that this appeal fails.

Appeal dismissed.

Solicitors for the appellant, *Rowcliffes, Rawle, and Co.*

Solicitor for the respondents, *J. Lewis Morgan.*

Saturday, Dec. 15, 1894.

(Before LINDLEY and SMITH, L.JJ.)

Re HERBERT F. ODDY (a Solicitor). (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Appeal—Order on summons to review taxation—High Court or Court of Appeal—"Matters of practice and procedure"—Supreme Court of Judicature (Procedure) Act 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-sects.* 1 (*b*), (4), (5) —*Rules of Court, Aug.* 1894, *Order LIV., r.* 23.

An appeal from an order made on a summons to review taxation of a solicitor's bill of costs is within sect. 1, *sub-sect.* (4) *of the Supreme Court of Judicature (Procedure) Act* 1894, *it being a "matter of practice and procedure;" and therefore such an appeal lies to the Court of Appeal, and not to the High Court.*

A. J. DADSON, having obtained an order for the taxation of a bill of costs delivered to him by his solicitor, Herbert F. Oddy, the master disallowed certain items in the bill. Oddy then carried in objections to the taxation. The master overruled the objections on the grounds that Oddy was precluded by the terms of a letter, under which he had agreed to accept Dadson's retainer, from charging Dadson for the items in question. Oddy then appealed to Day, J. sitting at chambers. His Lordship, on the 8th Dec. 1894, allowed the objection, and remitted the bill to the master, but gave Dadson leave, "if necessary," to appeal.

Dadson now appealed to the Court of Appeal.

By sub-sect. 1, clause (*b*), of sect. 1 of the Supreme Court of Judicature (Procedure) Act 1894, no appeal shall lie without the leave of the judge, or of the Court of Appeal, from any interlocutory order or interlocutory judgment made or given by a judge (subject to certain exceptions).

(*a*) Reported by E. A. SCRATCHLEY, Esq., Barrister-at-Law.

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By sub-sect. (4):

In matters of practice and procedure every appeal from a judge shall be to the Court of Appeal.

By sub-sect. (5):

In all cases where there is a right of appeal to the High Court from any court or person, the appeal shall be heard and determined by a divisional court constituted as may be prescribed by rules of court; and the determination thereof by the Divisional Court shall be final, unless leave to appeal is given by that court or by the Court of Appeal.

Rule 23 of Order LIV. of the Rules of the Supreme Court of Aug. 1894 provides that:

In the Queen's Bench Division, except in matters of practice and procedure, the appeal from a decision of a judge at chambers shall be to a divisional court.

Ernest Pollock (*T. Willes Chitty* with him), for the appellant, stated the nature of the appeal.

E. T. Holloway for the respondent.—I take the preliminary objection that this is not a "matter of practice and procedure" within sub-sect. 4 of sect. 1 of the Supreme Court of Judicature (Procedure) Act 1894; and that, therefore, the appeal ought to have been to the Divisional Court, and not to the Court of Appeal: (see sub-sect. (5) of sect. 1 and Rules of Court, Aug. 1894, Order LIV., r. 23.) [Lindley, L.J.—This is a matter of procedure, is it not?] It is a summons to review the taxation of a solicitor's bill of costs. There is a question of law arising on an agreement between the parties. I do not object to this tribunal, but I thought it proper to bring this point to the notice of the court.

Ernest Pollock, contrà.—I submit that this is a matter within sub-sect. 4. If it is not within sub-sect. 4, it does not, at any rate, come within sub-sect. 5, for two reasons: first, because that sub-section only applies to cases where there is "a right of appeal," and this being an interlocutory order of a judge, by sub-sect. 1, clause (*b*), no appeal lies except by leave; and secondly, because this is not an appeal "from any court or person" within the meaning of sub-sect. 5. That sub-section was intended only to apply to appeals from County Courts and from official referees. It follows that, unless this appeal is within sub-sect. 4, the appellant has no appeal open to him at all.

Lindley, L.J.—This is a very important question, and this is the first time that it has been raised. We are not, therefore, disposed to decide it off hand. We will reserve the point, and in the meantime hear the appeal.

The appeal was accordingly argued upon the merits.

Lindley, L.J.—As regards the preliminary objection that this is a matter of procedure, I think that Mr. Pollock's contention is right, and that the appeal has been properly brought to this court. [His Lordship then dealt with the merits of the case, and said that it became unnecessary finally to decide the question raised by the preliminary objection, as he was of opinion that the appeal ought to be dismissed on the merits.]

Smith, L.J.—The first point that has been argued is, that this summons to review the master's taxation of the solicitor's bill of costs is a "matter of practice and procedure." I am clearly of opinion that it is, and that this court has jurisdiction to entertain the appeal. I am quite satisfied that the contention put forward on behalf of the appellant is correct. [On the merits his Lordship came to the same conclusion as that arrived at by Lindley, L.J.] *Appeal dismissed.*

Solicitors for the appellant, *Morten, Cutler, and Co.*

Solicitor for the respondent, *Herbert F. Oddy.*

Dec. 13 *and* 14, 1894.

(Before Lord Halsbury, Lindley and Smith, L.JJ.)

Moore *v.* The Vestry of the Parish of Fulham. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Money paid under compulsion of law—Mistake of fact—Payment of money demanded by summons—Withdrawal of summons after demand for return of money—Right to recover back money paid.

The defendants summoned the plaintiff before a police magistrate to enforce payment of his apportioned part of the cost of making up a street. Before the summons was returnable the plaintiff sent a cheque for the amount to the defendants, who sent him a receipt. Shortly afterwards, and before the summons was heard, the plaintiff wrote demanding a return of the money on the ground that he had paid it under a mistake of fact that he was a frontager, and he had since discovered that he was not, and he stated that if the money was not returned he should attend the hearing of the summons. The defendants replied that, as the money had been paid, they would withdraw the summons without the plaintiff's attendance, and by leave of the magistrate the summons was withdrawn.

Held, that the money had been paid by the plaintiff under compulsion of legal process, and that he could not recover it back from the defendants.

Decision of Day, J. affirmed.

Judgment of Lopes, L.J. in Caird *v.* Moss (55 *L. T. Rep.* 456; 33 *Ch. Div.* 36) *distinguished.*

On the 19th Sept. 1893 the defendants took out a summons before a police magistrate returnable on the 3rd Oct. for 35*l.* 13*s.* 9*d.*, the amount of a part of the expense of making up a road called Silvio-street, which they apportioned against the plaintiff on the ground that his land abutted on that road.

On the 2nd Oct. the plaintiff, under the mistaken belief then that he was a frontager and was therefore liable to pay, sent a cheque to the vestry for the amount. On the 3rd they sent him the usual printed form of receipt. The cheque sent did not include the costs of the summons which the defendants had demanded. On the summons being called on it was, at the request of the defendants, adjourned to the 24th Oct., and they informed the plaintiff of that fact.

On the 19th Oct. the plaintiff's solicitor wrote to the defendants demanding the return of the money on the ground that the plaintiff's property did not abut on the street, and consequently he was not liable, and informing them that if the money was not returned he should attend the adjourned hearing of the summons. The defen-

(*a*) Reported by W. C. Biss, Esq., Barrister-at-Law.

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dants replied that, inasmuch as the plaintiff had paid the money, they would withdraw the summons without the plaintiff's attendance. Neither the plaintiff nor his solicitor attended, and by leave of the magistrate the summons was withdrawn.

On the 17th Nov. the plaintiff's solicitor again wrote demanding the return of the money, and as it was not paid the writ in this action was issued demanding the return of the amount paid, on the ground that the plaintiff paid it to the defendants under a mistake of fact that his land bounded or abutted upon Silvio-street.

The action was heard on the 27th July 1894 by Day. J., who held that the money had been paid by the plaintiff under the compulsion of legal process, and therefore the plaintiff could not recover it, and he gave judgment for the defendants. From this decision the plaintiff appealed.

Radcliffe for the appellant.—This money was paid in consequence of a mistake of fact, the plaintiff having paid it because he thought he was a frontager, but he afterwards discovered that he was not. The money was not recovered by process of law, the plaintiff sent a cheque and the summons was withdrawn. The decision of *Marriot* v. *Hampton* (7 T. R. 269; Sm. L. C. 9th edit. vol. 2, p. 441) that money paid under compulsion of legal process cannot be recovered back only applies "while that process stands:" (per Lopes, L.J. in *Caird* v. *Moss*, 55 L. T. Rep. 453, 456; 33 Ch. Div. 22, 36; Leake on Contracts, 3rd edit. p. 79.) Here the summons was "withdrawn" without being heard, and therefore, if the money was recovered under any process, that process does not stand. The cheque sent by the plaintiff did not include any costs, though they were demanded, and he has never paid any. It is similar to a case of a discontinuance of an action. There is, strictly speaking, no power to withdraw a summons, but it is similar to a dismissal for want of prosecution. If the plaintiff had attended the hearing of the summons and it had been dismissed, he might still have had to bring an action to recover back the money. *Marriot* v. *Hampton* is an extension of the principle of *res judicata* to a case where money has been paid in the course of proceedings. If that is not so, it might still have been said that the plaintiff paid the money under compulsion of law, although the proceedings had ended in his favour. The object of the decision is to prevent multiplicity of proceedings. In *Duke de Cadaval* v. *Collins* (4 A. & E. 858) a person who had paid money in consequence of legal proceedings fraudulently commenced against him, was allowed to recover it back in an action. There is no reason why the principle applied to a case of extortion should not also apply to a case of mistake of fact. In *Marriot* v. *Hampton* (*ubi sup.*), *Brown* v. *M'Kinally* (1 Esp. 279), and *Hamlet* v. *Richardson* (9 Bing. 644), the money had been paid although the plaintiff thought he was not liable. Day, J. relied on the fact that the plaintiff had not objected to the summons being merely withdrawn, but it was withdrawn after the plaintiff had said he had paid the money under a mistake of fact and had demanded repayment, and informed the vestry that if it was not returned he would appear and resist the summons.

Macaskie, for the respondents, was not called on.

Lord HALSBURY.—I am of opinion that this appeal fails, because the principle of law is that money, though it is not recovered under a judgment, but is paid under the pressure of legal process, cannot be recovered back. That principle appears to me to depend on this: that the person who has paid the money had an opportunity of defending the action if he pleased, but thought proper to pay, and therefore the law will not allow him in a second action to set up a defence which might have been set up as a defence to the original action. In *Milnes* v. *Duncan* (6 B. & C. 671, 679) Holroyd, J. states quite accurately what I think is the principle. He says: "If the money had been paid after proceedings had actually commenced I should have been of opinion that, inasmuch as there was no fraud in the defendant, it could not be recovered back;" and Bayley, J. in the same case says (6 B. & C. 677): "There is no doubt as to the rule of law applicable to this case. If a party pay money under a mistake of the law he cannot recover it back." That is the broad principle, and it is manifest that the effort to confine it to a case where the money is actually recovered by process of law is inconsistent with what is laid down in all the cases, because in every one of them, so far as I remember, the process had not arrived at judgment, but it was before the process had arrived at judgment that the then defendant thought fit to pay the money, and the authorities show that in such a case the law will not allow him to revive the question which ought to have been determined in the original process. In the case of *Caird* v. *Moss* (*ubi sup.*), upon which such reliance has been placed, Lopes, L.J., speaking of the case then before him, not unnaturally referred to the fact that the judgment was still standing, and for this reason, because the money in that case was paid under a judgment founded on the construction of an agreement in an action to rectify that agreement on the ground that such a construction was contrary to the intention of all the parties; and after giving judgment upon the merits of the case Lopes, L.J. practically says: "Why this judgment stands now. You cannot reopen that question. The plaintiffs had full opportunity of commencing those proceedings while the former action was pending, and ought to have done so, and we cannot now interfere with that judgment; that judgment still stands." It is quite true that the passage in his judgment, read without connection with the matter that was then being decided, looks as if he was putting a qualification upon the general rule of law; but when you look at the facts it is plain that he was doing nothing of the sort. He was referring to the fact that the money was paid in that particular case under a judgment, and that that judgment was still standing, and no effort had been made to upset it. Under those circumstances it was *à fortiori* that the money could not be recovered back. I am therefore of opinion that the judgment of Day, J. was quite right, and that the appeal ought to be dismissed.

LINDLEY, L.J.—I am entirely of the same opinion. I think, when you consider it, that the case is absolutely covered by a string of authorities,

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of which *Hamlet* v. *Richardson* (*ubi sup.*) is as good a type as any. The money there was paid after a writ to recover it had been issued and served, and, in fact, after appearance had been entered to it. But what does that mean? It means this: that the defendant says in substance to his opponent, "I do not intend to fight you. I will pay rather than fight." If he chooses to take that course he cannot back out of it, whether he discovers that he has made a mistake or does not. That is the *ratio decidendi* in that case and in several others. Of course, money paid under a judgment may be recovered back, and is recovered back, if that judgment is set aside. The Court of Appeal, in setting aside a final judgment, always orders the money paid under it to be refunded. I think Lopes, L.J., in the passage in his judgment in *Caird* v. *Moss*, which has been referred to, had that in his mind, and was dealing with money paid under a judgment which had been set aside. The plaintiff cannot recover back the money in this case.

SMITH, L.J.—I also think this appeal fails. This money was paid under the threat or fear of a summons which had been taken out, which is a legal process. A summons had been taken out against the present appellant to compel him to pay this apportionment, and voluntarily he went under that threat or fear and paid his money. A string of authorities from *Marriot* v. *Hampton*, which is far enough back, down to the present time, has said that money paid under those circumstances cannot be recovered back. In my judgment the point taken that the summons was afterwards withdrawn has nothing to do with the matter. The question is, was the money paid under fear or threat of legal process? I think it clearly was, and that this action cannot be maintained.

Solicitor for the plaintiff, *W. Tyndale Moore.*
Solicitor for the defendants, *T. Blanco White.*

Thursday, Dec. 6, 1894.

(Before Lord ESHER, M.R., LOPES and RIGBY, L.JJ.)

HANFSTAENGL *v.* THE AMERICAN TOBACCO COMPANY. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

International copyright—Picture painted abroad — Publication abroad — Place where picture "produced"—Action for infringement of copyright in England—Necessity of registration.

Under the International Copyright Act 1886, *and the Order in Council of Nov.* 28, 1887, *made thereunder, registration in England is not a condition precedent to the maintenance of an action for infringement of the copyright of a picture produced in a foreign country, party to the Convention of Berne of* 1887.

With reference to such a picture the word "produced," as used in the International Copyright Act 1886, *is equivalent to "published."*

Fishburn *v.* Hollingshead (64 *L. T. Rep.* 647; (1891) 2 *Ch.* 371) *disapproved.*

Hanfstaengl *v.* Holloway (68 *L. T. Rep.* 676; (1893) 2 *Q. B.* 1) *approved.*

THIS was an appeal from the judgment of Pollock, B. at the trial of the action without a jury.

The action was brought for an injunction to restrain the defendants from repeating, copying, colourably imitating, or otherwise multiplying for sale, hire, exhibition, or distribution, an original painting called "The Love Letter," and from selling, exhibiting, or distributing any such repetitions or copies; and for forfeiture of all copies in the defendants' custody or control; and for a penalty of 10*l.* for every copy unlawfully made, exhibited, or distributed; and for damages.

The picture in question was an original painting, painted in the year 1888 in Italy, by one Mareotti, an Italian artist. He shortly after sold it, with such copyright as he had in it, to a Florentine art dealer, who then assigned it, with all his rights in it, in Dec. 1888, to the plaintiff. The picture was never registered in Italy.

The plaintiff took the picture to Germany, and at Munich had it photographed. Copies of this photograph he sold in Germany and England. The picture was not registered in Germany, and it was admitted by the defendants that no registration is required there for the copyright of works of art

The defendants, a tobacco company, caused copies to be made of the picture, printed in colours, and bearing an advertisement of their tobacco. They then distributed copies to retail tobacconists in the United Kingdom for exhibition as show cards in their shops.

The plaintiff had never registered the picture in England. but, claiming to be owner of the subsisting copyright therein, brought this action for infringement.

At the trial before Pollock, B. without a jury, the learned judge held that the word "produced" in the International Copyright Act 1886, when applied to a picture, means "made," and not "published," and that the picture in question was therefore produced in Italy, not in Germany; and since the plaintiff, under Italian law, had no right of action, this action was not maintainable in England. He therefore gave judgment for the defendants.

The plaintiff appealed.

The International Copyright Act 1886 (49 & 50 Vict. c. 33), which received the Royal assent on the 25th June 1886, and which recited in the preamble that, at an international conference held at Berne in Sept. 1885, a draft convention was agreed to for giving authors of literary and artistic works first published in one of the countries parties to the convention, copyright in such works throughout the other countries parties to the convention, and that, as without the authority of Parliament the convention could not be carried into effect in Her Majesty's dominions, it was expedient to enable Her Majesty to accede to the convention, provides as follows:

Sect. 2. The following provisions shall apply to an Order in Council under the International Copyright Acts . . . (3.) The International Copyright Acts and an Order made thereunder shall not confer on any person any greater right or longer term of copyright in any work than that enjoyed in the foreign country in which such work was first produced.

Sect. 4. (1.) Where an Order respecting any foreign country is made under the International Copyright Acts, the provisions of those Acts with respect to the registry

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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and delivery of copies of works shall not apply to works produced in such country, except so far as provided by the Order.

Sect. 10. (1.) It shall be lawful for Her Majesty from time to time to make Orders in Council for the purposes of the International Copyright Acts and this Act . . .

Sect. 11. In this Act, unless the context otherwise requires, . . . the expression "produced" means, as the case requires, published or made or performed or represented, and the expression "production" is to be construed accordingly.

By the Convention of Berne, which was signed on the 9th Sept. 1886, it was agreed as follows:

Art. 1. The contracting States are constituted into an union for the protection of the rights of authors over their literary and artistic works.

Art. 2. Authors of any of the countries of the union, or their lawful representatives, shall enjoy in the other countries for their works, whether published in one of those countries or unpublished, the rights which the respective laws do now or may hereafter grant to natives. The enjoyment of these rights is subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work, and cannot exceed in the other countries the term of protection granted in the said country of origin. The country of origin of the work is that in which the work is first published. . . .

By an Order in Council dated the 28th Nov. 1887, and made by virtue of the authority committed to Her Majesty by the International Copyright Acts 1844 to 1886, it was ordered that the convention, as set forth in the first schedule to the Order, should have full effect throughout Her Majesty's dominions, and that the Order should extend to certain countries, including Germany and Italy, referred to in the Order as the foreign countries of the Copyright Union. It also contained the following articles:

3. The author of a literary or artistic work which, on or after the commencement of this Order, is first produced in one of the foreign countries of the Copyright Union shall, subject as in this Order and in the International Copyright Acts 1844 to 1886 mentioned, have, as respects that work throughout Her Majesty's dominions, the same right of copyright, including any right capable of being conferred by an Order in Council under sect. 2 or sect. 5 of the International Copyright Act 1844, or under any other enactment, as if the work had been first produced in the United Kingdom, and shall have such right during the same period; provided that the author of a literary or artistic work shall not have any greater right or longer term of copyright therein than that which he enjoys in the country in which the work is first produced.

8. This Order shall be construed as if it formed part of the International Copyright Act 1886.

Dickens, Q.C. and *R. M. Bray* for the appellant.—The words of the convention are perfectly clear, but the defendant contends that the word "published," there used, are cut down by the use of the word "produced" in the Act of 1886, so that, in the case of an artistic work, the copyright is to be governed by the law of the country in which the work was "made." The Act was passed to give effect to the convention, and must not be so construed as to cut down the meaning of it. It is clear that this picture was first "published" in Germany, and that the law of Germany determines whether the plaintiff has a copyright, and not the law of Italy. Registration is not necessary in Germany, though it is necessary in Italy.

Crackanthorpe, Q.C. and *Morton Smith* for the respondents.—The appellant must fail because (1) this picture was first "produced" in Italy, where it was "made;" and (2) because the copyright has not been registered in this country. As to the first point, sect. 2, sub-sect. 3, of the Act of 1886 provides that a person is to have no greater right than that enjoyed in the foreign country in which the work was first "produced;" and the word "produced" is defined in sect. 11 and means, in the case of a picture, "made." This picture was "made" in Italy, and was therefore "produced" in Italy, and the appellant has no copyright, because he has not registered it in Italy as required by the law of that country. In the Fine Art Copyright Act 1862 the word "made" is used in relation to paintings, and that is the word applicable to pictures, and is the word used in the Act of 1886 to apply to pictures. If the word "published" were used as applicable to pictures, it would at once lead to ambiguity as to what is publication in such a case. For that reason the Act of 1886 expressly provides that, in the case of a picture, publication means "making." An action cannot be brought in England in respect of copyright in a foreign work unless it has been registered in England. Under art. 2 of the Convention and the Order in Council a foreign author is to have no greater right than a native, and must, therefore, register in the same way as a native must register. There are conflicting decisions on this point. In *Fishburn* v. *Hollingshead* (64 L. T. Rep. 647; (1891) 2 Ch. 371) Stirling, J. held that registration was necessary, while Charles, J., in *Hanfstaengl* v. *Holloway* (68 L. T. Rep. 676; (1893) 2 Q. B. 1), held that it was not necessary. The object of the registration in this country, required by the different Copyright Acts, is to prevent people in this country from getting into trouble by copying works when they are ignorant of the existence of any copyright. If no registration of foreign works is required in this country, the foreigner is in a much better position than the native, and the native has no means of knowing whether he is infringing a foreign copyright or not. There is no greater hardship imposed on a foreigner by requiring him to register than is imposed on him by the patent laws and, in the case of trade marks, by the Act of 1883. But for sect. 4, sub-sect. 1, of the Act of 1886 a foreigner would have had to register twice, once under the International Copyright Acts and once under the English Copyright Act of 1842. Sect. 4 releases a foreigner from the first of such registrations, but it is submitted that he is still bound to register under the English Act.

Lord Esher, M.R.—In this case the whole matter depends upon what is the true construction of the International Copyright Act 1886. A great deal has been said about the judgment of Stirling, J. in the case of *Fishburn* v. *Hollingshead* (*ubi sup.*), and if his judgment is to the same effect as that of Charles, J. in *Hanfstaengl* v. *Holloway* (*ubi sup.*), then I agree with what he said there; but if it is opposed to the judgment of Charles, J., then I must say I disagree with him on this question. Now, in construing the Act of 1886, which I think is the only material statute to consider here, we may take into consideration that which is common knowledge, that from time to time Acts of Parliament have been passed by which successive steps have been taken for the

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benefit of foreigners in the matter of copyright, and that the Act of 1886 is the last which has been passed for their relief. The scheme of these successive Acts has been to obtain for Englishmen abroad the same benefit as was being granted to foreigners in England. Now, in 1885, a conference was held at Berne between the representatives of several countries, for the purpose of arriving at some agreement upon the question of international copyright. This country was represented at the conference, but though a draft convention was agreed to, it was clear that a convention would not of itself have such force in England as to override Acts of Parliament. This draft was obviously laid before Parliament, and the Act of 1886 was passed, as appears from the preamble, to enable the Queen to sign the convention, so that it might be carried into effect in Her Majesty's dominions. We have been asked to enter upon an inquiry whether the convention, as signed, followed exactly the draft convention as laid before Parliament. I absolutely decline to go into that question, and I assume that the convention, as signed, is the same thing as that which the Act authorised Her Majesty to accede to. Now, the object of the convention is shown in art. 1, and from that article it appears that the word "author" is used in the convention as applicable, not only to the writers of books, but to the authors of artistic works, such as paintings and sculpture. Art. 2 then makes the following provision for the benefit of authors: [His Lordship read it.] Power is then given in the Act of 1886 to the Queen to make provision by Orders in Council for the carrying out of the Act, and sect. 2 defines that power. Sub-sect. 3 enacts that an Order shall not confer on any person any greater right or longer term of copyright in any work than that enjoyed in the foreign country in which such work was "first produced." That word "produced" is a larger word than "published," and is defined in sect. 11. What is the meaning in that definition of the expression "as the case requires"? "The case" is the transaction which is being dealt with here, namely, the adoption of the Convention of Berne by an Order in Council so as to carry it into effect. Therefore, the word "produced" must be construed as meaning "published" when you are considering what is the "country of origin" of a work, that expression in the convention being defined in art. 2 as the country in which the work is "first published." That being so, the question here is, in what country was this picture first published? The question is not, in what country the picture was "made." The word "made" is an unusual one to apply to a picture, and is not used at all in this convention. Wherever the statute is being dealt with, in so far as it enables the Queen to carry into effect the Convention of Berne, the word "produced" must be construed as meaning "published." Therefore, I agree with what Charles, J. said in his judgment in *Hanfstaengl* v. *Holloway* (*ubi sup.*), that this Act "was not designed to impose disabilities, but rather, if they existed, to remove them, and to leave the foreign and native author as nearly as might be on an equality. The foreigner who complies with the requirements of the law of his own country is to be protected in England; the Englishman who complies with the requirements of English law is to be protected in the foreign countries of the Copyright Union." I can conceive nothing more just or more practicable than that, and that is the construction of the Act which I adopt. I think this appeal should be allowed.

LOPES, L.J.—I am of the same opinion. Two questions have been raised, the first being whether registration is necessary as a condition precedent to this action being brought. In my opinion it is not, and I am satisfied to decide that upon the true construction of the International Copyright Act 1886 taken with the Convention of Berne and the Order in Council of the 28th Nov. 1887. With regard to what was said as to the draft only of the convention being contemplated by the Act of 1886, I think that it is not immaterial to observe that the convention itself is set out in a schedule to the Order in Council which was made after the Act was passed. In considering whether registration is necessary or not, I think there is no need to go into the old Copyright Acts. The intention of the Legislature was to create a new order of things and remove, as Charles, J. said, the disabilities attaching to foreigners whose works come into this country. Sect. 4, sub-sect. 1, of the Act, provides that the provisions of the International Copyright Acts as to registry and delivery of copies of works shall only apply so far as may be provided by the Order in Council. The Order in Council, subsequently made, contains no provision with regard to registration. The provisions of previous Acts, therefore, do not apply, and that disposes of the question as to the necessity of registration. The second question is, what is the country of origin of this picture? It is said on the one hand that the country of origin is Italy, because that is the country where it was painted. It is said that "produced" means "made" and not "published." On the other hand it is said that Germany is the country of origin because it was published there. Now, by art. 2 of the convention it is provided as follows: [His Lordship read it.] The word "produced" is not used there at all, it is only used in the Act of Parliament and in the Order in Council. It is defined in sect. 11 of the Act as meaning, "as the case requires, published, or made, or performed, or represented." The words "as the case requires" refer to the Convention of Berne, and the result, in my opinion, is that "published" is the word which is to be applied to the picture which is the subject of this action. I agree that this appeal should be allowed.

RIGBY, L.J.—In my judgment there are only two questions involved in this appeal. The first of them is the construction of the International Copyright Act 1886 with regard to the meaning of the word "produced." That word is not to be found in the Convention of Berne. Supposing that publication only was being dealt with, the natural word to have been used in the Act would have been "published." But that Act was intended to apply to other cases than those of publication in any ordinary sense of the word, and therefore the Legislature used a wider word than "published," and chose a word which has not got any exact legal meaning, and which therefore required interpretation in the statute in which it was being used. Reading the words of the interpretation clause literally, there is no doubt, in my mind, that "production" includes "publication" of everything that can be published. I cannot doubt that, independently of the Conven-

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tion of Berne, works of art such as paintings are capable of being published as well as being made, and that fact is clearly recognised by the convention. But it is argued that sect. 11 ought to be construed *reddendo singula singulis*, and, because some of the words there used are not applicable to some of the subjects being dealt with, such as "performance" and "representation," therefore the words are to be separated, and it is suggested that "published" should be limited to literary works, and that "made" should be limited to artistic works, such as painting and sculpture. I do not so read the section. I think that the collateral arguments used in support of that contention were really against it. For instance, it was said that the word "author" applies only to a literary work. But the statute says the contrary in plain words, for, in sect. 11, "author" is defined to mean "the author, inventor, designer, engraver, or maker of any literary or artistic work." The word "author" is, therefore, expressly applicable to the maker of an artistic work. I consider, therefore, that, with reference to a picture, the word "produced" means "published." It is true that the actual convention was not signed till after the passing of the Act; but the Act was, in fact, passed in order to enable Her Majesty to accede to the convention, not, perhaps, literally in the form of the draft which had been already informally agreed to, but to its effect and purport. Now, as to the question of the necessity of registration in this country as a condition precedent to an action of this kind being brought. There is some complication of Acts, earlier ones being incorporated with later ones, but the effect of sect. 4 of the Act of 1886, which is the governing section in this matter, seems to me to be reasonably plain. The section speaks of an Order in Council "under the International Copyright Acts." By the second part of the first schedule to the Act sect. 12 of the Copyright Act of 1862 is included under the heading of "International Copyright Acts," and that section includes the provisions of the International Copyright Act 1844, so as to make them a part of the Act of 1862. Therefore, sect. 4 deals with the provisions of the Act of 1844 as incorporated in the Act of 1862. Looking now at sect. 4 of the Act of 1886, the question is, whether any provision for registration in this country can possibly survive it unless something has been provided for by an Order in Council? I think it cannot. Moreover, I do not see how any provisions as to registration in a merely municipal copyright Act can apply to international copyright. It is only by an Act applicable to international copyright that the duty of registration in this country can be enforced upon foreigners. With regard to the judgment of Stirling, J. in *Fishburn* v. *Hollingshead* (*ubi sup.*), the opinion given there by that learned judge upon the question of the necessity of registration, he expressly states to be only an opinion, and he reserves to himself full liberty to reconsider the point, so that it cannot be taken as a final decision by him. He makes a distinction, which is perfectly sound, between the International Copyright Act and the Copyright Acts, but I think he has not drawn the line properly. The Privy Council have, I daresay very wisely, refrained from making any provision as to registration, and therefore I think that, under this International Copyright Act 1886, no terms as to registration in this country exist. I agree that the appeal should be allowed.

Appeal allowed.

Solicitor for the plaintiff, *Herbert Bentwitch.*

Solicitor for the defendant, *Cecil Urquhart Fisher.*

Thursday, Dec. 6, 1894.

(Before Lord ESHER, M.R., LOPES and RIGBY, L.JJ.)

GRAY *v.* BARTHOLOMEW. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Practice—Payment of money into court—Verdict for sum less than that paid into court—Power of judge to order balance to be paid to the defendant —Order XXII., r. 5.

Order XXII., r. 5, *provides that when the liability of the defendant, in respect of the claim or cause of action in satisfaction of which payment into court is made, is not denied in the defence, the money paid into court shall be paid out to the plaintiff "unless the court or judge shall otherwise order."*

In an action of slander, the defendant paid money into court, and his liability was not denied in the defence. At the trial the jury gave a verdict for the plaintiff for one farthing. The judge ordered that amount to be paid out of court to the plaintiff and the balance to be paid out to the defendant.

Held, that the judge had power to make the order.

Dunn *v.* The Devon and Exeter Constitutional Newspaper Company (70 *L. T. Rep.* 593; 63 *L. J.* 342, *Q. B.*) *distinguished.*

THIS was an appeal from an order of Hawkins, J., after the trial of the action with a jury.

The action was for slander, and the defendant paid 5*l.* into court in satisfaction of the plaintiff's claim, his liability not being denied in the defence.

At the trial of the action before Hawkins, J. with a jury, the jury found a verdict for the plaintiff for one farthing. The learned judge gave judgment for the defendant with costs, and ordered that out of the money paid into court one farthing should be paid to the plaintiff and the balance should be paid to the defendant.

Against this order the plaintiff appealed.

By Order XXII., r. 5 (*b*), it is provided as follows:

When the liability of the defendant, in respect of the claim or cause of action in satisfaction of which the payment into court is made, is not denied in the defence, the money paid into court shall be paid out to the plaintiff on his request, or to his solicitor on the plaintiff's written authority, unless the court or a judge shall otherwise order.

W. H. Nash for the plaintiff.—The judge had no jurisdiction to make such an order. The plaintiff is entitled to an order for payment out to him of the whole of the 5*l.*:

Dunn v. *The Devon and Exeter Constitutional Newspaper Company*, 70 L. T. Rep. 593; 63 L. J. 342, Q. B.

He referred to Order XXII., r. 22.

Leslie, for the defendant, relied on Order XXII., r. 5.

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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Nash in reply.—The judge's only power is to restrain the plaintiff from taking the money out. Order XXII., r. 5, must be read in connection with rule 44 of the Supreme Court Funds Rules 1886. This is not a question of costs or a question for the discretion of the judge. It is a question as to whose property is the money that has been paid in by the defendant under Order XXII., r. 1, in satisfaction of the plaintiff's claim and admitting his liability in the action.

Lord Esher, M.R. — With regard to the judgment of Wills, J. in *Dunn* v. *The Devon and Exeter Constitutional Newspaper Company* (*ubi sup.*), I will only say that, if that learned judge was dealing merely with Order XXII., I do not agree with his decision. Rule 22 of Order XXII. was made after rule 5, and does not alter that rule in any way. Money paid into court by a defendant under Order XXII. must be paid out either to the plaintiff or the defendant, and rule 5 provides that in such a case as this it shall be paid to the plaintiff, "unless the court or a judge shall otherwise order." That is the order which the judge has made in this case. The rule was passed for the express purpose of giving power to a judge under certain circumstances of dealing with money paid into court. The appeal must be dismissed.

Lopes, L.J.—I am of the same opinion. *Dunn* v. *The Devon and Exeter Constitutional Newspaper Company* (*ubi sup.*) is distinguishable from the present case, because there the libel was published in a newspaper, and the defendant pleaded that it was inserted without actual malice and without gross negligence, and that a full apology had been inserted in the newspaper, and 50*l.* had been paid into court by way of amends. Whether that decision can be supported or not is a question not now before us, for the judgment was not founded upon the rules and orders of the court, but on the effect of payment into court under 6 & 7 Vict. c. 96, s. 2. That section refers to the rules and regulations to which money so paid in is to be subject. In the present case the question depends on Order XXII., r. 5, which provides that, when the liability of the defendant is not denied in the defence, the money paid into court shall be paid out to the plaintiff, "unless the court or a judge shall otherwise order." Here the money was paid in in full satisfaction of the plaintiff's cause of action, and comes within the very words of rule 5. The object of the rule is to give a judge power to prevent the money being paid to the plaintiff if he should think fit. I think the appeal fails.

Rigby, L.J.—I am of the same opinion. The only question is as to the meaning of the words "unless the court or a judge shall otherwise order," in Order XXII., r. 5. It was argued that the judge had no power to order the money paid in to be paid out to the defendant, but only to restrain the plaintiff from taking it out. I think no injustice has been caused here by the order which the learned judge made, and the order was quite in accordance with the words of the rule.

Appeal dismissed.

Solicitor for the plaintiff, *H. Percy Becher.*

Solicitors for the defendant, *Ranger, Burton,* and *Frost.*

Tuesday, Dec. 18, 1894.

(Before Lord Esher, M.R., Lopes and Rigby, L.JJ.)

The Vestry of the Parish of St. Martin-in-the-Fields v. Bird. (a)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Metropolis—Drainage—Covered arcade of shops—Drain down the central passage—"One building only"—"Premises within the same curtilage"—"Drain"—"Sewer"—Metropolis Management Act 1855 (18 & 19 *Vict. c.* 120), *s.* 250.

The Lowther Arcade, Strand, consists of twenty-five houses and shops, let to various tenants, which are built in two rows, one on each side of a passage which is used in common by those occupying the houses, such use being essential to the enjoyment of each of the houses. The passage is covered in by a roof, and has a gate at each end, which is closed to the public at night. Down the passage runs a drain, which is used as a common drain by all the houses in the Arcade. By sect. 250 *of the Metropolis Management Act* 1855 *the word "drain" in that Act means any drain used for the drainage of "one building only" or "premises within the same curtilage," and the word "sewer" includes sewers and drains of every description except drains to which the word "drain" interpreted as aforesaid applies.*

Held (*affirming the judgment of the Queen's Bench Division,* ante, *p.* 432), *that the Lowther Arcade is not "one building only" nor "premises within the same curtilage" within the meaning of sect.* 250, *and that therefore the drain down the central passage is not a "drain" but a "sewer" within the meaning of the Metropolis Management Act* 1855.

This was an appeal from a judgment of the Queen's Bench Division (Mathew and Kennedy, JJ.) upon a special case stated by the parties to the action for the opinion of the court upon the questions of law arising therein.

The defendant for the purposes of the present special case is to be deemed the owner of the Lowther Arcade, Strand, and the question for the opinion of the court was, whether the central drainage arrangement of the Lowther Arcade is a "drain" within the meaning of the Metropolis Management Act 1855 in respect of the repair and maintenance of which the owner is liable, or a "sewer" in respect of the repair and maintenance of which the vestry is liable.

By the Metropolis Management Act 1855 (18 & 19 Vict. c. 120), s. 250, it is provided as follows:

> The word "drain" shall mean and include any drain of and used for the drainage of one building only or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed . . . and the word "sewer" shall mean and include sewers and drains of every description, except drains to which the word "drain" interpreted as aforesaid applies.

The Lowther Arcade is a passage arched over by a common roof with a range of houses and shops, and was constructed, drained, and applied to its present uses before the 1st Jan. 1856. The houses and shops within the Arcade are approached by the passage aforesaid, which is used

(a) Reported by E. Manley Smith, Esq., Barrister-at-Law.

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in common by those occupying the said houses and shops, and the use of the same is essential to the enjoyment of each and every of the said houses and shops, and must be passed along by all people resorting thither. There are twenty-five houses and shops in the Arcade, and these are let to eighteen different occupiers on leases or agreements. At each end of the passage there are gates and doors enabling the passage to be closed. When these are closed there is no access by the public to the Arcade. They are closed every evening and the whole of every Sunday throughout the year. The passage giving access to the houses and shops is wholly on the property of the owner and there is no public right of way over the passage, which was constructed and has been maintained, paved, and lighted, by the owner and his predecessors in title.

The central drainage arrangement of the Arcade, which was the subject of this action, is a drain running down the centre of the passage and receiving in its course the drainage of the houses and shops forming the Arcade.

The Queen's Bench Division held that this drain was a "sewer" within the meaning of the Metropolis Management Act 1855, and that consequently the vestry was liable to keep it in repair: (*ante* p. 432.)

The vestry appealed.

Finlay, Q.C. (*T. Beven* with him) for the vestry.—The drain in question is a "drain" within the meaning of the Act. The Lowther Arcade is "one building only," or, if not, it is submitted that it is "premises within the same curtilage." This passage is none the less a curtilage because it is enjoyed by several houses. It is a curtilage within the explanation of that term given by Giffard, V.C. in *Marson* v. *The London, Chatham, and Dover Railway Company* (18 L. T. Rep. 317; L. Rep. 6 Eq. 101), citing *Lord Grosvenor* v. *Hampstead Junction Railway Company* (1 De G. & J. 446). A causeway or yard between two blocks of buildings has been recently held to be the curtilage of those premises:

Pilbrow v. *The Vestry of St. Leonard's, Shoreditch*, *ante*, p. 697; (1895) 1 Q. B. 33.

[LOPES, L.J.—In Sheppard's Touchstone, at page 94, a curtilage is said to be a "little garden, yard, field or piece of void ground, lying near and belonging to the messuage and houses adjoining to the dwelling-house, and the close upon which the dwelling-house is built, at the most."]

Lawson Walton, Q.C. (*Macmorran* with him) for the defendant.—Each house is a complete dwelling in itself held upon a separate lease, and the Arcade cannot be possibly considered as "one building only." There is in fact no difference between the Arcade and an ordinary street except that the pavement in this case has a roof over it. [He was stopped.]

Finlay replied.

Lord ESHER, M.R.—It seems to me absolutely impossible to say that this Arcade, which consists of several houses occupied on leases by various tenants and used as shops with an open passage between the two rows, can fairly be called "one building only." Then it was argued that they are "premises within the same curtilage;" the curtilage being said to be the passage in front of the shops. I can only say that I disagree entirely with that argument, and this appeal must be dismissed.

LOPES, L.J.—The question is whether the drain under this passage is a "drain" or a "sewer" within the definition of those words in sect. 250 of the Metropolis Management Act 1855. I agree that the Lowther Arcade cannot possibly be considered as "one building only." I am equally clear that it cannot be described as "premises within the same curtilage," since it consists of separate houses let on leases or agreements to different tenants. The appeal must be dismissed.

RIGBY, L.J.—I agree. This is a question as to the drainage of twenty-five houses inhabited by different tenants. How can they possibly be considered as one building only? Neither are they, because a passage runs in front of them, within the same curtilage. None of the houses are *in* the Arcade. The Arcade is the covered passage. The houses front the passage, but none of them are *in* it. It is obvious that they are not within the same curtilage.

Lord ESHER.—I wish to add that we have given judgment on the consideration of merely sect. 250 of the Metropolis Management Act 1855.

Appeal dismissed.

Solicitors for the plaintiffs, *Fladgates.*

Solicitors for the defendant, *Shepheard* and *Bird.*

Tuesday, Dec. 18, 1894.

(Before Lord ESHER, M.R., LOPES and RIGBY, L.JJ.)

MAY AND ANOTHER *v.* LANE. (*a*)

APPEAL FROM THE QUEEN'S BENCH DIVISION.

Chose in action — *Promise to lend money — Assignment—Judicature Act* 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-sect.* 6.

The owner of a piece of land covenanted with a builder for the erection of houses thereon, the builder to be entitled to long leases of the houses when built. While the work was being carried out, and in order to assist the builder in finishing it, the owner verbally agreed to lend the builder 250*l. on each pair of houses in small sums from time to time. The builder afterwards made an assignment in writing to the plaintiffs of* 50*l. out of the money due or to become due from the owner to himself. In an action by the assignees against the owner upon this assignment:*

Held, that as there was no consideration for the agreement to lend, there was nothing that could be assigned, and the action must fail.

Held also, that, if the agreement to lend had been a binding one, such an agreement, being enforceable only by an action at common law for damages, would not have been assignable under sect. 25, *sub-sect.* 6, *of the Judicature Act* 1873.

THIS was an appeal from a judgment of the Queen's Bench Division (Mathew and Charles, JJ.) reversing a decision of the County Court judge at Bournemouth.

The action was brought to recover the sum of 50*l.* under the following circumstances:—

The defendant owned land at Bournemouth, and covenanted with a firm of builders that they

(*a*) Reported by E. MANLEY SMITH, Esq., Barrister-at-Law.

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should construct houses on this land, and that he would grant them long leases of such houses when completed.

The work of building them commenced, but the builders, finding themselves in difficulties, came to a verbal arrangement with the defendant, whereby he agreed to make advances to them on the houses, in small sums from time to time, amounting in all to 250*l.* on each pair of semi-detached villas.

Subsequently, the builders gave to the plaintiffs a document, addressed by them to the defendant, which was in these words:

We do hereby authorise, order, and request you to pay to Messrs. May and Hassell the sum of 50*l.* out of the moneys due or to become due from you to us on the buildings we are erecting on plot 16, and their receipt for the same shall be a good discharge.

The plaintiffs gave the defendant express notice in writing of this document. In an action for the 50*l.* referred to in the document, the County Court judge held that no debt was due from the defendant to the builders, that there was nothing more than a general contract to lend, and he gave judgment for the defendant.

Upon the plaintiffs' appeal the Queen's Bench Division (Mathew and Charles, JJ.) reversed the decision of the County Court judge, and gave judgment for the plaintiff for 50*l.*

The defendant appealed.

J. Alderson Foote for the defendant.—The only question is, whether there was anything to assign. First, there was nothing more than a mere promise to lend; and, secondly, if there was a binding contract, the money agreed to be lent could never have been sued for by the builder, who could only have brought an action for damages for the breach. It has been held that a mere agreement to make a loan is not assignable:

The Western Waggon and Property Company v. *West*, 66 L. T. Rep. 402; (1892) 2 Ch. 271.

Brice v. *Bannister* (38 L. T. Rep. 739; 3 Q. B. Div. 569) is distinguishable. There was in that case an assignment of that which, when ascertained, became a debt; in this case there is no debt.

Brook Little for the plaintiff.—*Brice* v. *Bannister* is in point here. Any legal *chose in action* can be now assigned under sect. 25 of the Judicature Act. The plaintiff is not bound to prove a debt; any right of action may be assigned.

Lord ESHER, M.R. — This action has been brought on the allegation that the defendant was in debt to a firm of builders, who assigned the debt to the plaintiff. The defendant was owner of a piece of land, and contracted with the builders that they should erect houses on the land, and should then be granted leases of them. Afterwards the landowner agreed to lend the builders 250*l.*, in small sums from time to time, so that they might be enabled to carry out their contract. I take it that the defendant said he would lend the builders the money, but that did not create a debt from him to them. I think there was no consideration for the promise to lend; but, supposing that there was, and a binding contract was made, what would be the result? A breach would merely be ground for an action of damages. It seems to me that the judges in the Divisional Court have mistaken the case. I think the appeal must be allowed.

LOPES, L.J.—I am of the same opinion. Supposing that there was a binding contract by the defendant to lend money to the builders, there was nothing more than that, and no debt was contracted. As there was no debt there was nothing to assign, and the plaintiffs must fail. I agree with the County Court judge, and the appeal must be allowed.

RIGBY, L.J.—I agree, and in my opinion there was nothing that could be assigned. We have been referred to the Judicature Act, sect. 25, sub-sect. 6 of which deals with absolute assignments in writing "of any debt or other legal *chose in action*," and it was said that the subject of this "assignment," as it is called, which at the best was only a cause of action, is a "*chose in action*" within that section. That expression means a thing not in possession which can be sued for. The Judicature Act was never meant to include in it every cause of action, such as, for instance, for an assault. If that were so, the law of champerty and maintenance would be shaken. No such enormous change in the law has been made by this section.

Appeal allowed.

Solicitors for the plaintiffs, *Peacock* and *Goddard*, for *Trevanion*, *Curtis*, and *Ridley*, Bournemouth.

Solicitors for the defendant, *Prior*, *Church*, and *Adams*, for *H. S. Dickinson*, Poole.

Tuesday, Feb. 1.

(Before Lord ESHER, M.R., LINDLEY and RIGBY, L.JJ.)

THE BONA. (a)

APPEAL FROM THE ADMIRALTY DIVISION.

Marine insurance—General average—Stranded vessel—Extraordinary use of engines—Contribution for extra coal consumed.

By a policy of insurance effected by the plaintiffs with the defendants, the former insured the hull and machinery of their steamship against ordinary marine risks. In the course of her voyage the vessel stranded, and was eventually got off by means of her engines and by lightening the ship. On the question as to whether the defendants were liable to contribute pro rata *in general average in respect of the coal so consumed:*

Held (affirming the President (Sir F. Jeune), that, as there had been an abnormal use of the engines which constituted a general average act, there must also have been an abnormal consumption of coal, and the shipowners were therefore entitled to general average contribution in respect thereof.

THIS was an appeal from a decision of the President (Sir F. H. Jeune), reported 71 L. T. Rep. 551.

The defendants appealed.

Joseph Walton, Q.C. and *Carver* for the appellants.

Sir *Richard Webster*, Q.C. and *Holman* for the respondents.

Lord ESHER, M.R.—The question here, as I understand it, is confined to the matter of the coals, but I agree that the point as to whether

(a) Reported by BASIL CRUMP, Esq., Barrister-at-Law.

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these coals were used under circumstances which enable the shipmaster to demand an average contribution must depend upon what they were used for, and how they were used. I think if they were used for the purpose of moving the engines in such a way and under such conditions that any damage to the engines would be the subject matter of general contribution, that then the coals used as a part of the manœuvre would be in the same position as the engines. The case, therefore, depends, as has been admitted over and over again on both sides, upon whether the use of the engines in this case was the normal or ordinary mode of using them under usual circumstances, or whether the engines were used not only under unusual circumstances, but in an unusual and abnormal manner. Here we must first consider what are the conditions under which either the ship-owner or the cargo-owner can demand a general average contribution. It is better to confine oneself to the case of the shipowner, because that is the case before us. The shipowner, if he insists that the cargo-owner is bound to contribute in general average, must show that the ship has been in some way injured, that the ship and cargo were both in danger, and that the injury to the ship happened in consequence of an intentional putting her into that danger—an intentional putting her into that danger for the purpose of attempting to save both ship and cargo. Here it is admitted that the ship and cargo were in danger, and it is of no use, therefore, to argue to us about a case where a ship may touch a sandbank or be on a sandbank without danger to ship or cargo. A ship may be in that condition, and then the main circumstance on which to raise a general average contribution does not exist; but here it is not only that the vessel was on the sand or bar, but she was so fixed on the sand that both ship and cargo were in imminent danger. Then the captain of the ship is there to do what he ought to do for the benefit of both shipowner and cargo-owner, and his duty is to do everything that he can do or think of to save both ship and cargo. That is undoubted. The ship was aground, and so far aground that she had been there for four days. She was so far aground that she could not be got off without some extraordinary effort. It is found here that what the captain did he did with the intent to endeavour to save both ship and cargo. It really is not disputed that he was intentionally running a great risk. He was attempting intentionally to do what he knew to be a dangerous operation. But it is said that he only used the ship and her powers, and that however much he did that, if he only used the ship and her powers in the ordinary way in which a ship and her powers are to be used, then it cannot be brought within the doctrine of general average. I agree to that. That doctrine will solve some of the cases which have been brought before us. I say clearly that I am not going to attempt to-day to over-rule anything. I am going to deal with the case of a ship being hard and fast on the ground. That is not the normal condition of the ship. The normal condition of the ship is to be—except in mud harbours—afloat in the water. She was hard and fast on the ground. The manœuvre which this captain determined to follow, knowing that it was a dangerous manœuvre to the property of his owners, was to use the engines so as to force the ship off the ground. Is that a normal way of using the steam engines on board the ship? Mr. Walton, with great ingenuity, as might be expected, talked to us all about the screw, and he said the screw was in the water. So it might have been, but the engines were not. It was not the screw which was strained, but the engines. The engines have got to force themselves round so as to turn this screw, whilst the ship, instead of being afloat, and therefore a moving mass, is hard and fast on the ground. The learned judge who tried this case has come to the conclusion that if you use engines to force a ship either one way or the other when she is hard and fast on the ground, that is not a way of using engines in the manner in which they were made to be used. They were made to be used to move the ship when afloat, and not when on the ground. He has come to the conclusion that to use the engines when the ship is hard aground is a very excessive and abnormal mode of using the engines, with a result of much greater danger to the engines than if they are used in the normal way. Therefore, that is not using the ship and her equipment in the ordinary way, It is putting them to an abnormal use, intentionally, knowing the risk, for the purpose of saving the ship and cargo from the imminent danger in which they were. It seems to me that state of things, taking them altogether, supplies all the conditions which would, if the engines were strained, entitle the owners of the ship to say that they intentionally put their engines to this abnormal risk for the purpose of attempting to save the ship and cargo, and that by doing so they had saved them. The coal was used for the purpose of working the engines in that abnormal way. Coals, in being so used to move engines in that abnormal way, were actually used in that abnormal way, and therefore I think in this case the shipowner was entitled, under the circumstances, to general average contribution. The shipowner is bound to show you that the ship was in danger of being lost, both ship and cargo, and bound to show you that what he did was an abnormal use of the means he had under his hands—an abnormal use of the ship and things belonging to the ship. I think he has done that, and I think, therefore, that this appeal must be dismissed, and the judgment of the learned judge upheld.

Lindley, L.J.—I think that this case is a somewhat difficult one, and I do not think it is covered by any authority. It is not like any case which is in the books, so far as I know, and is certainly not like any of those which are constantly being brought before us. The question is whether, in the circumstances of this case, the defendants are liable to contribute general average in respect of 52 tons of coal used in working the engines for the purpose of getting the ship off Galveston Bar? I look upon the coals as accessory to the engines, and it appears to me that the real question is whether there was an extraordinary sacrifice? I think there was, and that it comes within the principle laid down in the case of *Birkley* v. *Presgrave* (1 East, 229; 6 Rev. Rep. 256). The question is, what is an extraordinary sacrifice? It has been contended by Mr. Walton and Mr. Carver that as a matter of law you cannot sacrifice anything if you use it for the purpose for which it is intended. I doubt that. Let us consider the position of affairs. The printed case shows that this ship was hard and

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fast on this bar, and had been there for several days. Was there any sacrifice at all? Was there any intentional risk run in working these engines far beyond their power? Certainly there was. And for what purpose? For the purpose of assisting the ship off the bar where she was stuck. Are we then to say that in point of law that was not an extraordinary sacrifice? I cannot help thinking that when we look at the view taken by business men to ascertain whether this is an extraordinary sacrifice or not, it shows that this is a sacrifice, and I think that the appeal must be dismissed.

RIGBY, L.J.—I concur. *Appeal dismissed.*

Solicitors: *Waltons, Johnson, Bubb,* and *Whatton; Downing, Holman,* and *Co.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Nov. 13 *and* 14, 1894.

(Before CHITTY, J.)

SANGUINETTI *v.* STUCKEY'S BANKING COMPANY LIMITED. (*a*)

Bankruptcy — Priority — Equitable charges of life interest — Foreclosure — Voluntary settlement — "Void against the trustee in bankruptcy" — Bankruptcy Act 1883 (46 & 47 *Vict. c.* 52), *s.* 47.

A bankrupt, who was tenant for life of certain property, had executed two post-nuptial settlements of his life interest in favour of his wife and children, settling by the first 500*l. and by the second* 800*l., a year upon them during life. He subsequently gave to the plaintiff equitable charges on the property for sums advanced and interest.*

By an order made in bankruptcy, in pursuance of sect. 47 *of the Bankruptcy Act* 1883, *on the application of the trustee in bankruptcy, with the consent of the parties interested under the settlements, and by way of compromise, it was declared that the settlement of* 500*l. a year was valid as against the trustee in bankruptcy; but that the settlement of* 800*l. a year was void as against him. In a foreclosure action brought by the plaintiff to enforce his charges, the question arose as to whether the effect of the operation of this order was to vest the* 800*l. a year in the trustee in bankruptcy for the benefit of the unsecured creditors in priority to persons claiming to be incumbrancers outside the bankruptcy, or not.*

Held, that there was nothing in sect. 47 *of the Bankruptcy Act* 1883 *which gave an order made under it the effect of thus vesting the property in the trustee in bankruptcy, and that the trustee failed in his claim for priority as against the plaintiff mortgagee.*

A TENANT for life of settled property executed two voluntary post-nuptial settlements in Dec. 1876 and March 1883, charging his life interest with annuities of 500*l.* and 800*l.* per annum respectively, in favour of his wife and children. He subsequently gave the plaintiff equitable charges on his life interest.

(*a*) Reported by H. M. CHARTERS MACPHERSON, Esq., Barrister-at-Law.

The settlor became bankrupt in Feb. 1885, within two years after the date of the second settlement; and by an order made in bankruptcy under sect. 47 of the Bankruptcy Act 1883, on the application of the trustee in bankruptcy, it was, by consent of the parties beneficially interested in the settlements and by way of compromise, declared that the settlement of 1876 should stand as valid, but that of 1883 should be declared void as against the trustee in bankruptcy.

The plaintiff having brought a foreclosure action, the trustee in bankruptcy claimed on behalf of the unsecured creditors to be entitled to the benefit of the second settlement in priority to the plaintiff's charge.

Levett, Q.C. and *George Henderson* for the plaintiff.—We rely on the analogous cases under the Bills of Sale Act:

Ex parte Payne; Re Cross, 40 L. T. Rep. 296, 563; 11 Ch. Div. 539;

Ex parte Blaiberg; Re Toomer, 49 L. T. Rep. 16; 23 Ch. Div. 254.

The words of the orders do not vest the property in the trustee.

Farwell, Q.C. and *Fossett Lock* for the trustee in bankruptcy.—The effect of the order is to vest the settled property in the trustee as far as necessary to satisfy the unsecured creditors in priority to the plaintiff.

Kenyon Parker and *J. W. Baines* for other parties.

CHITTY, J.—The point I have to consider is the effect of the bankruptcy order which set aside the second settlement as against the trustee in bankruptcy. To that order the present plaintiff, as mortgagee and a secured creditor standing outside the bankruptcy proceedings, was no party, and it was, as far as he is concerned, *res inter alios acta.* This order was admittedly obtained for the benefit of the trustee in bankruptcy only, and was made by consent and by compromise, as an embodiment of an agreement made between the trustee and the parties beneficially interested under the settlements. The defendant, the trustee in bankruptcy, says that the settlement is declared to be void as against him only, and therefore it is not declared void as against the present plaintiff. That is a correct proposition; the only person who gets the benefit of the order is the trustee in bankruptcy. It has been argued on behalf of the trustee in bankruptcy that he is a trustee for the unsecured creditors. That again is, I think, a correct proposition. The mortgagee stands outside the bankruptcy. He may come in under the bankruptcy subject to the provisions which relate to the mortgagees coming in. The trustee represents the general body of unsecured creditors, and this avoiding as against the trustee does not avoid in favour of the mortgagee, for whom he is not trustee. But that leaves open the question as to the effect of the order. The defendant is claiming the benefit of it as against the plaintiff, and it is argued for the trustee that the settlement, being avoided against him, is avoided for the benefit of the general body of unsecured creditors, and that the effect of this proceeding, to which the secured creditors were not parties, has been to vest in the trustee the property which purported to pass by the settlement, which settlement the court, at the instance of the trustee, have declared to be void as against

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him. I think it is not incorrect to state that the line of defence is that the trustee is endeavouring to set up as against the plaintiff mortgagee a settlement which he himself had, through the action of the court, set aside so far as relates to him. The 47th section of the Act does not contain the word "fraud;" and it is not necessary to say whether the trustee has obtained the order against the settlement on the footing of its being fraudulent; and the better way to express it is simply to say that the settlement has been avoided under this section as against the trustee. But that does not enable the trustee to say that the order, coupled with the 47th section and the other sections of the Act, have the effect of transferring to him all the beneficial interests of the parties under the settlement, to the extent required to answer the claims of the trustee in bankruptcy on behalf of the unsecured creditors. Whether the settlement is void or not as against the incumbrancer is a question left untouched by the 47th section. It is clear that the plaintiff might, if so advised, have impeached the settlement in this action; and, at first, it seemed strange that he did not take that course; but I think the parties have come here to have this one question decided, whether the effect of the order is to pass the property in the settlement to the trustee in bankruptcy; and in my opinion the effect of the order is not such as is contended for. It would be strange if sect. 47 of the Act had the effect of vesting the property comprised under the settlement in the trustee in bankruptcy as against incumbrancers or mortgagees outside the bankruptcy. In my opinion, the principle established by *Ex parte Payne* (*ubi sup.*) and *Ex parte Blaiberg* (*ubi sup.*), cited at the bar, apply to this case, and I cannot find any reason for saying that the property comprised in this settlement has passed to the trustee in bankruptcy. The defendant's contention that he is entitled to priority to the plaintiff fails.

Solicitors: *Richard Furber; Rowcliffes, Rawle,* and *Co.*, agents for *J. T. Davies*, Sherborne; *G. J. Coldham.*

Wednesday, Dec. 19, 1894.

(Before NORTH, J.)

Re SHAW; TUCKET *v.* SHAW, (*a*)

Account duty—Successive appointments—Portions of trust fund—Administration—Costs—Customs and Inland Revenue Act 1881 (44 & 45 *Vict. c.* 12, *s.* 38. *sub-sect.* 2 (*c.*).

A tenant for life, under a settlement made by will, of a trust fund with an absolute power of appointment by deed or will over the fund, by deed appointed a portion of the fund upon trust for herself absolutely, and by the same deed appointed the residue of the fund upon trust for herself for life, and after her death upon trust for such of her children and issue as she should by deed or will appoint. Subsequently at five different times, by five different deeds, she appointed different sums, parts of the residue, to members of her family, subject to her life interest therein, and appointed the remainder of the residue by her will to two daughters. On the further consideration of an originating summons taken out for the execution of the trusts of the settlement made by will, and for consequential relief:

Held, that the account duty which, by virtue of sect. 38, *sub-sect.* 2 (*c.*) *of the Customs and Inland Revenue Act* 1881 *became payable upon her death in respect of the trust fund appointed by her, and the costs of the administration of the trusts of the settlement made by will, should be borne rateably by the various sums, portions of the trust fund appointed by her, without regard to the priority of the various appointments in point of time; and not exclusively by the remainder appointed by her will.*

BY the will of Charles Shaw, dated the 8th March 1855, and proved on the 3rd July 1856, the testator, after giving certain specific and pecuniary legacies which have long since been paid and satisfied, gave all his residuary estate unto William Shaw (since deceased), Thomas De Charmes Maillard (since deceased), and George Shaw (since deceased), upon trust to divide the same into twenty-one equal parts, and to retain two equal twenty-first parts thereof in trust to keep the same invested as therein mentioned, and to pay the income thereof to his niece, Maria Smith (since deceased), then the wife of Charles John Smith (since deceased), during the joint lives of herself and her husband, and after the decease of either of them to pay the income thereof unto the survivor of them during his or her life, and after the decease of the survivor of them to hold the two equal twenty-first parts of his residuary estate upon trust for such persons as Maria Smith should by deed or will in manner therein mentioned appoint with trusts in default of appointment as therein mentioned.

The testator's residuary estate was devised, and the two equal twenty-first parts thereof invested as directed by his will, and immediately before the execution of the appointment of the 5th June 1879 the two equal twenty-first parts of the residuary estate were represented by the sum of 10,917*l.* 8*s.* 11*d.* New Three per Cent. Annuities standing in the names of Thomas de Charmes Maillard and George Shaw as trustees of the said will.

By a deed-poll, dated the 5th June 1879, a sum of 2217*l.* 8*s.* 11*d.* New Three per Cent. Annuities, part of the said 10,917*l.* 8*s.* 11*d.* like annuities, was appointed by Maria Smith in trust for herself absolutely, and the fund of 8700*l.* like annuities, the residue, was appointed by the said Maria Smith, during her life, upon the trusts thereof declared by the will of the testator, and after her death upon trust for such of her children and issue as she should by deed or will appoint, with trusts in default of appointment. And by a deed-poll, dated the 1st March 1880, Maria Smith, widow, pursuant to the provisions of the deed-poll of the 5th June 1879, appointed, subject to the life interest therein, a sum of 1000*l.* New Three per Cent. Annuities, part of the fund of 8700*l.* like annuities, to Charles Shaw Smith, to which sum of 1000*l.* William Shaw Smith subsequently became entitled as assignee thereof subject to certain incumbrances. And by a deed-poll, dated the 11th Nov. 1881, she appointed, subject to the life interest therein, a sum of 1000*l.* New Three per Cent. Annuities, further part of the fund of 8700*l.* like annuities, to Charles Shaw Smith, to which sum of 1000*l.* Ernest Hilton Tucket,

(*a*) Reported by J. TRUSTRAM, Esq., Barrister-at-Law.

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the plaintiff, subsequently became entitled as assignee thereof, subject to certain incumbrances. And by a deed-poll, dated the 29th June 1882, she appointed, subject to her life interest therein, a sum of 2000*l.* New Three per Cent. Annuities, further part of the fund of 8700*l.* like annuities, to Charles William Shaw Smith, to which sum of 2000*l.* he was entitled subject to certain incumbrances. And by a deed-poll, dated the 21st Aug. 1883, she appointed, subject to her life interest therein, a sum of 500*l.* New Three per Cent. Annuities, further part of the fund of 8700*l.* like annuities, to Maria Smith, spinster, to which sum of 500*l.* she was entitled, subject to certain incumbrances. And by a deed-poll, dated the 27th July 1886, she appointed, subject to her life interest therein, a sum of 1000*l.* New Three per Cent. Annuities, further part of the fund of 8700*l.* like annuities, to Maria Smith, spinster, to which sum of 1000*l.* Alma Holland subsequently became entitled, subject to certain incumbrances.

Maria Smith died on the 31st Jan. 1893, having by her will, dated the 19th Feb. 1887, appointed the sum of 3200*l.*, the residue of the fund, in favour of Maria Smith, spinster, and Elizabeth Skelton, and thus exercised the power of appointment over the whole of the fund of 8700*l.* New Three per Cent. Annuities, whereby the whole fund became divisible in pursuance of such appointments.

This was an originating summons, taken out by Ernest Elton Tucket, as plaintiff, under Order LV., r. 3, of the Rules of Court 1883, for an order that the trusts of the will of Charles Shaw, and of the deed poll of the 5th June 1879, should be carried into execution, and for the necessary inquiries; the defendants being the trustees of the will of Charles Shaw, in whose names the fund of 8700*l.* Two-and-Three-Quarter per Cent. Consolidated Stock was standing, and other persons interested therein.

The summons now came on for further consideration, and the questions raised for decision were (1) Whether the six appointments by Maria Smith ranked *pari passu* or in priority according to their respective dates, and, if the latter, whether the result was to throw the costs of the administration and also of the action on the 3200*l.* New Three per Cent. Annuities, the residue of the fund appointed by the will of Maria Smith; and (2) Whether such residue must bear the account duty claimed by the Commissioners of Inland Revenue on the whole fund.

Everitt, Q.C. and *Jessel* for the plaintiff.—The appointments rank in order of priority of time, and the costs of the administration and of the action, and also the account duty, must be borne by the residue of the fund appointed by the will of Maria Smith. If from any cause there should be a deficiency in the fund the priorities of the appointments are ascertained by order of date:

Wilson v. *Kenrick*, 54 L. T. Rep. 461; L. Rep. 31 Ch. Div. 658.

In the case of *Re Croft's Trusts; Deane* v. *Croft* (66 L. T. Rep. 157; (1892) 1 Ch. 652) the appointments were made by the same will at the same time; and in such a case, in the absence of words to the contrary, the presumption is that a testator intends each share of his estate to bear its aliquot part of the duty; but in the present case the appointments were made at different dates and by different instruments, and the residue which was appointed last must bear the burden of the costs and duty:

Re Bourne; Martin v. *Martin*, 67 L. T. Rep. 586; (1893) 1 Ch. 188.

S. Hall, Q.C. and *Fellows*, for the persons interested under the appointments of the 1st March 1880 and the 29th June 1882, adopted the argument for the plaintiff.

Sir *A. Watson*, Q.C. and *Pochin*, for the persons interested under the appointment of the 27th July 1886.—The burden must be borne by the residue appointed by the will of Maria Smith. They referred to

Booth v. *Alington*, 6 De G. M. & G. 613;
Wilson v. *Kenrick* (*ubi sup.*);
Gilbert v. *Whitefield*, 52 L. J. 210, Ch.

Swinfen Eady, Q.C. and *Vernon Smith*, Q.C. for the defendants.—The defendant trustees are desirous to act for the benefit of all persons interested in the fund. With respect to the question out of what fund the costs should be paid, the general rule that costs come out of residue does not apply to appointments:

Farwell on Powers, 2nd ed., p. 254, and the cases there cited;
Moore v. *Dixon*, 15 Ch. Div. 566;
Trollope v. *Routledge*, 1 De G. & Sm. 662;
Warren v. *Postlethwaite*, 2 Coll. 108.

Everitt, Q.C. replied.

NORTH, J.—I am not going to act on the form of the certificate, though the form is against Mr. Everitt's contention. If the matter had been discussed before the chief clerk I should not have entertained the application. [His Lordship then stated the facts set out above, and continued:] The appointments were not appointments of aliquot parts of the fund; but they happened to be aliquot parts at the time of distribution. Taking for example, the first and second appointments; each of these was an appointment of 1000*l.* New Three per Cent. Annuities, part of the 8700*l.* New Three per Cent. Annuities, with the intention of leaving the remainder of the fund for other appointments. At the death of Mrs. Smith, the Commissioners of Inland Revenue say that, by virtue of sect. 38, sub-sect. 2 (*c.*) of the Customs and Inland Revenue Act 1881 account duty is payable in respect of the property appointed by her. If there were no duty payable, and no costs, the trustees would have nothing to do but to divide the fund in shares according to the appointments, and if part of the fund had been lost through insufficient security, for example, there would have been a deficiency, and it might have been that the last appointee would have had to go short. In the present case there is no deficiency in the fund at all; the difficulty arises from the claim of the Government, who say, We have a right to receive part of the fund for account duty. The question is, how is the duty to be paid? Are the trustees to take it solely out of the share last appointed, or shall each share bear its own burden? The fair way would be that each share should bear its own burden. The duty is imposed by Goverment upon the various sums appointed and the person taking each sum can only take it subject to the duty. I can see no reason for saying that the portion of the sum last appointed should bear the whole duty. There is no authority or principle in favour of throwing the duty

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upon the last share. Before the Customs and Inland Revenue Act 1881, succession duty would have been payable in respect of the various sums appointed; but sect. 41 of that Act provides that legacy and succession duty shall not be payable in respect of property on which account duty has been paid. The whole fund has to provide the account duty; but, as between the various appointees, it must be borne by them according to the amounts to which they are entitled of the fund. With respect to the payment of costs, according to the decisions, the costs relating to the whole fund ought to be borne according to the shares in which it has been appointed. I may add that Mrs. Smith did not appoint either subject to or free of duty. The result will be that the trustees will take duty out of each share; or, more simply, they will take the duty out of the whole fund, and then charge it on each share in proportion to the amount of such share; and the costs must be borne in the same way.

Solicitors: *C.* and *E. Woodroffe*; *R. Chapman*; *Montague Gosset* and *Son*; *Lovell, Son*, and *Pitfield*.

Saturday, Dec. 15, 1894.

(Before KEKEWICH, J.)

Re DAVENPORT; TURNER *v.* KING. (*a*)

Married woman—Gift for life for separate use—Power of appointment by will—In default to executors, administrators, or assigns—Release of power of appointment — Absolute interest — Married Women's Property Act 1882 (45 *&* 46 *Vict. c.* 75), *ss.* 1, 2, *and* 5.

Under the trusts of a will, the testator's two daughters were entitled to the income of certain property in equal shares during their lives for their separate use. The capital of each share was, subject to a power of appointment by will given to each daughter respectively, held by the trustees upon trust to assign and pay over according to the appointment, and in default thereof to the executors, administrators, or assigns of the daughters respectively. The testator died prior to the passing of the Married Women's Property Act 1882, *and both daughters married subsequently to the Act without having released their powers of appointment. This was a summons on behalf of the daughters without the concurrence of their husbands, asking for a declaration that they were absolutely entitled to their respective shares.*

Held, that the policy of the Married Women's Property Act 1882 *being to make a married woman a* feme sole, *there must be a declaration that the married women, on releasing their powers of appointment, were absolutely entitled to their shares.*

THE testator by his will bequeathed property to trustees upon trust to invest and pay the income to his daughters in equal shares during ther lives for their separate use; and as to the corpus, the testator declared that the same should be, subject to the appointment by will of his daughters, and be assigned and paid over by his trustees, according to such appointment, and in default of appointment to their executors, administrators, or assigns.

(*a*) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

The testator died before the passing of the Married Women's Property Act 1882, and his daughters were married after the passing of that Act.

This was a summons on behalf of the daughters, without the concurrence of their husbands, asking for a declaration that the daughters were entitled to have their shares transferred and paid to them absolutely.

Lorence Ryland for the summons.—The ladies were entitled under the will at the time of their marriages, which were subsequent to the Married Women's Property Act 1882:

Page v. *Soper*, 11 Hare, 321;
Devall v. *Dickens*, 9 Jur. 550;
Re Onslow; Plowden v. *Gayford*, 59 L. T. Rep. 308; 39 Ch. Div. 622.

Stewart Smith for the trustees.—The cases cited do not apply. All prior applications have been by unmarried women, or married women who had power to appoint by will or deed.

KEKEWICH, J.—The main point in this case has been of not infrequent occurrence. Apart even from the decision of *Re Onslow; Plowden* v. *Gayford*, which has been cited, the Act itself solves the difficulties. I do not think there is any importance to be attached to the distinction between a direct gift and a direction to pay. It is clear that the ultimate gift is equivalent to a gift to the daughters themselves. [His Lordship read the gift.] Before the Act those interests would not coalesce (*Hanchett* v. *Briscoe*, 22 Beav. 496; *Whittle* v. *Henning*, 2 Phill. 731); but the Married Women's Property Act 1882 has removed the difficulty, as now by that Act the reversion is hers for her separate use. The policy of the Married Women's Property Act is to make the married woman a *feme sole*; that is, to place her in precisely the same position as if she was a man, and not a married woman, and in my opinion the interests do coalesce, and she may do as she pleases. It does away to a certain extent with the doctrine of *Whittle* v. *Henning* (2 Phill. 731); but I should fail to carry out the Act if I did not consider these ladies entitled. I hold that the ladies, on releasing their powers of appointment, are absolutely entitled to their shares.

Solicitors: *Huxham* and *Rawlinson*; *Austin* and *Austin*.

Wednesday, Dec. 19, 1894.

(Before KEKEWICH, J.)

Re GILCHRIST'S TRUSTS. (*a*)

Charity—Trustees—Accounts—Motion to commit trustees for not rendering accounts — Charity Commissioners—Jurisdiction—Charitable Trusts Act 1853 (16 *&* 17 *Vict. c.* 137), *ss.* 62 *and* 66.

Unless a charity comes within the exemptions specified in sect. 62 *of the Charitable Trusts Act* 1853, *the trustees are bound to render accounts to the Charity Commissioners.*

On motion to commit the trustees for refusing to render accounts, the trustees were ordered to pay the costs of the motion.

BY a codicil to his will, J. B. Gilchrist, who died in Jan. 1841, directed and appointed

That the trustees or trustee for the time being shall

(*a*) Reported by FRANCIS E. ADY, Esq., Barrister-at-Law.

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stand possessed of and interested in, the residue or surplus of the trust moneys, stocks, funds, and securities thereby to them bequeathed in trust, upon trust to apply and appropriate the same in such manner as they, my said trustees or trustee, shall in their absolute and uncontrolled discretion think proper and expedient for the benefit and advancement, and propagation of education and learning in every part of the world, so far as circumstances will permit.

In the case of *Whicker* v. *Hume* (7 H. of L. Cas. 124) it was held that this was a valid charitable bequest, and was not void for uncertainty.

The trustees refused to render accounts to the Charity Commissioners, and this was a motion on behalf of the commissioners to commit the trustees of the charity for contempt in refusing to render accounts.

Cozens-Hardy, Q.C. and *Vaughan Hawkins* for the motion.—The question is whether this charity comes within the Charitable Trusts Act 1853, or is exempt from the control of the commissioners: sects. 10, 62, and 66.

Re Sir Robert Peel's School at Tamworth; Ex parte The Charity Commissioners, 18 L. T. Rep. 541: 3 Ch. App. 543.

Warmington, Q.C. and *Church* for the trustees.—The trustees have an absolute discretion; it is a bequest or donation, and could be used in the same way as voluntary subscriptions:

Re Clergy Orphan Corporation, 71 L. T. Rep. 450; (1894) 3 Ch. 145.

The whole sum can be spent at once as income; the trustees can apply the whole of the capital money in any way they like to provide education. No permanent endowment was contemplated. We submit that we come within the exceptions in sect. 62 of the Charitable Trusts Act 1853, and are exempt from the control of the Charity Commissioners:

Re Lea; Lea v. *Cooke*, 56 L. T. Rep. 482; 34 Ch. Div. 548.

KEKEWICH, J.—In order to resist this application the trustees of the charity must establish that their charity falls within one or more of the exceptions of sect. 62 of the Charitable Trusts Act 1853. It is suggested that there are no special words, or that there may be no special words, which cover it; but that there are provisions of a wider kind within which the charity must, upon a benevolent construction of the section, be held to fall. That is not my view of the proper construction of the Act. Where you have an Act such as the Charitable Trusts Act 1853, conferring general jurisdiction, and then containing specific exceptions from that general jurisdiction, any charity, any institution, falling within the general jurisdiction must come precisely within the limits of some exception in order to be exempt. That the general jurisdiction is applicable if the exception is not to be found there can be no doubt. This is an endowed charity, and certainly a charity having an endowment is within the meaning of the Act. This charity is not in one sense of a permanent character; but it has already lasted some time, and probably it is likely to last very much longer. There is no doubt a power in the trustees, acting in their absolute and uncontrolled discretion so to deal with the endowment that it may cease to be the endowment of this particular charity—at any rate, cease to be applied in the way it is being applied at the present time. I may remark here that I am not called upon to say that the court will, at any time, direct a scheme, or will allow the Charity Commissioners to lay their hands on any part of the money for any purpose, or to control the discretion vested in the trustees. That is not in any way the question before me. If ever the question is raised, then the words of the will will deserve the fullest consideration. All I am asked now to decide is, whether the trustees are bound to render their accounts of this charity on the ground that it is a charity within the meaning of the Act. As regards their power to divert the charity funds, so as to interfere with the permanency of the charity, *Sir Robert Peel's* case (18 L. T. Rep. 541; 3 Ch. App. 543) is directly in point, because there the trust was only to apply the income, and we are here dealing with the case where the trustees' power extends to the corpus. But there was a power of revocation which might be exercised at any moment; and the Lords Justices distinctly held that the fact that the power might be exercised at any moment, so that their decision might be rendered of no avail, did not prevent the interference of the Charity Commissioners to the extent of demanding accounts, and did not prevent it being the duty of the court to insist on that being done. That is a distinct authority against the respondents on that point. Then the only other question is whether they come within the exempting clause, sect. 62 of the Act of 1853. The grounds upon which that has been argued seem to me to be unfounded, and not to be based upon a proper construction of the clause. I have not read the clause carefully for the present purpose; but I go upon the more satisfactory ground that the decision of the Court of Appeal, consisting of Lord Herschell, and Lindley and Davey, L.JJ., in the recent case of *Re Clergy Orphan Corporation* (71 L. T. Rep. 450; (1894) 3 Ch. 145) distinctly covers it. The considered judgment of the court, which was delivered by Davey, L.J., expressly says (at p. 151, (1894) 3 Ch.) that the sentence in sect. 62, which must be read as a proviso, "is made applicable only to 'any such charity as last aforesaid,' *i.e.*, to what has been called at the Bar a mixed charity." Here there is not "any such charity as last aforesaid;" there is not a mixed charity; and, therefore, that exemption on which the respondents rely, beginning with the words "and no portion of any such donation or bequest as last aforesaid," is not applicable to them. The result is that the words which follow in the judgment to which I have referred as regards the effect of the proviso, though directly in point as regards the charity then before the court, have no application at all to this case, and I am obliged to fall back on the general jurisdiction, and to say that the general jurisdiction covers this charity. The order should follow as nearly as possible the words of the order in *Sir Robert Peel's* case.

Solicitors: *Clabon; F. J.* and *G. J. Braikenridge.*

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QUEEN'S BENCH DIVISION.

Thursday, Dec. 13, 1894.

(Before Pollock, B. and Grantham, J.)

The Great Clacton Local Board (apps.) v. Young and Sons (resps.). (a)

Local government—New street—Footpath on one side only—Expenses of—Apportionment—Frontagers on other side—Liability of such frontagers to proportion of expenses—Private Street Works Act 1892 (55 & 56 *Vict. c.* 57), *ss.* 6, 10.

By sects. 6 *and* 10 *of the Private Street Works Act* 1892, *the expenses of an urban authority in executing private street works, are to be apportioned on "the premises fronting, adjoining, or abutting on such street or part of a street," "according to the frontage of the respective premises."*

An urban authority resolved under the powers of the Act to sewer, pave, and make good a new street, which had houses on the north side only, the south side being vacant land, and the works were to consist of a roadway and a footpath on the north side of the roadway where the houses were.

Held, that the expenses of the footpath ought not to be thrown exclusively on the premises abutting on the north side, but ought, with the expenses of the roadway, to be apportioned upon the premises abutting on both sides of the street.

Case stated by justices of the peace for the county of Essex.

At a special sessions holden at Thorpe, in the county of Essex, on the 26th April 1894, the justices heard and determined certain objections made by the respondents under sect. 7 of the Private Street Works Act 1892.

The following facts were proved or admitted:

The Great Clacton Local Board on the 17th Jan. 1894 passed a resolution to the effect that under sect. 6 of the Private Street Works Act 1892, the "Marine Parade," and also the portion of another road not already made up, be sewered, levelled, paved, metalled, flagged, and made good; and their surveyor duly prepared a specification of the requisite works with plans and an estimate of the probable expenses and a provisional apportionment of the estimated expenses among the premises fronting, adjoining, or abutting on the "Marine Parade."

Thee plans, estimates, and provisional apportionment, were duly submitted to the local board, and approved of by them by a resolution which was duly published.

The "Marine Parade" was a new street which had buildings on the north side only; on the south side it was bounded for the most part by land which extended to the edge of the cliff, and was the property of the Great Clacton Local Board, and on this side of the street there were no houses.

According to the specifications and plans it was proposed to make a thirty-six feet roadway, and also a twelve feet footpath on the north side of the roadway, and by the provisional apportionment the expenses of this footpath on the north side where the houses were, were charged wholly to the frontagers on that side of the street, in addition to one-half of the expense of making the thirty-six feet road.

The expenses of making up the whole of the roadway and all the other expenses of the proposed works, were apportioned among the owners of the properties abutting on both sides of the street, including the local board as owners of the adjoining land belonging to them.

The respondents as owners of premises abutting upon the "Marine Parade," objected that the apportionment was incorrect because the expenses had not been apportioned according to the frontage of the premises fronting, adjoining, or abutting on the street, and that the expenses of the paving of a twelve feet path had been charged wholly to the frontagers on one side of the street, in addition to one-half of the expense of making the thirty-six feet road.

The justices sustained the objection.

The Private Street Works Act 1892 (55 & 56 Vict. c. 57) provides:

Sect. 6. Where any street or part of a street is not sewered, levelled, paved, metalled, flagged, channelled, made good, and lighted to the satisfaction of the urban authority, the urban authority may from time to time resolve . . . to do any one or more of the following works (in the Act called private street works): that is to say, to sewer, level, pave, metal, flag, channel, or make good . . . such street or part of a street; and the expenses incurred by the urban authority in executing private street works shall be apportioned (subject as in this Act mentioned) on the premises fronting, adjoining, or abutting on such street or part of a street."

And the surveyor is to prepare a specification of the private street works referred to in the resolution with plans and sections, an estimate of the probable expenses of the works, and a provisional apportionment of the estimated expenses among the premises liable to be charged therewith under the Act.

Sect. 10. In a provisional apportionment of expenses of private street works the apportionment of expenses against the premises fronting, adjoining, or abutting on the street or part of a street in respect of which the expenses are to be incurred shall, unless the urban authority otherwise resolve, be apportioned according to the frontage of the respective premises, &c.

Lawson Walton, Q.C. (*A. Macmorran* with him) for the appellants.—We contend for the local board that the cost of the footpath ought to be thrown on one side only, namely, the side on which it was made. The question turns on the construction of sect. 10 of the Act, and is whether, under that section, the cost of the construction of the footpath can be separated from the cost of the roadway, or whether the cost of both is one cost. It is a question of principle whether we are to distinguish between the cost of the footpath and the cost of the street. In the case of the *Wakefield Urban Sanitary Authority* v. *Mander* (5 C. P. Div. 248), the court held that the owners of houses on which the footpath abutted, ought to bear exclusively the cost of the footpath. That case is in point here, and it shows that the justices were wrong in their decision.

Fleetwood Pritchard for the respondents.—The case of the *Wakefield Urban Sanitary Authority* v. *Mander* (*ubi sup.*) is different from the present in two points. The facts were not the same, and the case was under a different statute, namely, the Public Health Act 1875. The case of the *Vestry of Paddington* v. *The North Metropolitan Railway and Canal Company* (1894) 1 Q. B. 633), which was under the Metropolis Management Acts, is more

(a) Reported by W. W. Orr, Esq., Barrister-at-Law.

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in point, and it was held there that the expenses of flagging a footpath were to be borne by the owners on both sides of the street in which the footway was situate. In the present case, under the Private Street Works Act, the roadway or street is to be regarded as one whole, and the street includes the footpath: (sect. 6.) [POLLOCK, B.—The only question is whether it was within the power of the justices to make the order.] By sect. 10 the authority is tied down to the particular mode of apportioning the expenses, namely, according to the frontage of the respective premises, unless they otherwise determine, and here they have not resolved otherwise, as their apportionment shows that they have apportioned only according to the frontage.

Lawson Walton, Q.C. in reply.—The case of the *Paddington Vestry* (*ubi sup.*) was decided on very different words from the words applicable to the present case. It was decided under the Metropolis Management Acts, where the words are "bounding or abutting on the road or street in which such footway is situate," whereas in the present case the words are substantially the same as the words upon which the case of the *Wakefield Urban Sanitary Authority* v. *Mander* (*ubi sup.*) was decided.

POLLOCK, B.—Great Clacton is a new place requiring new roads and new paths, and with regard to the road in question the local board apportioned the cost of the road and the cost of the footpath, and treated the footpath as separate from the road, and they made their order accordingly. On appeal to the justices, this order was set aside as being incorrect in principle. The question now is whether the decision of the justices is correct, and that depends on the true construction of sect. 10 of the Private Street Works Act 1892. This section provides [His Lordship read the section and proceeded]: In this section we have the words "the premises 'fronting, adjoining, or abutting on the street or part of a street,' in respect of which the expenses are to be incurred." Now this was an entirely new street, footpath as well as road, and it seems to me that the matter must be dealt with as a whole, and that all persons whose premises adjoin or abut on the street are liable to the expenses. The only doubt I have had in this case arose from the decision in the *Wakefield* case (*ubi sup.*), which was referred to as a decision which governs this case. But the section on which that case was decided speaks of the owners or occupiers of "premises abutting on such parts of the street as may require to be sewered, paved, &c.," words which are very different from the words used in the present section which are "premises adjoining or abutting on the street or part of a street." That case, therefore, does not govern this case, and I think that this appeal must be dismissed with costs.

GRANTHAM, J.—I am of the same opinion. The difference between this case and the *Wakefield* case (*ubi sup.*) is clear. In this case the local board were owners of property abutting on the street, and they must bear their share of the expenses to be apportioned among all the owners of premises abutting on the street.

Appeal dismissed.

Solicitors for the appellants, *Chamberlayne* and *Short*.

Solicitors for the respondents, *Young* and *Sons*.

Dec. 14 and 15, 1894.

(Before POLLOCK, B. and GRANTHAM, J.)

ROBERTS v. PLANT. (a)

Practice — Writ — Special indorsement — Informality or omission—Amendment after summons for judgment — Order XXVIII., r. 2; Order XIV., r. 1.

Where a special indorsement on a writ is defective by reason of some omission or informality, it may be amended without leave under Order XXVIII., r. 2, and the court has jurisdiction to give judgment under Order XIV., although the summons for judgment was taken out before such amendment was made.

APPEAL by the defendant from an order made by the Dudley district registrar giving the plaintiff leave to sign final judgment under Order XIV. for the sum of 45*l.*

The summons was referred by Lord Russell, C.J., to the court.

The writ was indorsed with a statement of claim, and the plaintiff claimed "45*l.*, the amount of a dishonoured cheque, dated the 23rd Feb. 1894." The following are the particulars:

1894, Feb. 23. To amount of cheque for 45*l.* this day drawn by the defendant (under the name of "G. Plant,") in favour of the plaintiff, which cheque was dishonoured on presentment, and still remains due and payable.

No notice of dishonour was alleged on this writ. A summons was taken out by the plaintiff, returnable on the 6th Sept. for leave to sign judgment under Order XIV. When this summons came on for hearing on the 8th Sept. it was adjourned to the 13th Sept. On the 7th Sept. the indorsement on the writ was amended by inserting upon it the allegation that the defendant had notice of dishonour, and this amendment was served on the defendant on the 8th. On the 13th Sept., when the summons came on for hearing before the registrar, the defendant took the objection that the writ was not specially indorsed, on the ground that the notice of dishonour was not alleged upon it, and that such allegation was necessary (*Fruhauf* v. *Grosvenor and Co.*, 67 L. T. Rep. 350; 61 L. J. 717, Q. B.), and also that the amendment of the writ had not cured the defect, as having been made without leave; that Order XXVIII., r. 2, only entitled a plaintiff to amend without leave a statement of claim, and that an indorsement on a writ is not a statement of claim, unless it be a special indorsement within the meaning of Order III., r. 6. There was also another objection that the plaintiff's affidavit did not verify the cause of action, inasmuch as it was made before the writ was amended, and therefore could not verify the allegation as to the notice of dishonour having been given, which was a material part of the cause of action.

The registrar overruled these objections, and gave the plaintiff leave to sign judgment.

A. T. Lawrence and *J. W. St. Lawrance Leslie* for the defendant.—The registrar was wrong in allowing judgment to be signed under Order XIV. There was no cause of action shown on the original writ, as notice of the dishonour of the

(a) Reported by W. W. ORR, Esq., Barrister-at-Law.

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cheque was not alleged on such writ. This was fatal to the indorsement:

Fruhauf v. *Grosvenor and Co.*, 67 L. T. Rep. 350; 61 L. J. 717, Q. B.

The first objection therefore is that judgment could not be signed, because the writ was not specially indorsed by reason of the absence of the allegation of notice of dishonour. On the amended writ no doubt a good cause of action was shown, and no doubt the appearance stands, but the plaintiff must then, after such amendment, take out a fresh summons, and make a fresh affidavit, before he can get judgment under Order XIV. If the plaintiff takes out a fresh summons after amendment he could get judgment under Order XIV., according to the decision in

Paxton v. *Baird*, 67 L. T. Rep. 623; (1893) 1 Q. B. 139.

But if he takes out his summons, as he did in this case, before the amendment is made, then upon that summons he cannot get judgment. This is absolutely concluded by the case of *Gurney* v. *Small* (65 L. T. Rep. 754; (1891) 2 Q. B. 584), which is precisely in point here in favour of the defendant. Moreover there was no power to amend here without leave, as Order XXVIII., r. 2, which gives power to amend a statement of claim without leave does not apply. The indorsement on the writ can only be a statement of claim when it is a special indorsement within Order III., r. 6, as that rule says the writ may be specially indorsed with a statement of claim. The writ here was not in the first instance specially indorsed, and therefore it was not a statement of claim, and could not be amended without leave. The plaintiff's affidavit must verify the cause of action, but as the affidavit in this case was made before the amendment it could not verify the allegation that notice of dishonour was given, and it was therefore defective. They also referred to

May v. *Chidley*, (1894) 1 Q. B. 451.

T. W. Chitty for the plaintiff.—*Gurney* v. *Small* (*ubi sup.*) differs from this case, as in that case the part of the indorsement that was objected to could not be specially indorsed at all. Moreover the new rule—Order XIV., r. 1 (*b*)—has met *Gurney* v. *Small*, and that case is gone. The distinction is this: if the claim is one that could be specially indorsed, and if the indorsement is only defective, then you can put that right by amendment. Sub-sect. (*b*) of Order XIV. was not wanted for the amendment in this case; it was wanted only to meet the case of such an amendment as was made in *Gurney* v. *Small* (*ubi sup.*), but my right to amend is under Order XXVIII., r. 2. For if the cause of action is one which can be specially indorsed, then it is no less a statement of claim if some unimportant particular be omitted, and that is the present case. But if the cause of action is one which cannot be specially indorsed, then it cannot be made a statement of claim at all. The cases of *Gurney* v. *Small* (*ubi sup.*) and *Paxton* v. *Baird* (*ubi sup.*) applied only to cases where the indorsement on the writ was inherently bad as a special indorsement, and could not be made right by any amendment, and therefore they have no application to such a case as this where the indorsement can be made a good special indorsement by amendment. [He was stopped.]

St. Lawrance Leslie in reply.

Pollock, B.—I think the order made by the district registrar was right. It appears to me that Mr. Chitty is entitled to take the view that he contended for, namely, that an amendment may be made of a statement of claim indorsed on the writ once before the expiration of the time limited for reply. The plaintiff here was perfectly within his right when he issued his writ to proceed under Order XIV. He issued it for a cause of action which could be properly indorsed on the writ under that order. It appeared, however, that having taken out his summons, and having got his affidavit made, there was some informality in the indorsement on the writ. It may have been one that was material to the affidavit on the summons or it may not, but in either case it appears to me that the court had perfect jurisdiction, and that the plaintiff was entitled, without any leave, to make an amendment. Then what are the consequences of the amendment? They are the same as they would be in any other case if the writ was deficient in the sense of not having averred some condition precedent, or some date that was material to the cause of action. If that omission were amended the action could go on and proceed exactly in the same way as if that amendment had been made from the beginning, subject, of course, to any amendment of affidavits or procedure on the part of the defendant that would be necessary to meet the exigencies of the case. That appears to me to be enough to decide this case. Then we were told that it was necessary to apply under sub-sect. (*b*) of Order XIV., r. 1, because of the amendments which were required in certain cases. No doubt that is so in some cases. The case which commonly occurred of a party inserting on his writ a claim which was not within Order XIV., as a claim for interest on a debt which could not be specially indorsed, and in respect of which the court had no jurisdiction under Order XIV. In cases of that kind, it was held in *Gurney* v. *Small* (*ubi sup.*), that, though the amount of interest so indorsed was small, if the plaintiff amended his writ, he must after such amendment take out a fresh summons, because at the time the first summons was taken out the writ was deficient, not in the sense of being demurrable as disclosing no cause of action, but in the sense that there was no jurisdiction whatever under Order XIV.; and that there was no more jurisdiction to entertain an indorsement of this kind for unliquidated interest than there would be to entertain a claim for damages for assault, or any other claim for unliquidated damages. In my opinion neither the ground nor the necessity for the making of that new rule, nor the ground of the decision arrived at before that new rule was made, arises in this case at all. I think this amendment was properly made by the plaintiff without any order of the court, and the amendment having been made, the plaintiff was entitled to go on in the ordinary steps of the action, and there being no merits in the case there is no answer to the plaintiff's claim.

Grantham, J.—I am of the same opinion. When we come to look at the facts and know exactly what was done, the whole arguments which we have heard, based on *Gurney* v. *Small* (*ubi sup.*) and *Paxton* v. *Baird* (*ubi sup.*), become unnecessary. Here was a writ of summons which was specially indorsed, and an appearance to it,

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and on that there was power to make an application under Order XIV. Before the matter came on, the plaintiff amended his statement of claim as he had a right to do. There was the old writ specially indorsed and an appearance to it, and therefore the district registrar was perfectly justified in hearing and determining the case, and it was not even necessary to apply under the new rule, sub-section (*b*), of Order XIV., r. 1, which was applicable at the time this summons was before the district registrar. There were no merits sworn to or available, and there is no answer to the claim upon that ground. Under these circumstances the district registrar was right, and the order must be upheld.

Appeal dismissed.

Solicitors for the plaintiff, *C. Robinson* and *Co.*, for *W. Waldron*, Brierley Hill.

Solicitors for the defendant, *T. A. Dennison* and *Co.*, for *G. T. S. Plant*, Dudley.

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